

object what he would have said against the same if he had compeared before the passing thereof.

Conform to which interlocutor it was ALLEGED, The Duke could in no reason plead for eight years defalcation, because they offered them to prove that the Dutchy of Hamilton was detained by the enemy only from the 1652 till 1654, scarce by the space of two years, and so their loss was not so considerable as to afford them the foresaid benefit; yea, their advantage in being sequestrate was very great, seeing on that account they got considerable abatements from their creditors.

REPLIED, Their losses were very great, as appears by the probation led before the Council: neither will any man in law or reason say, that the only rule for judging whether a man should be eased of eight years annualrent must be the space of time their estate was detained by the usurpers before they recovered the peaceable possession thereof again.

They were to have the Lords' answer, whether the Duke should have the said defalcation, yea or no, seeing his lady stood forfaulted but two years.

*Advocates' MS. No. 241, folio 109.*

*November 11.*—In the foresaid action betwixt Sir L. Scot and Duke Hamilton at Number 241, taken to interlocutor, the Lords found the Duke should have defalcation of eight years annualrent; without prejudice to the fiar to debate with the liferenter why she and not he should bear that burden, and but prejudice to them of seeking reduction of that act in favours of the Duke in the next Parliament.

*Advocates' MS. No. 249, folio 112.*

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1671. *November 11.* HAISTY *against* HAISTY.

THIS was an action, at the instance of a relict against her husband's oldest son and apparent heir, for refunding to her the expenses she was at, the time she lay in of a postume child, as also for aliment to the said postume child, his sister.

ALLEGED,—It is contrary to our law, and the constant practise of this kingdom, for seeking that one brother or sister should aliment another; yea, it has been expressly found that they are not obliged to do it.

ANSWERED,—They crave nothing but what natural equity, in its greatest purity, would dictate; they are clearly founded in the common law: neither is our practise so averse to it as they would make it; for in the case *Edgars* against *Edgar of Watherly*, the Lords modified a small provision to the younger children, to be paid them by the Laird.

It was taken to interlocutor. The report was, that the Lords, having seriously considered the case and its merits, find a brother liable to aliment a brother *in tota latitudine*; and declare they will follow this in all time coming, and decide conform thereto when the like cases occur.

I think they mean only the eldest brother, who either succeeds or may succeed to his father's fortune; and that he shall only be bound to aliment *fratres aut sorores germanos ex utroque parente, non item consanguineos et uterinos*; and

that this obligation shall only remain till they be of such age as they can rationally provide for themselves. With which explication, the decision is most just and most agreeable to natural equity. See Monsieur Servin's *plaidoies*, last part, page 181; where, a father not found obliged to keep his bastard daughter, though it be recommended to him. *Quæritur*, if in our law a brother be obliged to aliment his bastard brother. *Sed puto quod non*, with Craig, *Feudorum* p. 265. *Vide* L. 4. D. *ubi pupillus educari debeat*; L. 1, p. 2, D. *de tutela et rationibus*, &c.; L. 73, *in fine*, D. *de jure dotium*; L. 20. D. *soluta matrimonio*; L. 13, p. ult. D. *de administratione tutorum*, *ibique Glossam et D D.* *Vide* Fabrum, *tractatu de alimentis*, p. 29; Stair's system *titulo 5, No. 10.*

*Advocates' MS. No. 250, folio 112.*

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1671. November 11.

MATHY against —————

ONE being pursued to pay annualrent for a sum since his denunciation, it was ALLEGED *absolvitor* from annualrent, because he was denounced not at the market cross of the head burgh of the shire where he then dwelt, *viz.* Glasgow, but at the market cross of Edinburgh, within which sheriffdom he dwelt never: upon which denunciation, no annualrent can be due; because the Lords after a most contentious debate betwixt *Dickson* and *Hutchesone* in anno 1664, found, where a man was not denounced within the sheriffdom where he dwelt, that on such a horning neither his escheat should fall, nor annualrent be due; but the only effects thereof should be caption and debarring him *ab agendo et defendendo*: yea, the common law would teach a man so much, though we had no practise for it. Escheat is the punishment of contempt and contumacy; now a man cannot be made *contumax* by a denunciation made at another place than where he lives, since it is not probable it can ever come to his knowledge.

This was found relevant. *Vide supra* No. 243, [10th November 1671, *Fraser of Middelty* ;] and *infra* No. 304, [18th January 1672, *Ramsay* against *Renton* ;] and 463, § 3, [February 1676.]

*Advocates' MS. No. 251, folio 112.*

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1671. November 11.

IT WAS OBJECTED against a declarator of escheat, It was not tabled. ANSWERED, 1mo, It needed not, since the rebel held no lands of the king. 2do, If he did, then his majesty's advocate's servant concurred for his majesty's interest.

2do,—It was objected that the horning whereupon the escheat was sought, is null, in so far as he is not denounced at the market cross of the Regality within which he then dwelt, and the lands lie. ANSWERED, This being a general decla-