

1705. *June 7.* WILLIAM STIRLING *against* JOHN MACREOCH.

MR William Stirling, writer to the signet, as donatar to the escheat and bastardy of one John Macreoch, a traveller-chapman, pursues a declarator of his being holden and reputed a bastard. Compearance being made for his nearest of kin, it was offered to be proven, That his father and mother cohabited together in Ireland as married persons; and that the said John was holden and reputed by all the neighbourhood their lawful son. And, in respect he was a very old man when he died, they craved a commission to Ireland; which being reported, and advised by the Lords this day, it was found proven, by many concurring witnesses, some of them a hundred years old, that the said John's father and mother were killed in the rebellion and massacre of Ireland in 1641, with all their children, except only this John, who was hid and saved in a wood from the native Irish by some neighbour, being then nine or ten years old, and afterwards came over to Scotland, and by carrying a pack gained some means; and that his father and mother were reputed, by all the country, married folk, and he also esteemed their lawful son.

The Lords found his legitimacy proven, and assoilyed from the declarator of bastardy; and finding it was both invidious and groundless to have taken out any such gift, therefore they inclined to modify large expenses to the defenders, to be paid them by this calumnious pursuer, who seems to have relied mainly on the impossibility of proving marriage *in re tam antiqua, post tanti temporis intervallum* as seventy or eighty years back; and many later marriages could hardly be so well adminiculated as this was, if they came to be drawn in question.

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1705. *June 12.* COCHRAN of PRIESTGILL, and DYKES of HALBURN, *against* JAMES URQUHART of KNOCKLEITH.

COCHRAN of Priestgill, and Dykes of Halburn, pursue James Urquhart of Knockleith, on this ground, That he was donatar to the forfeiture of Halburn, as having been at the insurrection of Bothwell Bridge: And having componed the forfeiture for a sum of money, and transmitted the gift to Priestgill; and the Parliament having rescinded all these forfeitures in 1690, and ordained restitution of the compositions,—they pursued Knockleith for repetition of £50 sterling, as the sum paid on the transaction, with its annualrent from the date of the payment.

And he (whose name was only borrowed to the gift, for the Earl of Air-lie's behoof,) denying the sum received, they CONTENTED,—That the disposition of the gift, bearing onerous causes in the general, presupposes that it was near adequate to the value of the lands, and which is worth 6000 merks; and Dykes's oath should be taken on the composition.

ANSWERED,—When the heritors bought back their own forfeited lands, or their friends to their behoof, they ever got an easy bargain; and none ought to depone anent it but the donatar who received it, unless the writ had bore the particular sum.

The Lords found the pursuers behoved to prove the quantity of the sum given

for the composition; and that it could only be proven by Knockleith's oath. And he being craved to be holden as confessed, it was found, by looking into the execution, that he had absconded of purpose, that he might not be personally apprehended; whereon the Lords granted a diligence to cite him edictally at the market-cross of the head burgh of the shire, and at the church-door of the parish, on dissolving the congregation. On which warrant, the messengers, searching narrowly for him, at last, by accident, found him, and gave him a copy, personally apprehended. And the pursuers now craving he might be holden as confessed, it was ANSWERED he could not; because there was no warrant for a personal citation, but only an edictal.

REPLIED,—Though the warrant proceeded on a supposition of his latitation, yet the pursuer had done more, in apprehending him personally.

The Lords held him as confessed; but declared, If he came in and deponed, the 3d of June, he should be received. And he having given in a bill, craving a commission, the same was refused: but the Lords superseded extract for eight days, that, if he came and deponed within that space, he should be reponed to his oath. And on this the Lords were divided, six against six; and it carried, "Supersede extract for eight days," by my Lord Chancellor's vote: for the generality of the Lords thought Knockleith had used much shifting and tergiversation in this cause, and had made the poor man expend near the whole sum in seeking.

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1705. June 15. SIR GEORGE HAMILTON *against* LIEUTENANT-COLONEL ERSKINE of CARNOCK.

SIR George gives in a complaint to the Lords, bearing, That though he be in possession of the lands of Tulliallan, and thereby has right to the maills and duties thereof, yet the said Colonel Erskine interrupts him therein. And when his servants, in March and April last, were carrying the corns to Clackmannan, where he had sold them, the Colonel's servants fell upon them, seized the farms, beat the men, and wounded some of them to the effusion of their blood; and therefore craved the said Colonel might be fined and punished for his contempt of the Lords' authority; who had, upon a former riot of this kind, committed in 1703, decerned him to restore the corns so unwarrantably intromitted with.

ANSWERED for the Colonel,—That the lands of Tulliallan did truly belong to the Earl of Kincardine; and he having, at a roup of that estate in 1700, bought these lands, he was the only proprietor. It is true, Sir George, and Sir Robert Miln his author, had a right in these lands for £30,000 Scots; and, *quoad* the annualrent of that sum, he was content to prefer him, till, on his declarator of extinction, he instructed he was paid of the whole; but that Sir George, under that pretence, had intromitted with the haill rents, and so he, as heritor, might lawfully interrupt him. And though he was formerly decerned to restore, yet that must be understood *habili modo et in terminis juris*, in so far as concerns Sir George's annualrent of the foresaid sum; but not to give him a total possession of the whole lands of Tulliallan, seeing his own decreets bear only a preference *quoad* his annualrents.