

1687. *January 28.* JOHN HAMILTON, Bishop of Dunkeld, and JAMES LAWSON *against* The LORD and MASTER of BALMERINO.

MR John Hamilton, Bishop of Dunkeld, and Mr James Lawson, his assignee, give in a bill against the Lord and Master of Balmerino, showing, that his action for proving the tenor of a discharge, mentioned 9th December 1685, was called, the dilators discussed, and avizandum made, and that their probation by witnesses who were old and valetudinary might perish; and therefore craved they might be examined on the adminicles for making up the discharge, to lie *in retentis*.

The Lords allowed a diligence to cite them.

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1686 and 1687. DAVID MELVILLE *against* The CREDITORS of CARSTAIRS of KINNEUCHAR.

1686. *January 21.*—David Melvil, a minor, having an adjudication on the estate of Carstairs of Kinneuchar, and having charged the Archbishop of St Andrew's, as superior; he gave in a bill, craving, that, during the ranking and discussing the competition among the creditors, they would modify and decern some of his bygone annualrents to be paid him by Robert Carstairs the factor. ANSWERED,—The factor was only placed by the Lords the last Session in March, and has had little intromission; and the pupil's father lifted three years' rent.

The Lords remitted to Castlehill to rank the creditors; and to consider if any annualrents should be given to the said David, or not. *Vide* 1st February 1687.

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1687. *February 1.*—The case of David Melvil against the Creditors of Carstairs of Kinneuchar was reported by Castlehill, anent sundry nullities objected to David's adjudication, *viz.* that it adjudged for a fifth part more, being of the whole lands.—But it was led before the Act of Sederunt 1684, rectifying that abuse *pro futuro*. *2do*, That the liferents were not deduced, nor the party's death proven, (but it was not denied,) nor the term of payment of one of the bonds come at the time of leading the adjudication, (but the term of payment of the bond corroborated was past.)

The Lords sustained the adjudication, and repelled thir nullities.

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1687. *February 2.* FRANCISCA CUNNINGHAM, and ——— JOHNSTON, her Husband, *against* The EARL of GLENCAIRN.

FRANCISCA Cunningham and Johnston, her husband, pursue the Earl of Glencairn, on a minute of contract betwixt Chancellor Glencairn and Cunningham of Ballyachan. Against which the Earl had a declarator of nullity, *1mo*,

That it was an undelivered evident, lying 38 years in Porterfield of Deuchal the writer's hands, and produced by him in an exhibition. ANSWERED,—It was a mutual contract, whereof there is only one double, and so neither could, nor needed to be delivered. REPLIED,—It bore registration, and so each might have got an extract; and it might have been made public by a process.

Next, ALLEGED,—It contained a *synallagma*; and Captain Cunninghame not having fulfilled his part, the Earl was not bound; *qui agit ex contractu reciproco debet prius docere omnia ex sua parte esse impleta*. ANSWERED,—Captain Cunningham's part was only the delivery of writs, and the minute in the end of it bears that he gave up a back-bond to the Earl.

REPLIED,—That cannot be the evidents meant in the first clause, which is conceived in the terms of a future obligation; and he either had such writs, or he had them not: if he had them, then he did not fulfil by delivering them; if he had them not, *dolus dedit causam contractui*.

The Lords, after a debate in presence, found Captain Cunningham's heirs could not seek implement of this minute of contract, in regard they had not performed their own part of it. Against this, a bill was given in, and refused.

Then Glencairn's oath was craved, if he had not those papers; and being offered, they resiled; so the Lords decerned.

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1685 and 1687. CAPTAIN JOHN ANDERSON *against* ANDERSON of DOWHILL and LECKY.

1685. December 3.—CAPTAIN John Anderson, in Glasgow, against Anderson of Dowhill, and Lecky. The Lords, having heard their mutual bills and answers, ordained Saline, who is auditor in the process pursued by Captain Anderson, to be likewise auditor in the other process raised since against him by Lecky and Dowhill, which was tabled before Harcus, to the effect, for avoiding confusion, and the interfering of two Lords, both parties may insist before him as they think fit, and make use each of them of their own clerk, in their respective actions; for this was a competition for two Lords, and two clerks: and ordained Anderson of Dowhill to answer that part of the bill, against tomorrow, of exhibiting the count-books, and anent his deponing about his making use of, or taking assignations to, retired bonds not purged by himself singly, but by the stock of the society.

This cause, upon report of Saline, was further decided on the 9th December; and the Lords found, seeing Dowhill was manager and book-keeper of the copartnery of the ship called the Providence, though the other partners had signed an account acknowledging a balance of £29,000 to be due to him, yet seeing it did not mention that the instructions of the articles on the debit side were shown to, and seen by them; therefore they ordained Dowhill to produce the journal and ledger-books, and such instructions as he had of the copartnery, with his accounts, upon oath; and remitted to the Lord Reporter to take his oath thereon, and on such interrogatories as he finds pertinent.

Dowhill reclaimed against this, as tending to propale his private fortune; and offered to show them to two merchants, but not to Captain Anderson.