

were two decisions conform to this before, *viz.* 17th *February* 1663, *Hay* against *Morison*; and 10th *July* 1677, *Carnegie and Smith* and *Mr Thomas Baird*.

*Advocates' MS. No. 709, § 6, folio 316.*

1678. *January 17.* SIBBALD of KAIR *against* FALCONER of GLENFARQUHAR and GUTHRIES.

IN an exhibition pursued by Sibbald of Kair against Falconer of Glenfarquhar, and Guthries, of some writs; in regard the defenders Guthries were not personally apprehended on the second summons, therefore the Lords found their procurator was not obliged to take a day to produce them, to depone anent the having of the papers called for, since they could not be holden as confessed; albeit it was alleged, that they lurked and kept themselves out of the way of purpose, or for fear of caption. *Advocates' MS. No. 710, folio 316.*

1678. *January 18.* JAMES DEANS *against* SIR WILLIAM PURVES.

THERE was a competition between James Deans, in the Canogate, and Sir William Purves, solicitor, anent the right to a sixteenth part of a ship which belonged to Francis Aird. Sir William claimed right, as donatar to Francis Aird's single and liferent escheat, and whereon he had obtained a decret of general declarator. James Deans his right was an assignation from Francis, and intimated; who alleged Sir William's decret was in absence and null; because every such declarator has two conclusions: one that the party was rebel, and orderly denounced; the *second*, that the pursuer was donatar to that casualty of rebellion. Now, though this second was proven in his decret, by production of his gift mentioned therein, yet he had produced no hornings therein, though the gift narrated three; and so the decret was intrinsically null, for lack of probation of the first point.

ANSWERED *1mo*,—It was but *vitiū transcriptoris*; he would mend it, and abide at it; for the hornings were as truly then produced as his gift was. But, *2do*, *Esto* he had no declarator, he must be preferred to James Deans, because the common author, Aird, was denounced before the making of that assignation; and so, there being a *jus quæsitum* to the fisk, he could do no act in prejudice thereof.

REPLIED,—We must first see the hornings, to object against them; for they may have nullities and informalities. Newton ordained us to see the hornings.

*2do*, REPLIED,—That James Deans his assignation and intimation being before Sir William's gift of escheat and declarator, though it be posterior to the denunciation itself, it must be preferred; as was found in Dury, *20th November* 1623, *Hamilton*.

DUPLIED,—The assignation in that practick was not altogether voluntary, but in obedience to a caption. *2do*, The Lords have clearly decided since this case, and preferred the donatar wherever the assignation is after the denunciation; and particularly in the case of *William Veitch* and *Peter Pallat*: where

that practick of Dury's was urged, and repelled. See *supra*, No. 422, in November 1673; *item, supra*, No. 156, *Helen Hamilton* against *Bell, &c.* 25th February 1671. See the information of this case against Sir *William Purves* largely. The Lords, upon Newton's report, preferred Sir William donatar to the assignee.

Then offered to prove, by Sir William's oath, that he promised to communicate the benefit of this gift, (at the time he took,) for the common relief of himself and the said James Deans, wherein they stood cautioners for Francis Aird in the first place. This Sir William denied on oath. James may get a second gift burdened with Sir William's backbond. We also ALLEGED against the one horning,—That it was posterior to our assignation. This horning they passed from. Against the second horning we objected, it was for relief and no distress. Offered to instruct distress. Against the third, That Aird dwelt within the Canongate, which is a part of the regality of Broughton, and yet not denounced at the Canongate cross. ANSWERED, *1mo*, He dwelt in the house at the back of the Abbey, which is within the shire; *2do*, It was not receivable *hoc loco*. It was repelled, because *in facto* and not verified, reserving our reduction on that head as accords, since the Officers of State were concerned. *Vide supra*, 11th November 1673, *Mr Patrick Home*, [No. 423.]

*Advocates' MS. No. 711, folio 316.*

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1676, 1677, and 1678. WILLIAM HAY of DRUMALZIAR against JOHN, EARL of TWEDALE, his Brother.

1676. *July*.—WILLIAM Hay of Drumalziar pursues John, Earl of Twedale, his consanguinean brother, to warrant to him some lands, as heir-general, whereon had followed distress and eviction; *item*, to relieve him of sundry debts, and to purge incumbrances, which he condescended on as lying on his lands.

ALLEGED,—He had no title, not being served heir of the second marriage. ANSWERED,—He would do that *cum processu*. REPLIED,—His active title behoved to be established before he raised his process, else it was *filius ante patrem*. *Vide supra*, February 1674, *Duke and Duchess of Hamilton* against *Mr Gavin Loudon*, No. 441.

The Lords found he might serve *cum processu*, though it was a part of his active title. *Advocates' MS. No. 490, folio 257.*

1677. *February 23*.—In William Hay of Drumalzier's action against his brother, the Earl of Twedale;—the Lords sustained Twedale's defence of having alimented him, &c. *Advocates' MS. No. 550, § 1, folio 277.*

1677. *July 19*.—This day, Drumalziar and his brother the Earl of Twedale's cause, was debated anent the Earl's relieving him of the debts, he being bound to warrant Drumalziar's infestment.

ANSWERED, *1mo*, There is no distress; and it is a lewd wantonness and caprice to crave relief before distress, by which anticipation he hounds out other creditors on my Lord. *2do*, Drumalziar, for making up his title in this pur-