

1674. *February.* ALEXANDER BIRNY *against* GORDON of Aberzeldie.

MR ALEXANDER BIRNY, advocate, pursues Gordon of Aberzeldie, upon a bond of pension he had given him of 100 merks yearly, to do his law affairs.

ALLEGED,—It was of the nature of a factory, or a donation, and so revocable at will.

ANSWERED,—Opponed the constant tract of the Lords' decisions, finding pensions valid and obligatory as remunerations, even where the party deserts his employment, in contemplation whereof the pension was first constituted; since it might sustain, as an acknowledgment of bygone services, as Stairs, in his System, *tit.* —, Of Annualrents, § *ultimo*, shews the Lords have decided. And, in fortification of the bond insisted on, he produced letters under the defender's hand, recommending the prosecution of the particular affairs therein mentioned to him.

The Lords sustained the bond of pension, and pursuit raised thereupon; and found nothing relevant to take it away, but either refusing and declining to serve him, or malversation, and ingratitude, if great; this being *donatio remuneratoria*. Dury, 25th March, 1629, *Doctor Strang*; 24th July, 1678, *Mr William Weir against Calander*.

*Advocates' MS. No. 443. folio 232.*

1674. *February.* RICHARD LOUTHIAN *against* LOUTHIANS, &c.

RICHARD LOUTHIAN, merchant in Edinburgh, for himself and as administrator to Alexander Louthian, his son, pursues Catharine, Alison, and ———, Louthians, as heirs, and upon the other passive titles, and Mr Matthew Ramsay, husband to the said Catharine, for his interest; to ratify the right and disposition of some lands in Edinburgh made to the said Alexander, by George Jolly and Alexander Louthian, his nearest heir, and brother to the said Catharine, Alison, and ———, Louthians.

The DEFENCE was, *Quoad* Alexander their brother, they offered to renounce to be heirs to him: And as to George Jolly, though they were heirs to him, they cannot ratify that his deed in favours of the pursuer, because it is a right granted by him on deathbed, and to their prejudice who are heirs, and is under reduction at their instances upon that head; and which is ready, and they are content to hold the production satisfied, and debate the reasons presently.

Whereunto it was REPLIED for the pursuers, That they will not suffer the defenders to renounce their being heirs to Alexander Louthian their brother; because they insist upon the passive title of being successor *titulo lucrativo post contractum debitum*, in so far as Catharine and Mr Matthew, her husband, accepted a disposition of sundry tenements of lands from the said Alexander, after his ratification and obligation to the pursuer, and thereupon was infest, and has sold and wadset the said lands. As to the second, crave they may be decerned to ratify as heir to

George Jolly, and reserved their reduction of the right the pursuers derive from the said Jolly, as accords.

DUPLIED for the defenders, They cannot be liable as successors, *Imo*, Because that is an universal title, and supposes an immixtion *per universitatem*, which the acceptance of this disposition will not imply. *Secundo*, That passive title is only introduced in favours of those who are creditors for onerous causes before the said lucrative succession, and not in favours of those who acquire rights for love and favour, as the pursuer's right was. But, *tertio*, That passive title reaches only such as are *alioqui successuri et necessario hæredes*, as when the father or son disposes to their eldest son or grandchild; but not where the party receiver of the disposition is only *hæres præsumptive et probabiliter tantum*, as when a sister succeeds to a brother, which is our case; and that it was a certain principle, that lucrative succession was not a passive title except in the line descendant. (*Vide supra*, February, 1670, Whytfoord of Milnetown, No. 8.)

TRIPLIED for the pursuers, The defenders must be reputed as *necessario hæredes* to their brother, because at the time he made them that disposition he was on death-bed, and could have no other heir, *per rerum naturam*, being also unmarried. *Secundo, Esto*, That succession were not enough to make them liable to all their brother's debts; yet the Lords were in use to [find] always such successors liable in *quantum lucrati sunt*: and they sought no more.

QUADRUPLIED for the defenders, That though he had died instantly upon the making that disposition to them, yet it would not alter the case. As for the second, though they were liable in *quantum lucrati sunt*, that was not competent here, but only in a reduction or in a declarator; and it was not in all their libel.

QUINTUPLIED for the pursuers, That they might add it or reply upon it, since it was unexceptionably relevant, *et lites non sunt prolongandæ seu multiplicandæ*.

My Lord Gosfoord FOUND they could not propone upon it here, since it was not libelled, therefore repelled it, reserving to the pursuer their reduction and declarator upon that ground.

See the information of this cause beside me. See 15th June, 1678, thir parties, *Louthians*; 19th December, 1678, *Setons of Blair against Pitmedden*.

*Advocates' MS. No. 444, folio 232.*

1674. February 28. The MARQUIS of HUNTLY against HIS FEUARS.

A second appeal was given in to the Lords by the Earl of Aboyne as commissioner, and in name and behalf of the Marquis of Huntly, his nephew, in an action pursued by the Marquis against Gordon of Carneborrow, and sundry others his feuars, for reducing their feus, as having fallen under his forfeiture, they not being confirmed by the King.

The Lords found the defender's feu-infeftments good, valid, and sufficient to defend against the forfeiture; especially the apparent heir of the person forfeited being restored, and the forfeiture *funditus* taken away as *ab initio* null and unjust, and the restitution being *non per modum gratiæ*, but *justiciæ*. See *supra*, No. 406, (June, 1673, General Dalzeel against Tenants of Caldwell,) 437, (28th January, 1674, General Dalzeel against Tenants of Caldwell,) where the Lords