

1710. *February 1.* ÆNEAS MACDONALD of AUCHTERAW *against* MACDONALD of GLENGARY.

RONALD Macdonald of Auchteraw enters into a submission with Macdonald of Glengary to the late Marquis of Athole, anent his pretensions to some part of the succession of the deceased Lord Macdonald; and there having been a decret-arbitral signed, decerning Glengary to pay him 8000 merks and some other things, this decret being accidentally lost and amissing, Æneas Macdonald of Auchteraw, son to the submitter, raises a summons for proving of its tenor against Glengary; who alleged, No process at your instance; because you produce no title nor right to the decret-arbitral, *esto* it were lying there; and your being apparent heir can never sustain the process.

ANSWERED,—This is a preparatory action, like an exhibition *ad deliberandum*; and when I prevail in the tenor then it will be time enough to make up a title to it: Why should I put myself to the expense or danger of a service till I see the decret made up? And apparent heirs have been allowed to defend their predecessors' possession, and to pursue reductions on the head of death-bed, and why not a tenor: and before I seek implement of the decret, I shall produce a sufficient title.

REPLIED,—Every process should have a legal contradictor, that, if I be assolvied, it may afford me the benefit of a *res judicata*. But, *ita est*, an absolviator from the process will not secure against any who shall hereafter make up a title to this decret-arbitral, and then pursue him for the same thing over again. And so the Lords, on the 22d June 1671, *Leslies against Jaffray*, refused to sustain process for a count and reckoning at the instance of an apparent heir; because, when the account was closed, the defender could not be exonerated, but might be put to a new litiscontestation and probation afterwards. And this differs much from a process *ad deliberandum*, which is only for inspection to know the conditions of the heritage.

The Lords sustained the dilator, and found, No process at the apparent heir's instance.

There was another point moved, but did not require to be decided at this time; *viz.* how far the tenor of a decret-arbitral could be proven; seeing the Lords have demurred as to the proving decreets of apprising, as Dirleton observes; and the tenor of decreets-arbitral are more nice and various, according to the parties' claims, circumstances, and mutual prestations. But this was not decided.

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1710. *February 4.* THOMAS CALDERWOOD *against* SIR JAMES COCKBURN of RYSLAW.

Thomas Calderwood, in Dalkeith, being creditor in considerable sums to Ryslaw, partly due to himself, and partly to Alexander Martin in Dunse, his father-in-law, he pursues a roup and sale of his lands on the statute of bankrupt: And, in the probation of the rental, several points came to be discussed; such