

1701. July 9. JAMES GORDON of DAACH *against* The TENANTS of WESTERTON.

JAMES Gordon of Daach, as donatar to the liferent-escheat of John Anderson of Westerton, constituted by Duff of Braco, superior thereof, pursues a general and special declarator against the tenants; in which process Major Alexander Anderson, brother to Westerton, the rebel, craves to be preferred, as donatar constituted to his brother's liferent-escheat by the King's Exchequer: and, for instructing that the lands held of the King, he produced a seasine following on a resignation made by Arthur Forbes of Balveny, then superior, in Westerton's favour, to be holden of the King, and whereupon Westerton was infeft as the King's vassal in 1687.

OBJECTED,—That the Major could never compete on the said gift nor infeftment; not on the gift, for he had not so much as raised a declarator; not on the infeftment, for it was *a non habente potestatem*, Arthur Forbes being long before that denuded by adjudications, whereunto Braco had right; so he was no more superior.

ANSWERED,—The Major was seven years and more in possession, by virtue of a gift, and likewise of an infeftment holden of the King, of whom all lands were presumed to hold, unless their holding of a subject were instructed; and he was not obliged *hoc loco* to debate the validity of his right, but had the benefit of a possessory judgment till Braco's donatar raised a reduction, calling the King's officers of state and his author Arthur Forbes's heirs, and then he would debate his rights.

The Lords thought superiors might be thus prejudged, if parties, on lame pretences, should apply to the Exchequer, and take forth gifts of liferent-escheats, as if they were the King's vassals, and then tell the true superiors, You must call the officers of state, and reduce: and therefore found the Major bound to debate the validity of his right in this same process. And, in regard Braco's anterior right was instructed, they allowed the Major to reply, that either his adjudications were extinct by payment or intromission, or that the legal was yet current, and they still redeemable; and appointed the Ordinary to take them in summarily in this same process.

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1701. July 9. The CITIZENS of GLASGOW *against* The MAGISTRATES and COUNCIL.

GEORGE Lockhart, and other citizens of Glasgow, having given in a complaint to the last session of Parliament, bearing that the King's charter to the burgh of Glasgow, and the printed Act of Parliament 1690 anent electing their magistrates, have not been observed; and that John Anderson of Dovehill, provost, and the Town-Council, his dependers and adherents, had unwarrantably overstented the burgesses in £32,000; and had continued themselves in the magistracy more than a year, contrary to the old acts in King James III.'s reign; and that sundry of the trades had no vote in the election, whereas they had two halls, the one of merchants, the other of trades, who should have a share in

the elections; and that severals were chosen who were not trafficking merchants; and that they had exacted sundry illegal impositions of tonnage, cartage, crannage, and for borough-missive dues, &c. And this complaint being remitted by the Parliament to be discussed summarily by the Session, the burghesses insisted, *primo loco*, on the nullity and illegality of the bygone magistracy: for, during the standing of episcopacy, the Archbishop of Glasgow named the provost; and, out of a leet of nine presented to him, he chose the three bailies. During the former abolition in 1640, the Duke of Lennox was presented by the King to the bishop's right. And now, at the last revolution, King William allowed them, in 1689, a popular election, and, at Michaelmas thereafter, the Town-Council to choose their successors; the King not seeming to be informed of his own right; and so was obtained by subreption, *celata veritate vel expresso mendacio: l. 5. et 6. C. Si contra jus vel util. pub.*

ANSWERED,—The electing by the poll was permitted in other boroughs as well as Glasgow; and to controvert the actings then is to strike at the root of the present constitution and establishment, which is a corner-stone *non tangendum non movendum*.

The *second* point was, If the charter given to the community and council gave the sole power of election to the council, or to the community represented by the two halls.

ALLEGED,—That Dovehill and his party had inhanced the magistracy, which ought to circulate; and that in electing the dean of guild and deacon-convener, and in buying and borrowing, the two halls are always consulted, and ought likewise to have an interest in electing the other magistrates.

ANSWERED,—The election is conform to the set and custom of that burgh; and it is true the power is radically and originally conveyed to the body of the people, but formally, *et in actu exercito*, unto the council, as its representative; and it is found in Edinburgh, and other places, that the giving the trades too great an influence and hand in elections is very inconvenient.

The Lords, finding an inclination in the parties to settle, did only give their interlocutor anent the legality of the magistracy, and appointed some of their number to commune betwixt them, as to the other points in controversy; for though there were several things in their set defective, which well deserved amendment, yet the remit did not empower the Lords to adjust a new set and form of government, but only to determine betwixt them according to law: Therefore the Lords, for sopiting their heats and animosities, fell upon this method to agree them.

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1701. July 16. ANDREW HAY and HAY of ALDERSTON *against* PATRICK AIKENHEAD.

MR Andrew Hay, and Hay of Alderston, his factor, pursue Patrick Aikenhead, son to Sir Patrick Aikenhead, commissary-clerk of Edinburgh, for payment of a balance of an account in his father's hands, as factor for the said Mr Andrew, before the Sheriff; and he having decerned, they suspend on this reason, That he, contrary to law, had sustained scrolls, missive letters, and unsub-