

No 19.

In a removing, at the instance of an heir of a donatar to a ward, against a tenant, this exception, that the tenant had a tack from the defunct, which was to stand during the said granter's pleasure, was not interpreted to stand during the ward, but that *voluntas morte extinguitur*.

1583. *January.*

HEIRESS and REPRESENTATIVES of EARL of MURRAY *against* TUTORS of SANQUHAR.

THE tutor of Sanquhar, Crichton, being warned to flit and remove frae the lands and mains of Sanquhar, be the heritrix of Murray, as donatar to the ward thereof, it was *alleged* be him, That he had tacks for terms to run, of umquhile Annabal Stewart, daughter to the Earl of Murray, Regent, donatrix at that time, with consent of her father, the said Earl, as lawful administrator to her, and that during the will of the said Annabal and the said Earl, *nam ita cavebat assedatio*, during our will the time of the ward.—It was *alleged* be the heritrix of Murray, That the tack produced proved not the allegiance, *nam status quæstionis fuit in termino probatorio*; because the tack and assedation being set during the will of the setters thereof, being deceased, the will was expired, *et voluntas morte extincta esset, prout in l. qui ad ff. locati*.—It was *answered* on the other part, *quod non stricte voluntates decedentium interpretandæ*; and that thir words, during the time of the ward, *fuit modus adjectus*, and behoved to stand so long as the ward stands.—THE LORDS, *una voce dicentes*, fand the exception not proven; and that the will was expired be the decease of the person, *et morte expiaretur*.

Fol. Dic. v. 1. p. 146. Colvil, MS. p. 252.

1632. *July 10.*

BOWMAKER *against* HOME.

No 20.

BONDS made by the donatars to the treasurer, that they being satisfied of their just debt, and their expenses debursed on the gift, shall be relieved anent the rest by the treasurer his sight and declaration, is understood to be the treasurer that shall be in office when any exception shall be founded upon the said bond, and not upon the declaration of him who was treasurer when the bond was granted.

Fol. Dic. v. 1. p. 146. Auchinleck, MS. p. 17.

1713. *July 9.*

THE DUKE of MONTROSE *against* ARCHIBALD M'AULAY of Ardincaple.

No 21.

Erection of lands into an earldom, with as ample powers as were competent to any other Earl in Scotland,

THE Duke of Montrose standing infest in the dukedom and regality of Lennox, pursued a reduction, improbation, and declarator against his vassals, and particularly against Ardincaple, who claimed an heritable right to the office of bailiary of the regality of Lennox. The defender, for vouching his right to that office of bailiary, produced certain heritable rights of the bailiary of the earldom,

granted by the Duke of Lennox to Logan of Balvie, and disposed by him to the defender's predecessors, from whom he derives right. He produced likewise several deeds and documents, proving, That he and his predecessors had possessed upwards of 40 years as Bailies of the regality. Upon this production the defender pleaded, *1mo*, That he, as having right to the bailiary of the earldom, had right to be heritable Bailie of the regality; because, *1mo*, The heritable office of Bailie of the earldom, was the same with the heritable office of Bailie of the regality; and all ancient earldoms included regalities; in so far as anciently, the erection of lands in a *comitatus*, was the highest denomination of dignity and jurisdiction in Scotland, including *omnimodam potestatem*; as appears by several charters of the old Earls of Douglas and others, and charters even of some Lords, as Galloway, Annandale, &c. wherein the powers of regality are particularly enumerated, such as, judging malefices, repledging, the leading and training fensible men; *2do*, The Earl of Lennox had all the powers competent to any other Earls of Scotland, within the lands of the *commitatus et dominium de Lennox*; and consequently had the powers of regality; which is not only probable from their near relation to the Royal Family, but also appears from several charters of the family of Lennox, bearing particular privileges competent only to regalities; as the charter of Walter Fostine, and of Duncan Earl of Lennox, granted by King Robert the Second, and the charter of Matthew Earl of Lennox, granted by King James the Fourth, in the year 1511; all which rights and privileges in the charters aforesaid, came in the person of John Earl of Lennox, who, in *anno 1517*, disposed the heritable bailiary of the earldom in favours of Logan of Balvie; *3tio*, Albeit Ludovick Duke of Lennox, (who succeeded to Earl John) procured the earldom to be erected into a dutchy and regality, with free chapel and chancery, escheats, and other privileges competent to any regality; yet he did immediately thereafter grant a commission to Logan of Balvie, when heritable Bailie of the earldom, to be also his Bailie of regality; declaring, That the said commission, in so far as concerned the office of Bailie of regality, should continue for 19 years after the date, *anno 1593*, and that Logan's accepting thereof should noways prejudice his heritable right of bailiary of the earldom; *2do*, After expiring of this temporary commission in the 1613, M'Auly of Ardincaple, the defender's predecessor, purchased the heritable office of bailiary of the earldom from Logan of Balvie; and upon that title hath continued since then to act as heritable Bailie of the regality; so that whatever exception his title might have been liable to *ab initio*, the same is now rendered unquarrellable by prescription.

