

but, *ita est*, their reason of reduction upon the inhibition could not have reached the defender's author's right, because long anterior to the inhibition: *Urgo, 2do*, The certification is still null, because the apparent heir of the party inhibited is not called in it, for his interest, as ought to be done. *3tio*, The said decret of certification nowise meets the defender's interest; because the writ reduced for not production in that decret of certification is allenarly a disposition of thir lands, alleged granted by old Forsyth of Dykes to one Ja. Muirhead; whereas, there neither is, nor ever was such a writ *in rerum natura*: and, from the defender's production in the clerk's hands, it will appear, that any right he has is from John Muirhead, and which John derived his right from Forsyth of Dykes younger; so that neither the person granter of the disposition, nor the party receiver, nor the writs called for, do quadrate; and the defender is content certification stand against the disposition mentioned in the decret of certification; he is not concerned, nor are his rights reduced. *4to*, No certification could have been granted against the defender's author's right, because, before the date thereof, he was denuded of his right in favours of this defender, and so cannot prejudge him, a singular successor, acquiring it *bona fide*, and not being called. And whereas negligence is alleged, that by the space of twenty-one years no reduction has been intended of that certification; they cannot be heard, because we needed not, it being intrinsically null for the causes foresaid.

II.—He can never object the defender's being *in mora*, because he is *in pari casu* himself, in so far as, through his cessation and supine negligence for the same tract of time, he had never done any diligence, either by action for maills and duties or removing, to clothe his right with possession: and the defender thought himself *in tuto* and in *bona fide* to continue his possession, so long as the pursuer did not stir; yea, till then he knew not of the certification, but so soon as he heard of it he intended reduction, which is seen, returned, and enrolled, and near ready for calling. In respect of all which, the said certification ought to be reduced, and the defenders assoilyied from the pursuer's action for maills and duties, *hoc maxime attento*, that the pursuer being a member of the College of Justice has taken an assignation to this plea.

Upon this debate the Lords FOUND, The decret of certification did not meet the defender's right, and therefore reduced the said certification, and assoilyied therefrom, *tam pro præterito quam futuro*; so that they had no need to determine the general case, if a certification gives right to the duties aye till it be reduced, for they were not straitened here. As to the question, From what time possessors are obliged to restore the fruits; if from the date of the citation, or litis-contestation, or sentence in a reduction; see the various rules in M'Kenzie's Observations on the Act of Parliament 1621, anent Bankrupts, p. 137.

*Advocates' MS. No. 468. folio 241.*

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1676. *February.* The WRIGHTS and MASONS of Edinburgh *against* the BOWARS, SLATERS, COOPERS, &c.

THE wrights and masons of Edinburgh raise a declarator against the bowars, slaters, coopers, painters, glaziers, sieve-wrights, plumbers, and upholsterers,—two

trades against eight,—to hear and see it found and declared, that these eight trades had not the privileges competent to the masons and wrights, nor were capable of the deaconry, &c. As this was negative, so the said eight trades did raise a mutual declarator, assertory of their privileges and capacity; in which, *in January last*, the Lords, after a most contentious debate, in respect of the social acts clearly proven, and past memory of man possessed, found the first five trades had equal privilege with the wrights and masons, were members of their incorporation and not pendicles, and were capable to be elected deacons; but as to the three last, the sieve-wright, plumber, and upholsterer, in regard their assumption was since the decreet-arbitral and recent, so that they had not possession requisite to prescription,\* the Lords demurred, and declared they would hear the parties farther, as to their privilege.

