

confident person, *ratio legis*, being only that fraud is committed, or the common debtor's goods affected; and by a practick in Durie, *in anno* 1623, betwixt William Hamilton and Dick, and by some of late, it was clearly found, That if the common debtor himself make voluntary payment to a lawful creditor, who had denounced for not payment, or had granted an assignation for payment, that the same was not null, and did not fall within the Act of Parliament. And the reason is, that the assignation could not be reputed a voluntary deed, but to have been made of necessity, after charging and denouncing the common debtor rebel; notwithstanding whereof, the greatest part of the Lords were of another opinion. Which seems very hard, seeing, by the former interlocutor, they found, that, notwithstanding both of horning and a decret of declarator, yet Pallet should be preferred, albeit Veatch was both a creditor and had denounced; and farther, had obtained the gift of his escheat, and a declarator: And as to Sanderson being bankrupt, *anno* 1649, that appeared only by the deposition of one witness; whereas it was instructed for Pallet, that a decret was obtained against Stewart for £2000 sterling, which he had affected as said is, having got an assignation thereto; and that, that same year, the wines were sent home to him in his own name, and was a public trafficking merchant, there being neither arrestment nor caption used at Veatch's instance, or any other creditor.

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1675. June 24. The COLLEGE of the NEW TOWN of ABERDEEN *against* The TOWN of ABERDEEN.

IN a declarator, at the instance of the Masters of the College of the New Town of Aberdeen, against the Magistrates of the town, to hear and see it found and declared, that they had the only right to present and admit bibliothecary, to have the care and custody of the bibliothecque of the said college; conform to a mortification, made by Doctor Reid, of a sum of money, to be put in the town's hands, whereof the annualrent extended to 600 merks, and should be yearly paid to the person that should be presented by the masters of the college, and of the grammar school:—It was ALLEGED for the town, that long before that mortification made by Doctor Reid, the town of Aberdeen having another bibliothecque of their own, did transport all their books to a place of the college, and appointed one to wait upon that office; and, accordingly, they did continue, from time to time, when the place vaiked; so that the mortification made by Doctor Reid, being but an accession to a standing bibliothecque and office, could not prejudice the town. Likeas, after Doctor Reid's mortification, Doctor Dun, as principal, did subscribe as witness to a contract betwixt the town and Mr Robert Dounie, who was the first person nominated by Doctor Reid, whereby the town of Aberdeen did present and confer that place upon Mr Robert Dounie, and he did accept thereof from them, as patrons of the said bibliothecque; so that they have been in constant possession above 40 years, and thereby had prescribed their right.

It was REPLIED for the college, That the bibliothecque being within the college of Aberdeen, and a constant stipend mortified to him, the town of Aberdeen having put therein a parcel of books, and appointed one to attend them, could not prejudice the college for the use and benefit, the whole bibliothecque

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was made up ; and any books sent by the town were inconsiderable ; and Doctor Reid having not only left his whole bibliotheque, but mortified a salary fit for a bibliothecary, who was to be chosen as said is, the declarator ought to be sustained ; especially seeing, since that mortification, which was in the year 1632, they had been in constant use of electing and presenting a bibliothecary, and never suffered any presented by the town to enter or possess.

The Lords did sustain the declarator, and found, that there being no formal mortification by the town, that their sending of books to that bibliotheque within the college, did not make them patrons ; and that the mortification made by Doctor Reid of that yearly salary to a bibliothecary, could not be inverted, but ought to be applied to those that were elected conform to the mortification ; seeing this ought not to be looked upon as a benefit formerly founded, to which Doctor Reid had only granted an accession, it being only a salary mortified to an office, which required a daily attendance, and never had any before : and so determined the same, only to belong to those who were elected, conform to the mortification.

Thereafter it was ALLEGED, That Mr Alexander, who was presented by the town of Aberdeen before Mr Paterson was presented by the college, being entered to the possession of that place, should have the full benefit, at least since his presentation ; he having succeeded to one formerly presented by the town ; which was so homologated by the university, that he continued in exercise of that place until he died ; and did constantly receive the payment from the town, as patrons, whose right was never questioned until the intending of this declarator.

It was ANSWERED, That any payment made, or deeds of homologation, being expressly relative to the mortification, could not invert the college right, and that any possession had by Mr Alexander was but momentaneous *et vi* ; the town having broken up the doors, and was immediately opposed by the college, who did present and enter Paterson to that office.

The Lords, before answer, did ordain probation of the manner and time of Mr Alexander's entry and exercise, after which they would decern at what time Mr Paterson had right ; as likewise that the town might take away their books, or appoint another keeper to them.

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1675. July 4. KENNEDY of AUCHTERFARDELL against WILLIAM HAMILTON of RAPLOCH.

IN an action and improbation of a right of wadset, now standing in the person of Hamilton of Raploch, younger, coming by progress in his person from John Weir of Overcommerhead, as being infeft, by a precept of *clare constat*, in the said lands, *in anno* 1609, as heir to John Weir, his father, who held the said lands of Sir James Hamilton of Libbertoun, as superior ; which wadset was redeemable by payment of 1050 merks ; and was at first granted to James and William Weirs, from whom Raploch, as to the one half, derived right, and Kennedy of Auchterfardell for the other ; and by virtue thereof, they and their authors have been in possession from the year 1609 to the year 1670 ; in which improbation there being only produced a seasine of the lands given to John