Answered for the pursuer, *1mo*, The erection of lands in a *comitatus* or *dominium*, doth not necessarily infer any jurisdiction except what is competent to any Baron, (an earldom being only a higher denomination of barony,) and therefore can never be extended to comprehend jurisdiction of regality, which, besides other privileges, carries along with it the power of repledging from, and an abso-

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was found not to give the Earl a right of regality, nor to his heritable Bailie of the earldom, a right to be heritable Bailie of regality.

No 21. lute exclusion of the King's ordinary Judges. If earldom did virtually include the jurisdiction of a regality, why was it that the Earls, mentioned by the defenders and others, were so anxious to have some branches of the jurisdiction of a regality specially inserted in their charters; and others, long after they were Earls, got their earldoms erected into regalities, as did the Earl of Sutherland, by a charter from King David the Second, to him and Margaret his spouse, the King's sister? Why did they not retain the old denomination of earldom or lordship, and, under that, exercise all the powers competent to regalities? No other reason can be given, but that such erections comprehended no more than the ordinary jurisdiction, which they, and all other vassals holding *in capite* of the Crown, to this day retain. It is certain, that albeit the stile of all the patents of Earls and Lords do contain the general clause of enjoying their earldoms and dignities, as free, and with all the rights and privileges competent to any Earl or Lord of the same dignity; yet many of our ancient Nobility, who have their lands erected in earldoms and lordships at this day, have no regalities, v. g. the Lordship of Scone, &c.; and those who have, the date of the erection of their lands in regalities, with the powers and privileges thereof, are known. Again, the special privileges of regality granted to the Earls of Lennox, are not contained in any one charter, but were got from the Crown by degrees; which is a convincing evidence, that they belong not to Earls or Lords by having their lands erected in an earldom or lordship. What need had Ludovick Earl of Lennox to procure his earldom and lordship to be erected in a dutchy and regality, with free chapel and chancery in common form; if, previously by erection of the earldom, he had a right of regality? And then his taking care, immediately upon the erection, to distinguish the province of Bailie of an earldom from that of Bailie of a regality, and granting a commission of the bailiary of regality to his heritable Bailie of the earldom, for 19 years only, with the other's accepting such a commission, seems to put it beyond controversy, that an earldom doth not imply a regality, *2do*, Logan of Balvie having entered to possession by the temporary commission, the continuance of that possession, whether by him or Ardincaple, cannot be ascribed to any other title; because, that of Bailie of the earldom could not vest him with the character or powers of Bailie of regality. And the question is not how far the defender hath extended his power of Bailie of the earldom by long prescription, but whether the heritable right of Bailie of the earldom, could be a title to the defender's predecessors to prescribe a right as heritable Bailie of the regality; so that the defender's pretended prescription was without any title; in so far as his infestment in the bailiary of the earldom could be none; because he possessed as Bailie of the regality; and the temporary commission could not establish an heritable right, contrary to the express tenor of it, *Arg. l. 2. C. de Præscript. 30. vel 40. Ann.*; nor could have any more effect in law, than tacit relocation after expiring of a tack. It doth not alter the case, that the commission was expired before Ardincaple acquired from Logan of Balvie the heritable office; for still Ardincaple succeeded

in place of Logan, whose possession was by an express commission, or *per tacitam relocationem*, and can be in no better case than he was; besides, the acquisition of the heritable office of Bailie of the earldom must, as a bounding charter, influence Ardincaple's possession perpetually, to hinder him to prescribe beyond the bounds of that office.

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THE LORDS found, That any charter erecting the estate of Lennox into an earldom, with as ample powers as any other Earls, did not give the Earls of Lennox a right of regality, nor to Balvie, their heritable Bailie of the earldom, a right to be heritable Bailie of the regality; and that Balvie's heritable office of the bailiary of the earldom, did not comprehend an heritable office of bailiary of the regality; and also found, That after the estate of Lennox was erected into a dukedom and regality, Balvie, who was formerly heritable Bailie of the earldom of Lennox, having accepted of a temporary commission for 19 years from the Duke of Lennox, to be Bailie of the regality of Lennox, and having commenced his possession by virtue thereof, he and his successors could not prescribe a right to the heritable bailiary of the regality of Lennox; and found the writs and documents produced for the defender not sufficient to exclude the pursuer's title.

Fol. Dic. v. 1. p. 146. Forbes, p. 697.

1724. *January.* COCKBURN *against* EDWARD.

No 22.

A DECREE-ARBITRAL, bearing that the Judges arbiters are to determine betwixt and the 22d day of December, this is construed to include the 22d day.

Fol. Dic. v. 3. p. 124. Edgar, p. 17.

See The particulars, *voce* ARBITRATION, No 31. p. 640.

* * * In the stile of law, the words 'betwixt and a certain term,' do not exclude the day of the term. *See* Joint Petition of the Advocates, No 10. p. 345.

SECT. IV.

Clauses in Contracts of Marriage.

1685. *March.* JANET LINDSAY *against* JOHN LOTHIAN.

No 23.

A HUSBAND, who stood obliged by his contract of marriage, sufficiently to secure his wife in a jointure, amounting to 1000 merks a-year, having purchased

A husband
being bound
to secure his