For which three trades it was ALLEGED, That whatever grounds had been urged in the former debate in favours of the coopers, bowars, &c. whose capacity the Lords had already declared were as binding, pregnant, and convincing, in behalf of thir three, whose privilege was still under controversy, as the other five; they both have exercised *eosdem actus sociales*. Thir three trades have ever been in use to sit with the wrights and masons in their Mary Chapel corporation; they concurred and voted at the election of their deacon; they are masters and boxmasters to the calling; they are judges to their essays and assises, by a similitude not unlike to the *pares curiæ*, who were *convassalli ejusdem domini* in the feudal law; they have a share in the trust and management of the interests of the corporation, *ubi onus ibi et honos*; in all their acts, seals of causes, assumptions, grants, and other writs, they are denominated by appellatives importing a society, communion, and an equal participation of privileges. But since this neither was nor could be denied by their antagonists, therefore I would come to the disparity assigned, whereby it was alleged, thir three trades were stated in a different and worse case than the other five, in so far as they had been assumed since the date of King James his decreet-arbitral, and the other five trades were incorporated before; and so were in immemorial possession, and might rationally be supposed to be comprehended therein; but after that decreet, which is like the town's *magna carta*, containing the fundamental and unalterable principles of its government, they could do nothing prejudicial thereto, nor assume trades, or communicate privileges or any part of the administration or policy of the burgh to any others save those mentioned and included in the said decreet-arbitral. Notwithstanding of which disparity, I alleged declarator behoved to pass in favour of my clients, unless the wrights and masons could say one of thir two, (none of which they were able to subsume upon:) either that there was a let and impediment resulting from some prohibitory clause in the set or decreet-arbitral, hindering the fourteen trades from assuming new callings into their incorporations, or else that the particular admissions of thir three trades are limited and coarctate *ad speciales effectus*. As to the first, though it were enough to me to say that it is a negative which proves itself aye till they condescend where and how it was prohibited, yet I will deal more liberally with them, since it is easy to demonstrate, that the decreet-arbitral, neither as to its words nor meaning, doth debar the trades from assuming new ones; for, *Imo*, There is no legislator or judge can be so quicksighted, (though you would allow him Argus his hundred eyes,) when he is statuting or judging, as to have all the future contingencies, all the *casus novi et incogitati*, under his view

\* Every community is a fraternity *in qua est dignitatis æqualitas*. Cujacius, *ad Tit. C. Pro Socio.—Et fraternitatis nomen nihil aliud est quam æqualitas et communio*. Idem, *ad Tit. C. De Collationibus*.

and consideration, that may afterwards emerge; but the lawyers give advice in such cases, that is, *qui jurisdictioni præest illud ad similia producere interpretatione, vel jurisdictione supplere debet.* 2do, Though all events cannot be provided for, yet it is manifest, from a reservation in the set, that some such thing has been in their eye; for it is expressly provided, when any good head or overture, tending to the weal of the crafts, shall be proposed by any deacon or tradesman to the council, the same shall be instantly authorised by an act made thereupon; of which kind, the assuming of trades, whereby they are much united and strengthened, is undoubtedly one. 3tio, *Ubi eadem remanet ratio, eadem debet esse juris dispositio*; but so it is, whatever reasons persuaded the modelling and reducing the several associations and companies of trades, which were then in being under fourteen deaconries, the same militated still to enforce the necessity and reasonableness of assuming new arts and trades that come in request, or spring up with the genius of the age, and which either were not formerly, or at least not so frequent; and which reasons may be reduced to these three heads,—the 1st shall be, The constitution and government of the burgh upon solid and lasting foundations; which in all democracies, whether supreme or subaltern, can be attained by nothing so well as by an equality among the citizens, which is very rationally tempered and adjusted in this decret-arbitral by a proportion rather geometrical than arithmetical, *habita ratione dignitatis personarum*; for the merchants and trades being the two poles, whereupon the interest of Edinburgh rolled, the great council of the burgh, consisting of thirty-eight persons, was made so to share the town's administration between these two competitors, that the merchants make twenty of the number and the crafts eighteen, whereof fourteen are deacons, the other four are counsellors. At the time of the framing of this there was above twenty-eight trades' incorporations in Edinburgh: all of them behoved to be reduced and moulded into fourteen deaconries. The rest of the trades then in being were not annihilated,—were not turned out of the town; but were brought under such and such deaconries to which they bore the nearest analogy and semblance. 2do, As the government of the town required that the trades should be reduced to a definite number, that in votes they might not overpower the merchants, so the interest and utility of the trades themselves is extremely concerned therein; for thereby they dilate and extend both their number and power, and hold up their number in case any trade, such as at present the furrier, should decay and fail; and they get no small accession to their common purse thereby. And how thir wrights and masons come so far to deviate from what their predecessors judged to be of so great and important advantage to them, may seem a paradox; for they may remember, during the late animosities and debates, managed with so great heat and zeal, in 1661, between the merchants and trades, one of the main articles of the merchants' grievances against the trades was, that though there were but fourteen deacons mentioned in the set, yet they had engrossed and assumed many other trades under their deaconries, for fortifying and strengthening themselves, and for perpetuating the faction. What has diverted the channel I know not, but *Timeo Danaos et dona ferentes*; and to the present agreement between the merchants, and wrights and masons, against thir other trades, may be properly applied that old politic maxim, *Divide et impera.* 3tio, As the government of the city, and the advantage of the trades themselves, persuaded them to be listed and ranked under deaconries, so the interest of the subject was not a little concerned therein, viz. that there should be no independent trades, nor vagrant tradesmen allowed to work at random without trial and inspection of some persons of skill and understanding to over-

