to accept Ancrum's presentation, because he had a better right to the patronage; in so far as King James, by his charter, *in anno* 1608, to the then Archbishop of Glasgow, upon the bishop's resignation, disponed the bishopric with all benefices thereto belonging, with a *novo-damus*, enumerating the patronage of Ancrum as one of the benefices belonging thereto, *cum omni alio jure* the King had to the bishopric or benefice foresaid; whereby the Archbishop had right before Ancrum or his author.

It was ANSWERED for Ancrum, That he had obtained a decreet *in foro* against Archbishop Lightoun, declaring his right to this patronage; in which decreet the King's gift, now produced, was founded on; and yet the decreet bears,—"That the Lords having considered the rights produced, declared Ancrum's right."

The Archbishop REPLIED, That bishops cannot dilapidate their benefices directly nor indirectly, by omitting lawful defences; and therefore *competent and omitted* is not relevant against their successors, they being but liferenters. *2do.* It cannot be questioned but collusion, in suffering decreets to pass, is a dilapidation; but this decreet is evidently collusive, bearing, That the Archbishop produced the King's gift, 1608, containing the patronage of Ancrum; and yet no mention of any defence founded thereon, which was obvious, the Bishop's right being anterior to Ancrum's: And though the decreet bears,—That the Lords did consider the rights; yet that could be only in relation to the allegeances of parties; but all the allegeance in this decreet is this dilator only,—No process till the dean and chapter be called.

It was REPLIED, That if decreets *in foro*, against beneficed persons, cannot operate against their successors, they shall have greater privileges than the King; and no process for or against them, can be finally ended. And as to the collusion, it does not appear from the decreet; seeing the bishop's right was produced, and under the Lords' consideration. And the great mean of termination of pleas is, that, after compearance, nothing then competent and omitted can quarrel the decreet, even though there be no defence proponed, but the libel denied; much more where a dilator is proponed; seeing now it is declared by act of sederunt,—That parties cannot pass from their compearance, after dilators proponed and discussed, though sometimes they might.

The Lords found, That collusion did appear from this decreet; the bishop's right having been produced, and anterior, and an obvious defence thereupon, without any mention of the said defence: but delayed the interlocutor till the 29th of February.

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1680. *June* 11. GORDON of DAVIDSTOUN and ISOBEL ROBERTSON *against* WILLIAM MENZIES.

GORDON of Davidstoun and Isobel Robertson pursue the Laird of Weym, and William Menzies his tenant, for a spuilyie of five horses and the said Isobel's whole household-plenishing. The defenders being absent, the libel was admitted to the pursuer's probation: who proved, that, in the night-time, some

unknown person committed this spuilyie; and that Gordon of Davidstoun, having followed the goods, found one of the horses in the possession of William Menzies, and marked the horse in the lug. Whereupon the question arose,—how far this probation could reach, the defender being absent; and, especially, whether the spuilyie being committed in the night-time, where there was no witnesses and the spuilyiers were not known, that a part of the spuilyied goods being found in the possession of William Menzies, did not infer a presumptive probation that he was actor or resetter of the spuilyied goods, and so liable to the whole spuilyie.

The Lords found, That it did not so infer a presumptive probation; but that the said presumption might be taken off, if Menzies could instruct that he came warrantably to this horse: but, because Menzies was absent, and probably upon design, because it could not be proven who the spuilyiers were, the Lords ordained a second citation to be used against Menzies, with this special certification,—that if he did not appear, and instruct that he came warrantably to the possession of this horse, that he should be decerned in the whole spuilyie, as actor, resetter, or accessary thereto.

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1680. *June* 30. The PROCURATOR-FISCAL of PEARTH *against* DUNBARNIE and JOHNSTON.

THE Procurator-fiscal of Pearth having pursued Dunbarnie and Johnston for blood-wits, they raised advocation upon this reason,—that the sheriff had unjustly repelled their defence, *viz.* That the bloods in question had been judged in Dunbarnie's bailie-court, before they were attached by the sheriff; Dunbarnie holding of the King *cum bloodwitis.*

It was ANSWERED, That this was but collusion to prevent the sheriff and the King of his casuality of blood, by bringing the cause before Dunbarnie's own bailie, constituted by himself, where he was both judge and party; and Johnston committed the blood out of Dunbarnie's bounds.

It was REPLIED, That Dunbarnie, being pursued by the party injured, had no just defence to exclude process, because that was his own court; though, if he had been pursuer in some cases, the cause might have been advocated from him upon the influence of his bailie: for, though he has power to constitute a bailie, yet the bailie is the sole judge, and may determine either for or against his constituent. And as for Johnston, though he committed the blood without Dunbarnie's jurisdiction, and thereby became convenable *ratione loci delicti;* yet he remained also convenable *ratione domicilii*, at the option of the party injured; who having convened him before Dunbarnie's court, he was not convenable again before the sheriff.

The Lords found the sheriff committed iniquity in repelling either of these defences; and therefore did advocate the cause.

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