

1696. *December 3.* SIR JOHN DEMPSTER of PITLIVER *against* MR JOHN MACKENZIE of ASSENT.

SIR John Dempster of Pitliver craves, by a bill to the Lords, a warrant for an edictal citation of Mr John Mackenzie of Assent, brother to my Lord Seaforth, on a summons to pay a debt, because he had failed to present the Countess, his mother, conform to his bond, and, to frustrate it, had retired with his family to the Lewis, where no messenger durst go to cite him, and therefore craved, in the terms of the 65th Act, Parliament 1587, they might be allowed to cite at the market-cross of Inverness, as the nearest burgh-royal in the Lowlands, there not being *tutus accessus* whither he had retired. ANSWERED,---That Act of Parliament is only in favours of the King's causes. *2do.* It can only take place when the Highlands are broken. REPLIED,---If the King need to use that extraordinary remedy, much more ought it to be indulged to the subjects. *3tio.* It has been often granted *cum causæ cognitione*, 29th June 1666, M'Pherson against M'Leod; and lately, in the Criminal Court, the Justiciaries granted an edictal citation to the Laird of M'Intosh against M'Donald of Keppoch and his Accomplices; and *Maranta de Judiciis*, Part 6, allows this way, *ubi locus non est securus*. It was urged, That this might be very prejudicial to the inhabitants of these remote parts, for warrants might be thus sought for citing them which may never come to their knowledge, and so decreets pass against them. But the Lords thought John, in his brother Seaforth's land, would be *difficilis conventio*; and therefore granted Pitliver's bill for an edictal citation against them. *Vol. I. Page 739.*

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1696. *December 4.* ROBERT MILNE *against* The SISTERS and HEIRS of MR JAMES STEVENSON.

I REPORTED Robert Milne, deacon of the masons, against the Sisters and Heirs of Mr James Stevenson, late secretary-depute for Scotland, for implementing a minute of sale of some houses in Edinburgh by Mr James's two factors, whose commission was only to lift his rents, &c. : But it was ALLEGED,---That, having entered into a communing with Mr Milne, and he having offered ten years' purchase, they acquainted Mr James (who was then at London,) with the same; and he, by a letter, signified he thought the price too small, and expected twelve years' purchase, but left to them to do what they thought most for his advantage: whereon they entered with the deacon into a written minute, and sent an extended disposition to Mr James, to be signed by him; and he, by a second missive, intimated to them that he was displeas'd with the absolute warrandice inserted therein; and that the paper having fallen by his hand, he desired them to form a new one, with the advice of lawyers, and transmit it to him, so as he may have no more scruples. All which prove he ratified the bargain; and as he would have been forced to implement the minute, so must his heirs.

ANSWERED,---The first letter gives them no absolute power to sell, but only

to treat and commune ; and the second letter can be no warrant, because the minute was entered into prior thereto ; and it does not appear he then knew, or was acquainted that they had sold it by a minute ; but he seems to look on it still as in the terms of a communing, and no consummated bargain ; and men's heritage ought not to be sold on such general warrandice as these.

The Lords found the heirs of Mr James not obliged to implement this minute of sale.

The heirs would not have much quarrelled the bargain, either on the inequality of the price or otherwise, but in regard it was designed the same should not fall to them ; for he had named his Lady executrix and sole legatrix, and she had agreed with Mr John Forrest, minister at Prestonhaugh, (who had married one of the three sisters and heirs-portioners,) and for a sum of money had made it over to him ; and he claimed the price as moveable, and falling under executry, to the exclusion of the other two. And he contended it was as much moveable as if it had been money lying beside the defunct : though some of the Lords thought the price heritable aye till the bargain was perfected by an extended disposition. But this point was not determined at this time.

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1696. *December 4.* MR HARRY IRVING *against* MR WILLIAM IRVING.

ON a bill given in by Mr Harry Irving against Mr William Irving, son to Drumcoltran, this point occurred to be argued amongst the Lords,—Whether one debtor in a sum, and creditor by a clause of relief, as cautioner, can plead retention against an assignee until the cedent first relieve me of my cautionary. It was not doubted, if he be distressed, that the compensation meets. The only question is, If retention be legal before distress. The Lords, in the case of *Lord Sinclair against the Lord Bellenden*, found the registration of his bond a sufficient distress ; and more lately betwixt the *Laird of Gadgirth* and *Mr David Scrymzeour*, and in other cases, they sustained retention though there was no distress. But the Lords superseded to determine here till it were farther considered.

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1696. *December 8.* DAVID THREIPLAND *against* The MARQUIS of DOUGLAS.

PHILIPHAUGH reported Mr David Threipland against the Marquis of Douglas, as donatar to the Viscount of Dundee's forfeiture, for declaring Clavers's estate liable for the sum of £1400 Scots he violently took from his collectors of excise when he entered Dundee in 1689.

ALLEGED for the donatar,—That this was a debt contracted after Clavers was in actual rebellion, and the treasury should be liable for that, and have given the tacksman a proportional abatement and deduction of their tack-duty on that account ; but the donatar cannot be burdened therewith.

ANSWERED,—If it had been voluntarily lent, they not only deserved to lose their money, but to be demeaned as serving traitors ; but, where it is taken