

should be taken thereon, it carried Spango's. But being taken *ex officio*, they would not hold it as a full probation, but ordained him also, on a diligence, to recover Francis Kinloch's books, if any thing of this was stated there.

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1693. *February 8.* THOMAS RANKEILLAR and MICHAEL GEDDY *against* The MAGISTRATES of St. Andrews.

THOMAS RANKEILLAR and Michael Geddy, skippers in St. Andrews, against the Magistrates thereof. The Lords found the pursuers had sufficient interest to lift the money; but considered first if there was any necessary cause for calling for it at this time; and therefore ordained them to condescend why they did not think it sufficiently secured in the town of St. Andrews hands; and if they should uplift it, then ordained them to re-employ it again, and not to break the stock; but discerned them to get the bygone annualrents.

It was PLED in this cause,—That a society and incorporation could not subsist in fewer than three, and that here there were only two skippers; and so the corporation of the seamen of that town being dissolved, this sum either fell as caduciary to the fisk, or returned to the city within which the decayed incorporation had acquired that fund.

But the Lords did not regard this subtlety, for the rest of the seamen there concurred with thir pursuers.

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1692 and 1693. HEW WALLACE of Ingliston *against* LORD FORRESTER.

1692. *November 30.*—HEW WALLACE of Ingliston against my Lord Forrester. The Lords did not incline, by the depositions of witnesses, to make up the tenor of interlocutors amissing or abstracted, but rather to hear them upon the material grounds of justice which may induce the Lords to renew them; and, therefore, *ante omnia*, ordained Thomas Baillie to fit his accounts during the years he was factor on the estate of Corstorphin, and my Lord Forrester to give in his objections against the same. And if by the balance, Thomas was found debtor, the Lords would, at advising, consider if Hew Wallace should be liable for him *subsidiarie*. And as to the other interlocutor, of Mrs. Martha Temple's annuity, depending on Hew Wallace's right, it being alleged, that since November 1689, the present Lords of Session had found the same; they ordained the Lord Ordinary to try that, and if it was not so, to hear them on the grounds of law why it should not subsist as a separate debt alone. *Vol. I. page 525.*

*December 14.*—Hugh Wallace of Ingliston against the Lord Forrester, mentioned 30th November last. It was ALLEGED,—The commissary's decret was more than a decret in absence; seeing the passive titles were proven, not by cir-

cumducing the term, and holding him as confessed, but by extracting his service, as heir of tailyie, to James Lord Forrester, his uncle; and for anticipating and preventing that exception, *litis ingressus impeditiva*, that the heirs of line of Lord James were not called and discussed, he produced a decret at Major Murray's instance, against this present Lord Forrester, wherein the heirs of line were found sufficiently discussed, and he decerned against.

And it being ANSWERED,—That this was *res inter alios acta*, the Lords reponed him against that decret, on his payment of the expenses; and found James Lord Forrester's daughters, as his heirs of line, need not be discussed, unless the present Lord, who is his heir of tailyie, condescended on an estate to be affected; and ordained him to condescend; and found his adjudication should subsist for the sum which, on the event of this cause should be found due to Ingliston, by my Lord, as heir of tailyie to his uncle. *Vol. I. page 532.*

*December 15.*—Another cause was reported, between the said Hugh Wallace and Forrester, about the lands of Letham, *viz.* If Forrester was bound to debate his right to these lands, on a suspension raised by Ingliston, in the name of the tenants of Letham, without their knowledge or consent, yea contrary thereto, they having subscribed a disclamation of the process under their hands; and that by this means my Lord Forrester's possession might be inverted, and he summarily dispossessed.

ALLEGED,—Thir lands were no part of the tailyied estate; and Ingliston was only debarred by the liferentrix, who is now dead; and there is nothing more ordinary than to bring in causes summarily for discussing preferences amongst creditors, in the name of the tenants; and they cannot disclaim it, or elect their own master.

