

1764. CAPTAIN JAMES CUNNINGHAM *against* DAVID BLAIR, Minister at Brechin.

CAPTAIN Cunningham brought an action of injury, defamation, and damages against Mr David Blair, minister at Brechin, charging, that Mr Blair, having conceived a most groundless jealousy of his wife, did, to sundry persons, at sundry times and places, falsely charge him as an adulterer. Mr Blair's defences were three:—1st, The incompetency of the Court to injuries merely verbal, *prima instantia*; 2dly, He stated defences *in causa*; 3dly, He pleaded *compensatio*, in regard of a publication against him by Captain Cunningham, entitled *Tartuffe*, &c. The Court, 1764, sustained the defence, and assoilyied, and found expenses due. The action was sustained as competent before this Court, but the defence was sustained also.

DEPUTE ADMIRAL OF CLYDE.

1776. June 14. BEUGO and BRYCE *against* M'CLERY.

IN an action of damages for neglect of commission in trade, skins from Ireland, at the instance of Beugo and Bryce, tanners in Glasgow, against MacClery, residenter there, before the Depute Admiral of Clyde; the pursuer obtained decret. The defender suspended, and pleaded incompetency. The Lords, 21st December 1775, sustained the reason of suspension of incompetency. Practice was pleaded, and also a decision, *Crosbie against Corbet*, 25th February 1741, observed by Kilkerran, p. 300. But the Lords, 14th June 1776, adhered. They held to the decision, *July 1768, Haig, Daes, and Company against Campbell*.

In this case, also, the Lords repelled the defence of prorogation of the Admiral's jurisdiction. But, in respect that the objection of incompetency had not been pleaded by the suspender in the inferior court, they found him liable in the chargers' expenses incurred in that court.

LYON-COURT.

1776. December 20. PROCURATOR-FISCAL of the LYON-COURT *against* MURRAY of TOUCHADAM.

A SUMMONS before the Lyon Court having been brought at the instance of Procurator-Fiscal *against* Murray of Touchadam, concluding for payment of the statutory penalty for wearing arms though not matriculated, and for confiscation of the moveables upon which they were engraved; the Lyon Court

gave decret in terms of the libel. Mr Murray presented a bill of advocation, which was past. Pleaded at discussing for the Lyon :—the advocation is incompetent ; his jurisdiction, as to arms, is privative and independent. But Lord Hailes, 30th November 1774, “ Repelled the declinature, and sustained the jurisdiction of the Court of Session : Found the advocation competent, in respect that the question at issue was a civil cause ; neither is there any statute pointed out by the pursuer, whereby the radical or consuetudinary jurisdiction of the Court of Session, in matters of this sort, stands abolished ;” and, 26th July 1775, the Lords adhered. And, by interlocutor of date 30th November 1774, the Lord Hailes, Ordinary, “ Ordained the pursuer to set forth,—*1mo*, Whether there are, in the Lyon Office, any register or authentic books of armorial bearings, of a date prior to the statute 1672 ; *2do*, Whether there is in the Lyon Office a connected series of registers from 1672 unto this present day ; and, if not, what chasms there are in the register, and whether there is evidence that any volume of such register is lost or amissing ; *3tio*, To set forth whether it is proposed to matriculate the arms of the defender, as of one entitled to bear arms in matriculation, or to give arms to him as a well-deserving person, in terms of the Act 1672 ; and, if the former is proposed, what are the arms which Murray of Touchadam ought to bear on a matriculation : And, whereas it is said for the pursuer, that one reason for demanding larger fees from a gentleman than the sum of ten merks, specified in the statute 1672, is, that an expense must be incurred for illuminating the arms on the margin of the instrument of matriculation ; the Lord Ordinary requires the pursuer, *4to*, To explain the use and intention of such illumination, when it is considered that the science of heraldry has its own terms of art, precise and fixed, and which may serve as a certain directory to all painters, engravers, and others, for properly delineating the arms of every family respectively, on wheel-carriages, plate, and household furniture : Moreover, the Lord Ordinary appoints the defender to lodge, in the hands of the clerk to the process, the most ancient seals, impressions of seals, or other evidence that he is possessed of, or can procure, for proving, that, before the 1592, or before the 1672, the Murrays of Touchadam did actually bear ensigns armorial.”

In answer to these questions the pursuer did set forth, that there was no public authentic record of arms in the Lyon office prior to the year 1672. The tradition was, that most of the old records of arms were destroyed by fire ; there are, however, in the office several old manuscript books of heraldry which are of great use in matriculation.

The matriculations, since the year 1672, are all contained in one very large folio, in manuscript, on vellum ; and from the institution of said register to the present time the entries are regular, only until of late they did not mention dates. As to the arms to be given Mr Murray, when he applies for them it was time enough to answer this when he did so ; and as to the illuminations, they are used for the better direction of painters, or carvers, many of whom are not sufficiently instructed in the science of heraldry without illuminations.

