

1627. July 12.

BISHOP GALLOWAY *against* INGLIS.

No 4.

Commissaries had no power to name their clerks and procurators-fiscal, but only the Bishop within his own diocese.

IN an action betwixt the B. of Galloway and Thomas Inglis, to hear him be decerned to desist from the office of procurator-fiscal to the Commissary of Kirkcudbright; the defender defending himself with a right of that office, gifted to him by the Commissary, and that the Commissary had power and right to confer the same to him, the Commissary's gift containing power granted to him to admit procurators and other members of court; the LORDS found that the Commissary, by virtue of the gift of the tenor foresaid, had no power to constitute a procurator-fiscal, albeit thereby he might admit other procurators to procure in his court; and that the right to make procurators-fiscal or clerks, belonged only to the Bishops within their diocese, and not to their Commissaries, whereanent look to the act of Parliament 1609 anent the granting of the commissariots to the Bishops. And the clerk further *alleging*, That the Commissary had a gift from the last Bishop, of that same office, which gave him power also to make deutes therein, and this clerk being received and admitted by the said Commissary, who had the foresaid right and power, and being by virtue thereof in possession many years, the same ought to defend him against the pursuit of the Bishop, in this possessory judgment, while the Commissary's right were taken away by some ordinary pursuit; which allegiance was repelled, and the foresaid gift found null; for, seeing the Commissary could not be both Commissary and procurator-fiscal, as his own gift fell, so also the power to depute to himself in that place, which was not compatible to him to bruik, became extinct.

Act. Mowat.

Akt. Belsher.

Clerk, Gibson.

Fol. Dic. v. 2. p. 291. Durie, p. 309.

1665. February 14.

Sir WILLIAM THOMSON *against* TOWN of EDINBURGH.

No 5.

The office of town-clerk being given *ad vitam*, was found to imply a tacit condition to be also *ad cult. p. am.*

THE Magistrates of Edinburgh having deposed Sir William Thomson, town-clerk, from his office, on this ground, That a tack of the new imposition and excise being set to their tacksmen, (which was to have been subscribed by him as clerk for the deacons of the crafts,) he had given it up to the tacksman and had not taken their subscription thereto, neither to their own double, nor taken another double for the Town, albeit the tack duty was four score thousand merks yearly for two years, and that it being an uncertain casualty, the value of it was most difficult to prove, and not but by the tacksmens own oath; Sir William raised reduction on several reasons, especially that the sentence was unjust, in so far as it was the putting on of an exorbitant and incommensurable punishment, of deprivation from an office of so great value, upon a fault of

mere negligence or escape; and that before the sentence the tack-duty was all paid but four months, and now all is paid, and that Sir William was still willing for to have made up the Town's damage. It was *answered*, That here was no process to put a punishment commensurable on a fault, but Sir William having, by the free gift of the Town, had so profitable a place for his life, upon consideration of his fidelity and diligence, there is implied in it, as effectually as if expressed, that it is *ad vitam aut ad culpam*; so that the cognoscing of the fault is the termination of the gift freely given, so if there be a fault justly found by the Town, they might well take back their gift they gave, upon that condition implied; for it was not the loss *in eventu*, nor *dolus in proposito* that made such a fault, else all negligences imaginable would not make it up. Though a servant should leave his master's house and coffers open, if nothing happened to follow, yet the fault was the same, and could not be taken away by making up the damage; but here was a fault of knowledge and importance, for Sir William could not, by mere negligence or omission, give away the tack to the tacksmen, and neither see them subscribe their own double or any other, nor subscribe himself. This fault was like as in his office he had had a particular gratuity as clerk to the excise.

THE LORDS repelled the reason of reduction, and found the sentence not to be unjust, upon this ground, because they thought that Sir William being a common servant, who, by his act of admission, had specially engaged never to quarrel the pleasure of the Magistrates, they, as all masters, have a latitude in cognoscing their servants' faults, wherein, though they might have been wished to forbear rigour, yet having done it by their power, as masters over their servants, the LORDS could not say they had done unjustly; but found, that the committing such a fault terminated their free gift, being of knowledge and importance; but found, that if it could be proved, that the tack was duly subscribed and lost thereafter, which was not of knowledge but of mere omission, incident to any person of the greatest diligence, they would not find that a sufficient ground to depose him.

1665. June 6.—THE ordinary Council of Edinburgh having deposed Sir William from his office of town-clerk, he raised a reduction of the sentence on four reasons; *first*, That the same was null, because it proceeded without citation or necessary solemnities of process; *2dly*, Because the Town could not be Judge in their own cause; *3dly*, Because by the sett, or the King's decree-arbitral for the government of the Town, no person could be admitted to any office or benefice therein, but by the Great Council, consisting of the Ordinary Council and their deacons; and consequently, none could be deposed from such offices but by the same Great Council; and this sentence was by the Ordinary Council; *4thly*, That the sentence was exorbitant and unjust in deposing him for an omission, *sine dolo, lata culpa, aut damno*.

No 5.

THE LORDS having discussed the fourth reason, and heard the whole dispute at length *in prasentia*, the defender, after interlocutor, but not pronounced, on the fourth reason, borrowed the process, and refused to re-deliver it. The Town called upon a copy, and represented the manner of abstracting the process. The question was, what should be done, and whether Sir William might, before litiscontestation, or any interlocutor pronounced, take up his process.

THE LORDS admitted protestation on the copy, and ordained an act of sederunt, prohibiting the clerks to give up any process to the pursuer, after it was disputed to the full in all the members thereof, though no interlocutor were passed or pronounced thereupon, lest, after so long debate and hearing, the LORDS should, at the discretion of the parties, lifting their process, lose their time; but what had been disputed should be advised *de recenti*.

*Stair, v. 1. p. 269. & 278.*

No 6.

Taxation for a particular year held sufficiently discharged, by the discharge of one who was held and reputed collector.

1665. December 14. Duke of HAMILTON *against* Laird of CLACKMANNAN.

THE Duke of Hamilton, as Collector of the taxations 1633, charges the Laird of Clackmannan, who suspends, and produces discharges of the first three terms. It was *alleged*, These discharges could not liberate, because they were granted by John Scobie, who was neither Sheriff, Bailie, nor Clerk; nor does it appear that he had any warrant or commission, nor do his discharges mention any commission or warrant. It was *answered*, That by the discharges produced, it appears, that Ormiston and Humbie, deputed for the Duke, had granted discharges to this John Scobie, and offered to prove, that he was in use of uplifting the taxations during the terms themselves, and was commonly reputed as Collector thereof, which must be sufficient *post tantum tempus*. It was *answered*, That that ground would not oblige the Sheriff, and so both the heritor and Sheriff being free, the King loseth his right.

Yet the LORDS sustained the reason.

*Stair, v. 1. p. 326.*

No 7.

An inhibition of teinds sufficiently executed by a Sheriff in that part, and not by a messenger.

1666. January 27. Earl of EGLINTON *against* Laird of CUNNINGHAMEHEAD.

THE Earl of Eglinton pursues the Laird of Cunninghamehead for the teinds of his lands, conform to a decret of valuation. The defender *alleged* absolutor, because he bruiked by virtue of a tack, at least by tacit relocation, which must defend ay and while the same be interrupted by inhibition or process. It was *replied*, The pursuer produces inhibition, and craves only the valued duties for the years thereafter. It was *answered*, The inhibition is directed to mes-