The Lords found this was a formal and ordinary way of bringing in causes for dispatch of justice, by raising suspension in the tenants' names; and that it was not in their power to disclaim it. *Vol. I. page 532.*

1693. *February 8.*—The Lords advised the debate, mentioned 15th December, 1692, betwixt Heugh Wallace of Ingliston and my Lord Forrester; and found that the tailyie of Corstorphin and Letham was not such a mutual tailyie, (having neither resolute, nor prohibitive clauses,) as to hinder James Lord Forrester to contract debts; and that he was fiar, being both the first member of the tailyie, and the last termination on his heirs: and, therefore, found his debts contracted not only during the standing of the marriage affected these baronies, but also those contracted thereafter: and that it was not like the *fidecommissa* in the Roman law; nor like that in the English law, called *feuda possibilitate successionis extincta*: and that this did not interfere with the decision in Spot's action against this Lord Forrester in 1691, whereby the Lords found this tailyie bound up to the said James Lord Forrester, that he could not dispoise the lands to the children of the second marriage, who were not of the blood of George Lord Forrester; for though the tailyie hindered him from doing voluntary and gratuitous deeds, yet that could not prejudice his extraneous creditors, who seeing the fee in his person, on the faith thereof lent him their money. But the Lords reserved to Lord Forrester, as heir of tailyie, relief against the heirs of line of the said James Lord Forrester; as also ordained the creditors to depone on the truth of their debts, that

they are yet resting owing unpaid ; and such as had right by assignations, farther to depone what eases and compositions they got down. *Vol. I. page 556.*

1693. *February 9.* MR. DAVID WILLIAMSON and MR. JOHN ANDERSON, ministers at St. Cuthberts, *against* MR. JAMES LOWS of Mercheston.

THE Lords repelled the first reason of suspension, that he was not legal minister, not having the call of the major part of the heritors, though he had the last incumbent's demission : for the Lords thought that cognition belonged to a church judicatory. And as for the *2d*, that he was unequally stented, and that his quota could not be so many bolls by far, when calculated with the rest of the heritors of the parish, in regard the locality was laid on by the King and Lords of the Treasury, and ratified by a decret of the Commission for 'plantation of kirks ; they remitted him for his redress to that judicator by reduction, the Lords not being competent Judges of their sentences. As for the *3d*, they also repelled it, *viz.* that they were always in use to pay only the middle fiars for their teinds, when they belonged to the bishop, and had an ease from the King when they fell to him by abolition of Episcopacy, and that past memory ; and therefore they ought still only to pay him the middle fiar ; for the Lords considered that it was *actus meræ facultatis*, and did not tie the ministers who had not such large revenues as the bishops had, and that the decret expressly bore either delivery of the bolls, or one hundred pound for each chalder thereof. *Vol. I. page 556.*

1692 and 1693. JOHN CARSTAIRS of Kinneuchar *against* SIR JOHN RAMSAY of Whitehill.

1692. *Dec. 22.*—THE Lords sustained Kilconquhair's declarator, and found it not *jus tertii* to him to propone ; but that it was all one as if he should allege that Sir John's comprising was satisfied, paid and extinct within the years of the legal, by intromission with the means of the common debtor, which is certainly relevant ; and that he might allege it, though he transacted with Sir John Ramsay, and acquired his said comprising, and had given him security for 38,000 merks for the same ; seeing, when he comes to defend himself by that comprising, against other posterior creditors, they may say it is extinct by satisfaction in the person of Sir John Ramsay, your author, before he was denuded in your favours. Some of the Lords were against declaring presently, but to reserve it as a ground of recourse of warrandice against Sir John, in case Kinneuchar should afterwards be distressed, or that comprising quarrelled upon that ground.

*Vol. I. page 536.*

1693. *February 9.*—The Lords found that even Carstairs had interest to propone this allegiance, that you are paid by intromission with rents of houses belonging to the common debtor ; and that, when I came to use the adjudications