

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-

suit, being served heir of provision to the father, (*vide supra*, num. 490 and 550,) he cannot pursue, because the obligation is extinct and confounded. And there was no rational or legal way of securing the provision he got from his father, from his father's posterior debts, but by serving an inhibition against the father upon that obligation, though the remedy be a little harsh.

On the 27th of July 1677, both parties having submitted one point of £1000 sterling, in variance betwixt them, to the President, he arbitrated 16,000 merks with consent of both parties; and, having reported it to the Lords, he obtained their authority interposed thereto. *Advocates' MS. No. 609, folio 294.*

1678. *January 22.*—This day Hay of Drumalziar's action against the Earl of Twedale his brother, was advised, and the Lords modified the price of the lands to 16 years; and thereafter, on a bill given in by Drumalziar, they raised it a year's purchase more, *viz.* to 17, which was thought a very competent price for lands in Twedale. See this more fully observed *alibi*.

*Advocates' MS. No. 712, folio 316.*

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1678. *January 25 and 26.* The DUKE of LAUDERDALE *against* The EARL of TWEDALE.

THIR two days were wholly consumed almost in the Inner-House (yea, they sat till one o'clock, which some affirmed unlawful,) in advising the Duke of Lauderdale's action against the Earl of Twedale, about the teinds of Pinky, within the lordship and regality of Mussleburgh, in which there were three points; one of the tack, another of the heritable disposition, and if it was annexed property, and the third was, if it was prescribed, since, in the English usurpation, the Duke of Lauderdale was *nec valens, nec volens, nec potens agere*. Of this see more *alibi* in thir collections. *Advocates' MS. No. 714, folio 316.*

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1678. *January 29.* JOHN LAMB *against* The EARL of CARNWATH.

IN the action pursued by John Lamb, merchant in Edinburgh, against the Earl of Carnwath, on the passive titles, for payment of the sum of contained in a decret *in anno* 1668, obtained by Lamb's cedent against his father:

ALLEGED,—The decret was for a remain of the maintenance in 1649; and, by the Act of Grace in March 1674, all these taxations are discharged.

ANSWERED,—The Act contained an exception, where bond was granted for them; and here a decret compearing was obtained for it long before the Act, which was equivalent, since the same execution passed on decreets that passed on bonds. Next, they were only seeking relief of what they had paid for Caruwath's father.

REPLIED,—*Statuta sunt stricti juris*, and so cannot be extended to the case of decreets.

This point being reported to the Lords by Harcous, they found the debt fell