

1697. *Jan. 8, and Feb. 17.* ANDREW RAMSAY *against* The MAGISTRATES of AYR.

*January 8.*---WHITEHILL reported Andrew Ramsay, Tacksman of the mills of Ayr, against the Magistrates of that burgh, for their contempt of the Lords' authority, in stopping his multure-malt after a suspension past and intimated. Their pretence was, that, by an imposition granted to them by the Parliament, they had the power of exacting a merk out of every boll of malt grinded at their mills; and they claimed, that the malt he got for his service, as miller, whether the multure, the bannock, or lock, might also pay this duty. He contended, his multure being only a part of the malt brought to be grinded, and having paid *eo nomine*, it cannot pay over again, when he gets it separate for his work, else this would be double exaction.

The Lords inclined to think this an extortion, but had no occasion to decide it here, (because that came in to be argued in discussing the suspension,)—all before the Lords at present being the complaint of the *spreto mandato*, and contempt: as to which they declared they would reserve it to the conclusion of the cause; but saw grounds to refund the poor man Ramsay's damages, and allowed him to produce a probation *talis qualis* thereon; and, if they saw need, they would take his oath in supplement, and give him large expenses.

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*February 17.*---In the complaint at Andrew Ramsay's instance against the Town of Ayr, mentioned January 8, 1697, the Lords shunned that point,---whether his passing from the suspension was simple and absolute, or copulative with the clause whereby they submitted their difference to arbiters, so as if the submission did not take effect, it is presumed to be his meaning, that his suspension should revive, and he might make use of it; but the dubiety of the clause, passing from the suspension as connected with his submission, moved the Lords to assolyie the Magistrates from being guilty of contempt of their authority, in proceeding, notwithstanding the suspension, which they looked upon as passed from; but yet allowed the Ordinary to consider the said Andrew's damages, as they had done before; for, though burgesses are not to oppose their magistrates, yet oft times, by terror and concussion, they are made to pass from their rights.

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1697. *February 18.* SIR JOHN MALCOLM of INNERTEIL *against* COLVIL of BLAIR, LINDSAY of DOWHILL, and Others.

I REPORTED Sir John Malcolm of Innerteil against Colvil of Blair, Lindsay of Dowhill, and others. They had pursued him for a spuilyie of some sheep; he, by way of defence, repeated a declarator against them, bearing he stood infeft in the property of the hill of Bannarty, off which thir wedders were taken; and though the defenders had, in their feu-charter from him, a clause *cum communi pastura*, restricting them to such a definite number of sheep, yet he and his predecessors, past memory of man, had the right and privilege of ranging that hill for two effects: 1<sup>mo</sup>. To see that they did not over-charge the hill, nor exceed

the number allowed them; in which case they used to seize upon all the super-numerary and waiff cattle as escheat. *2do.* To prevent the keeping of scabbed or diseased sheep, which may infect the whole; and by which he made no profit; but the country people, who assisted at the search, got a sheep out of every flock, which was one of the perquisites and emoluments of the office; and this was all the spuilyie that was committed.

ANSWERED,---His charter carried no such right. If it had borne a *jus scrutandi*, it might have been a title *ad inchoandam præscriptionem*; but he being infest in no such *scrutinium*, but only in the property of the hill, he can never introduce any such unusual, unknown, exorbitant servitude upon them; it being none of these known in the Roman law. And though the right of forrestry had sundry special privileges of escheating the goods, that only held where it was expressly granted, being *inter regalia*.

The Lords allowed a conjunct probation, to try the beginning, frequency, and reiteration of the exercise of this power of searching, and the quantity of the emoluments, and if it was only used upon complaints, and how far it has been interrupted; and then the Lords would determine if there was a sufficient constitution for introducing such an extraordinary servitude.

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1697. *February 19.*

BRUCE *against* Low.

In a reduction betwixt Bruce and Low, on the Act of Parliament 1621, it was ALLEGED,---You cannot quarrel my infestment, because you were not a creditor till long after.

ANSWERED,---In several cases, posterior creditors have been allowed to reduce; as *9th January 1673, Street*; *2d July and 4th December 1673, Reid.* *2do.* You must be liable *super dolo*; because, though you stood infest in the fee of your father's estate, yet you communed with me when I came in suit of your sister, and suffered your father to contract for the tocher, and signed as witness to the contract, and now refuse to pay your sister's portion, because you was in the fee before the said contract.

The Lords assoilyied from the reduction, unless he would say, that he had, by some positive act, (beside his concealment,) induced him to enter into the said contract, to make him believe the father was still fiar and undenuded; especially seeing he had reserved his own liferent, out of which the tocher might have been paid.

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1697. *February 19.* The COUNTESS and EARL of ANNANDALE, and SIR WILLIAM DENHOLM of WESTSHEILS, *against* DAVID BAILLIE.

I REPORTED the Countess and Earl of Annandale, and Sir William Denholm of Westsheils, their assignee, against David Baillie, chirurgeon apothecary in Edinburgh, upon his forfeiting a bond of presentation, whereby he had obliged