

plague was the cause why he made the same. Yet Craig seems to be of the other opinion, page 86. *Advocates' MS. No. 244, folio 110.*

*November 10, 1671.*—HAVING more ripely considered the reason of reduction proponed *supra* betwixt Nicoll and Hunter, at number 244, it seemed to deserve the Lords' answer; for though *tempus pestis* be *tempus privilegiatum*, and so *testamentum factum tempore pestis non requirat septem testes, et alia quædam habeat privilegia*, yet there is no law or practice in our country allowing them to dispoone an heritage after they are affected; and there is reason for it. If a fever incapacitate a man from alienation of his real rights, much more should *febris pestilentialis* do it, since all the reasons inductive of that law have place there, *videlicet, insanitas mentis*, sollicitation of friends, &c. And Craig *ubi supra* is so clear in it that there is no room for any doubt, for (which is more) though he be *intactus*, if the family be infected, he concludes him incapable of making any real conveyance. *Advocates' MS. No. 248, folio 111.*

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1671. *November 8 and 11.* SIR LAURENCE SCOT *against* DUKE OF HAMILTON.

*November 8.*—SIR LAURENCE SCOT, sometime of Clarkington, as having licence, pursues Duke Hamilton for sundry annualrents of the principal sum of 26,000 merks owing by Duke William to Sir William Scott his father, who died in 1656.

ALLEGED, The Duke must have defalcation of eight years annual rent, indulged to the forfaulted persons the time of the usurpation; which is founded first on an act of Parliament, granting commission to sundry persons for trying and taking probation upon the losses of the several forfaulted persons, and then on an act of Council, finding the losses of the house of Hamilton to have been so great that they deserved the said benefit. To which it was REPLIED, That the most the Duke could crave was only six years and a half, because he had got allowance from the liferentrix of the sum of an year and a half's annualrent, upon the account of their forfaulture. *2do*, The said act of Parliament and act of Council following thereon cannot be respected, because it was but a private act; he was not called thereto, and therefore his interest by the act *salvo jure* was reserved. To thir it was DUPLIED, *Imo*, The Duke craved but allowance for six years and a half. *2do*, He can never ALLEGE it was done *parte non citata*, because he was expressly called to the trial taken before the Council. *3tio*, The Lords cannot be judges for taking away an act of Parliament. TRIPLIED, His calling then imported nothing, because then he had not a right in his person, and so had no interest to oppose: yea, there was one of the Duke's creditors appeared and opposed, and he is expressly excepted out of the act, and is ordained to be paid of his haille annualrents.

The Lords, without respect to the act, reponed Sir Laurence to his defences; and appointed him, as if he were *in campo*, and as if the said act were never passed, to

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