see their work, that the lieges be not cheated and abused with base and insufficient work. As thir were the reasons that evinced the usefulness of reducing and fixing the trades under particular corporations, so the same militate as pregnantly now; for there can be no more but fourteen deacons still. The interest of the trades is much enlarged by thir assumptions still; the people's security against bad work requires the same still: so that the assuming of new trades can never be imagined to have been prohibited. 4<sup>to</sup>, As the words of the set, and reason and meaning thereof, make for me, so also custom, *quæ est optima legum interpres*, stands on this side; for in the incorporation of the hammermen there are eleven trades, such as spurrier, saddler, sword-slipper, &c. all assumed; of which there are four or five taken in since the date of the decreet-arbitral: and yet even some of these lately assumed trades, as particularly the coppersmith, have been actual deacons of the hammermen; which unanswerably proves, there is no difference as to the time of the assumption, whether before or after the set, as is pretended. And whereas the wrights and masons frame an argument from the acts of admission of thir three trades, as if they were limited and qualified *ad speciales effectus*, only to work in their own trades, and not to participate privileges,—it is answered, in so far as their admissions are indefinite, and not exclusive of their capacity, they, in construction of law, must extend to all privileges; *nam favores sunt ampliandi, et indefinitum æquipollet universali*. (*Lege 3. in fine, et 4. D. de Tutelis; L. 43. in princ. et 44. D. de Legatis, 2<sup>do</sup>, ibique Gothofredus. Dynus, ad Regulas Juris Pontificii, p. 4. cap. 15 et 61, de Regulis Juris, in 6<sup>to</sup>, ibique Dynus.*) 2<sup>do</sup>, Where it allows them to work in such and such work, which fell not naturally and properly under the subject-matter of their own occupation, the same is so far from being taxative, that it is demonstrative and in their favours, and is an evident ampliation and enlargement of their liberty, beyond what the limits of their calling would have borne them to; *et quod in alicujus gratiam conceditur non est in ejus odium detorquendum*. Now, freedom being that which all men naturally covet, thir pursuers' ambition swells no higher than to be declared freemen, and not slaves; to be capable of the deaconry, not to be deacons: and since, in all their common evidents, they are designed *confratri*, (for *confratres*,) let their animosities be this day buried, and all ordained, by your Lordships' decreet, to live together like brethren in unity.

The Lords declared in favours of thir three trades, that they had equal privileges with the masons and wrights, as well as the other five, who were incorporated and assumed before 1583; at which time the decreet-arbitral was made.—See, between the pewtherers and plumbers in another place, February, 1679.

*Advocates' MS. No. 469, folio 242.*

1676. February. ANENT INITIALIA TESTIMONIORUM.

I HAVE heard some hudibrass the *initialia testimoniorum*, viz. the examining of witnesses upon their age, their being married or not, &c. as an impertinent and insignificant old style; notwithstanding that the same is necessary to be interrogated and inserted; for, 1<sup>mo</sup>, If the witness be found lying and trinketing in thir, it vilifies and derogates much from the weight and faith of his testimony: but many doctors think that *falsum* committed by a witness *in extrinsecis, non facit testimonium cor-*