

1668. February 21.

SIR LAURENCE SCOT of Clerkington, *against* The LADY CLERKINGTON.

Sir Laurence Scot of Clerkington having obtained himself to be executor surrogated *ad omnia et male appreciata* of his father's testament, and having obtained licence to pursue, pursues the Lady Clerkington as principal executrix, who alleged no process upon the licence, because licences are only competent to executors principal, before there be any confirmation, after which the Commissaries neither use, nor may give licence *ad omnia*, as was found the 14th of December, 1621, Halliday against ———, No. 59. p. 3871. observed by Durie. The pursuer answered, that there was more reason to sustain licences after the principal confirmation, when the best of the inventory was given up, and what remained was uncertain, and for the practise the Lords had since allowed licences after confirmation.

The Lords repelled the defence, and sustained the process upon the licence.

Stair, v. 1. p. 529.

No. 33.

Title to pursue upon a licence, sustained after confirmation of the principal testament, and before confirmation of datives *ad omnia*.

1675. November 9.

FLEMING *against* The TOWN of CUPAR in FIFE.

M'Duff Earl of Fife having mortified an annuity of £.22 13s. 4d. out of his mills of Cupar to the Abbacy of Culross, the same was confirmed by King Alexander the Second; and after the suppression of monasteries, King Charles the First erected the Monastery of Culross into a temporal lordship to the Lord Colvil, and disposed the whole rights of the Monastery to him, with the burden of the Minister of Culross's stipends, by his charter *in anno* 1609, in which this annuity out of the mills of Cupar is expressed, but it is designed to be £.17. Mr. Matthew Fleming, as having been Minister of Culross, and having right from the executors of a prior Minister, pursues the Town of Cupar, who now have right to the mills, for this annuity, who alleged, *1mo*, No process, because there is no sufficient title produced, there being nothing produced to instruct that the Earl of Fife was heritor of the mills of Cupar, or that he mortified this annuity, but only a transumpt by instrument of a notary, of certain charters granted to the Abbacy, and among the rest, of a charter by the Earl of Fife, mortifying £.22 13s. 4d. to the Abbacy of Culross, and of a charter of King Alexander's, confirming the same, but without citation of parties, or authority of any Judge, and therefore such instruments cannot prove, or be any title to declare or decern such a perpetual burden out of lands; *2do*, Albeit there were a title, the right is extinct by prescription. The pursuer answered, That he had produced sufficient instruction of his title, viz. "A most famous and authentic Register of the Abbacy, kept in

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the Abbacy from the year 14 years," which in a matter so ancient is sufficient, especially being adminiculated by the King's charter of erection, *in anno* 1609; and as to the prescription, it can take no place against the King, by the special act in his Majesty's favours, not to be hurt by the negligence of his officers. *Ita est*, The whole abbacies in Scotland were annexed to the Crown *in anno* 1587, after which no charter of erection could take them from the Crown, without previous dissolution in Parliament, upon special reasons for public good; so that this annuity is yet the King's right, whose officers will concur, that it may continue to the kirk. It was replied for the defenders, that albeit *in antiquis*, where there is possession in kirk benefices, slender probation of titles may suffice; yet here there can nothing be shown that ever there was possession; and as to the prescription by the act of Parliament 1633, anent the superiorities of kirk-lands erected, the right of the Lords of erection, as it is qualified and restricted to the property and feu-duties till they be redeemed, so it is acknowledged by that public law, in so far, which is more than a particular dissolution; for the King's general determination, which was by his decret-arbitral, upon the surrender of the Lords of erection, is held as repeated in the act, which is the security of all the erected lands in Scotland, and whereby it is declared, "that it is without prejudice to the Lords of erection of all lands and others of the erected benefices, whereof they had the right of property, the time of the general surrender, providing the same hold of the King, for such *reddendos* as they paid before to the kirk-men;" but the Lord Colvil had the right of property by his infestment of erection long before the said general surrender, not only of all lands of the Abbacy of Culross, but of all others, which comprehends the property of annuity or annual-rents belonging to that abbacy, which therefore became the Lord Colvil's private right, and therefore might be prescribed against the Lord Colvil, or against the Minister deriving right from him; so that the King is not concerned, and prescription cannot be excluded upon his account. It was duplied for the pursuer, That by the foresaid act, there is only reserved to the Lords of erection the feu-duties, till they be redeemed by the King, and the property they had the time of the general surrender acquired by them, either before or since the foresaid erections, according to the laws of the Kingdom; which evinced that the right of property was not understood that right which was acquired by the erection, which was not according to the laws of the kingdom, being granted without dissolution in Parliament, but only lawful rights before or after the erection, but not by the erection itself; and the mention of his Majesty's decret-arbitral is not to confirm it in all points, but only to qualify the right of the lords of erection to be redeemable on the conditions in the King's general determination; but there is nothing redeemable but feu-duties which were due by the vassals of kirk-lands to kirk-men, as their superiors; but the Abbot of Culross was not superior of the mills of Cupar, nor is this annuity a feu-duty, but a distinct right, and therefore it remains still the King's without any redemption.

The Lords would not sustain the title upon the adminicles produced, unless there were adminicles to instruct that the Abbacy had been sometime in possession,

and therefore before answer ordained the pursuers to produce the books of assumption, and the old rentals of the Abbacy, that it might appear whether this annuity was contained therein as a part of the benefice; for if possession at any time had been instructed, they would have sustained the instruction of the title of the kirk-benefice in a matter so ancient, where it is notour that most of the original evidents were lost; but they came not to determine the point of prescription, or whether the King had right to this annuity.

Stair, v. 2. p. 364.

No. 34.

1676. February 23.

The APPARENT HEIR of GEORGE HERRIOT *against* His CREDITORS.

Several creditors of George Herriot having adjudged his tenements in Edinburgh, and pursuing for mails and duties, there is a reduction raised at the instance of the apparent heir, of the bonds whereupon these adjudications proceed, as being granted on death-bed, and of the adjudications in consequence. It was alleged for the adjudgers, no process in the reduction, because the apparent heir hath no interest till he enter heir. It was answered, That death-bed is a ground of reduction at the instance of personal creditors, that they may affect the defunct's estate, and was so sustained in the case of the creditors of Balmerino and Cowper *against* the Lady Cowper, No. 25. p. 3203; and much more ought it to be sustained at the instance of the apparent heir, because the creditors have only interest as they found upon the privilege of the apparent heir; and there are many cases in which an apparent heir may reduce, as when the deeds on death-bed impede their entry to be heirs; or as if tailzied lands be disposed on death-bed, and infestment follow thereon, the heir of tailzie cannot at all be served as heir of tailzie to the defunct in those lands wherein he died last vest and seised, as of fee, because he was disseized by the infestment on the disposition on death-bed, which therefore the apparent heir must remove, as an impediment to his entry.

The Lords sustained the reduction at the instance of the apparent heir, but granted to the adjudgers decret for mails and duties, because the event of the reduction was dubious.

Stair, v. 2. p. 420.

No. 35.

Competent for an apparent heir to reduce bonds granted by a defunct on death-bed, though there was no infestment thereon in the defunct's time, but an adjudication after his death.

1680. July.

LADY MARGARET CUNNINGHAM *against* LORD and LADY CARDROSS.

Process sustained at the instance of an apparent heir, not served, for declaring the lands he was to succeed to free of the predecessor's debts.—See APPENDIX.

No. 36.

* * This case is mentioned in No. 65. p. 13292. *voce* QUOD AB INITIO VITIOSUM.