Upon advising the cause, the Lord Ordinary pronounced this interlocutor :—13th February 1776, “ Finds, that it is admitted by the procurator-fiscal that William Murray, the raiser of the advocation, is the representative of the ancient family of Murray of Touchadam : Finds it proved, from the seals produced

in process, that the Murrays of Touchadam, the predecessors of the said William Murray, were in public possession of a coat armorial in 1511 and 1568, long prior to the Act of Parliament 1592: finds that this public possession has been continued in the family of the Murrays of Touchadam unto the present times, with respect to charge, as well as with respect to field: finds, that it must be presumed, since no evidence is offered to the contrary, that the colours of field and charge were the same anciently as now: finds it proved, by the evidence produced, or referred to, and not contradicted, that, ever since the year 1660, the family of Murray of Touchadam has been wont to give or bear the supporters, crest, and device which the said William Murray now gives or bears: finds, that such long possession infers an antecedent right, or excludes all challenge on account of defect of such antecedent right: finds,—that although the Procurator-fiscal has been called upon, by an interlocutor of the Ordinary, specially to set forth whether it is proposed to matriculate the arms of William Murray of Touchadam as of one entitled to bear arms on matriculation, or to give arms to him as a well-deserving person, in terms of the Act 1672; and of the former, is proposed, what are the arms which Murray of Touchadam ought to bear on matriculation;—yet that he refuses to make any answer to this question, which is plain, and can be answered by any one versant in the science of heraldry: Therefore, and upon the whole, finds, That the representative of the family of Touchadam was entitled to be matriculated, in terms of the statute 1592 and 1672, for the armorial bearings whereof William Murray of Touchadam, raiser of the advocation, is in possession. And having considered the original precept or summons at the instance of the Lord Lyon and the Procurator-fiscal of Court against the said William Murray, finds, That the conclusions thereof are altogether penal; and having considered the state of the register of the Lyon-office, as set forth by the Procurator-fiscal himself, finds, That the said register affords not sufficient evidence as to what armorial bearings have been matriculated by the Lyon, and what not:—1^{mo}, Because the register is so framed that any chasms therein cannot *ex facie* be discerned; 2^{do}, Because it is admitted that the armorial bearings of certain persons matriculated did not appear therein till of late: that the present Lord Lyon has become more attentive to the duties of his office than his predecessors; and, therefore, finds, That it is not proved whether the armorial bearings of Murray of Touchadam have been actually matriculated in the Lyon register or not: that William Murray was not *in mala fide* to continue the use of the armorial bearings which his predecessors enjoyed; and that there is no sufficient warrant for the penal conclusions of the original summons: and upon the whole assoilvies the said William Murray, and decerns; reserving always to the Procurator-fiscal to charge the said William Murray to matriculate his armorial bearings in the registers of the Lyon Court, in terms of the statute 1672, and to pay the fees exigible from a baron, and no more, as the statute bears: and also reserving to the officers of Court to exact whatever further sum may be judged reasonable, in case the said William Murray shall incline to be furnished, not only with a blazoning, in terms of the art, but also with a painting in water colours and other ornaments,—these being things which the Lord Lyon is not bound by law to provide without a suitable remuneration.”

The Lords, on advising a reclaiming petition and answers, 4th December 1776, adhered to the interlocutor of the Ordinary, and refused the petition, except as to the fees exigible on matriculations; as to which, remitted to the Ordinary to hear parties further, and to do as he should see cause.

In reasoning, the Lords made a distinction betwixt a right to wear arms and matriculation. In the *first*, immemorial possession would presume a grant even from the Sovereign himself to wear them; and many families in Scotland had right to arms before the Act 1592; so did not derive right to wear them from the Lyon in virtue of that Act of Parliament. But, as to matriculation, in consequence of the Act 1672, that was requisite in every case, and is so found by the Ordinary in this case. The fees, no doubt, are fixed by the Act 1672, but Lord President thought that, as in other regulations of fees about that period, practice and change of times had introduced an alteration; so this might be the case here, and therefore he proposed to remit that point to the Ordinary to hear further; which was agreed to.

20th December 1776, the Lords refused a reclaiming petition without answers, and adhered.

And again, 25th June 1778, the Lords, on report of Lord Hailes, found that the Lyon can exact no higher fees for Mr Murray of Touchadam's arms than ten merks, being the fees exigible by the statute 1672 from a baron; and found the Lyon liable in the expense of process prior to the last remit, and of the whole extract of the decret. They thought the plea, so far as concerned the matriculation-fees, not improper; as the statute was so ancient, and the practice for at least twenty years against it, though not uniform. But, as to the former parts of the process concerning Mr Murray's right to arms, and the jurisdiction of the Lyon, they thought them unjustifiable, and that the Lyon was liable in the expenses incurred on that account; and, 9th July 1778, they refused a reclaiming petition without answers, and adhered.

1762. *January 22.* DUNDAS of DUNDAS *against* DUNDAS of FINGASK.

THE Laird of Dundas complained to the Lyon, That Dundas of Fingask had got from the Lyon's predecessor, in the year 1744, a grant of an armorial bearing, to which he and his predecessor had right many ages before. The matter was brought before the Lords by an advocacy at the instance of Fingask. Dundas disputed the competency; but this plea was soon abandoned, and on the merits the Lords, 22d January 1762 pronounced this interlocutor:—

“ Finds, That George Dundas of Dundas, heir-male of James Dundas of that ilk, who was forfeited in the year 1449, but afterwards rehabilitate, has the sole right to use and bear the coat of arms belonging to Dundas of that ilk, as matriculated in the register, authenticated by the subscription of Sir James Balfour then Lord Lyon; and find, That the coat of arms obtained in the 1744, by Thomas Dundas, defender, from the late Lord Lyon, was obtained by obreption, and that he has no right to use the same; and therefore or-