was his father's evident, and taken out of his charter-chest by his uncle Kinfauns; seeing it was notourly known what access he had to his father's writs during the time of his distemper; and that the like trick was done in a case of George Cheyne's bond; as was found by the Lords, July 17, 1679, marked by Stair, *et semel malus semper præsumitur talis in eodem genere;* and that it was found in a bundle, wrapt up with other papers, uncontrovertedly belonging to Northesk; and that his father had given a receipt of it to Gosford.

ANSWERED,---A blank writ in my hands is as much presumed mine as if my name were filled up in it; and, as to the particular condescendence, they denied the same.

The plurality of the Lords found the presumptions sufficient to convince that the said blank translation belonged to Northesk, and not to Kinfauns.

Against this interlocutor, the Lady Kinfauns, as executrix to her son, protested for remeid.

[See other Cases between the same Parties pointed out in the Index to the Decisions.]

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1697. *January* 29 *and July* 20. ANDREW MASSIE *against* The MAGISTRATES of EDINBURGH.

January 29.---PHILIPHAUGH reported Mr Andrew Massie against the Town of Edinburgh, for reducing the decreet whereby they deprived him from being one of the Philosophy-Regents in the College of Edinburgh. His *first* reason was against their competency and jurisdiction; for though they be patrons, empowered to place masters there, yet it was alleged they could not depose; for a patron presenting a minister has no power to judge him in order to deprivation; and though they produced a charter from King James in 1582, giving them *facultatem removendi*, yet that was before the erection of the college, when it was but *studium generale*, (that any learned man set up, and taught the sciences in his chamber, as many do at London, Amsterdam, &c. where there are no formed universities;) which differs much from a university, or *Academia*, where degrees are conferred; and, if masters in colleges malverse, or be negligent, the Magistrates may either pursue them before the Lords of Session, or the Commission for Visitation of Schools and Colleges; and that, if the Town had any such intrinsic power of judging and depriving, they would have certainly made use of it in a hundred years' space, and yet no instance can be given; for Mr Cunnyngham was not deprived by them, but demitted: And, if professors were so precarious as to be turned out *ad beneplacitum* of the Town Council, few scholars of pregnant spirits would accept of these offices; which would tend to the decay of learning, and prejudge the education of youth.

ANSWERED,---The Town's jurisdiction and competency was clearly founded in their right of patronage and the foresaid charter; and a *studium universale* and a college was all one as to this power, and their gifts and admissions did not bear *ad vitam;* and their salaries were paid by the Town, and they depended as much upon them as the assessors do; and yet none will contend but the

Town Council may depose or lay aside any of their assessors without a process, merely by rescinding the Act made in his favours.

The Lords waved to determine this point of the Town's competency at this time, and proceeded to the other reasons of reduction founded on the nullities of the decreet; such as,---The warrant for his citation was signed by no judge; neither had the procurator-fiscal any accuser or informer who concurred with him in the libel: It was given him on Saturday night to appear on Tuesday morning, so he had but one free day: The citation wants a date, and place of compearance, and the depositions are only signed at the end by the Provost as preses; and the witnesses were dependers on the Town, as the janitor and bursars, who afterwards got better bursaries: The decreet mentioned four interlocutors, *viz.* one repelling a dilator of a sist upon an advocation, in respect it was recalled; the *second*, repelling his declarator upon their incompetency; the *third*, restricting the libel to articles not formerly insisted on against him before the visitation, because, *quoad* these, he had the defence of *res judicata;* and the *fourth*, sustaining the libel relevant as so restricted, and admitting the same to probation: yet there was not a separate warrant for one of these interlocutors, but only *ex post facto* made up in the decreet, which was but the clerk's assertion.

ANSWERED,—These formalities were not customary in processes before the town-court, where most things were done *summarie et de plano;* and, if these were found nullities, most of their decreets would fall, which would be a great insecurity to the people;—and custom must rule in all such cases.

REPLIED,—Whatever may be the practice in small processes of £20 or £30, there should be more exactness in taking away a man's livelihood and reputation.

The Lords, abstracting from all the other nullities, that they might not endanger decreets, pitched on the last, *viz.* the want of the interlocutors, and their not being signed by the Judge, contrary to the express command of the Act of Parliament 1686: they found it a nullity, and opened the decreet, and reponed Mr Massie against the same; and allowed him to be farther heard before the Ordinary anent his repossession, and damages in lying out of his place.

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July 20.—In the action at Mr Andrew Massie's instance, (mentioned 29th January 1697,) against the Town of Edinburgh, and Mr John Row, for reposition to his place, as one of the Regents of the College;—the Lords, having ordained Mr William Scot to be cited *incidenter* in this process, and repelled his dilator, That he was not bound to answer summarily *hoc ordine*,---the debate fell in betwixt Row and Scot, which of the two should cede their place, to make room for Mr Massie's reëntry, Mr Row being admitted to Mr Cunningham's class, but to Massie's place; and Mr Scot is called to Mr Cunningham's vacancy, but to Massie's class.

The Lords found thir qualifications sufficient to prefer Row to Scot, that he was invited from St Andrews to Edinburgh by the Magistrates before Mr Massie's deprivation, and that Mr Scot's program was general, without naming any particular vacancy; and that this act being framed as succeeding to Cunningham, the same was rejected by the Town Council, and torn out of the registers; and which being proven, they ordained Mr Scot to cede.

A debate arose, *de modo probandi*, that it was incongruous to prove, *per mem-*

bra curiæ, (the Magistrates' oaths,) what contradicted their Acts of Council, which ought to make more faith than to be disproved in such a manner;---but the Lords found the qualifications foresaid so probable. *Vol. I. Page* 787.

1697. *July* 23. The EARL of TILLIBARDEN *against* MR DAVID GRAHAM of KEILLOR.

THE Earl of Tillibarden, against Mr David Graham of Keillor,---being a declarator, That he had bought and acquired the lands of Keillor for the Marquis of Athole and the pursuer's behoof, as their trustee, in regard he was depositary of a right from Murray of Keillor to the Marquis, and likewise of the Marquis's bond for the price; and, that disposition not taking effect, he bade at the roup of the lands, and carried it as the greatest offerer; and, by letters subsequent thereto, insinuated as much as if he had purchased them for the Marquis's behoof. ANSWERED,---The trust ceased when the lands were exposed to sale; and the letters import no more but that he was willing to treat with the Marquis; and any such communing may be resiled from before delivery of writs; and he had no compulsitor whereby he might force the Marquis to have taken the bargain off his hand: Likeas, he had sold his place as clerk to the bills to pay the price, which no trustee would have done.

The Lords found it a continuation of the first trust; and ordained him to denude on payment of the price and all his expenses, he being kept *indemnis cum omni causa*. *Vol. I. Page* 789.

1697. *July* 27. MARGARET SMITH, and JAMIESONS, her Children, *against* FORBES of BALFLUG.

MARGARET Smith, relict of Jamieson, and her Children, pursuing Forbes of Balflug for a spuilyie,---the DEFENCE was, It is prescribed, *quoad modum probandi*, by the Act of Parliament 1579, not being intented within three years after the committing. The ANSWER was,---The children are minors, against whom that prescription does not run. REPLIED,---The title, as executrix, is in the mother's person, who is major, and cannot stop the prescription. DUPLIED,---It is only *nudum officium*, and she is *fidecommissaria*, and trustee for the nearest of kin, the legatars and creditors; and so the bairns, *jure sanguinis*, having the natural right,---the personal privilege, That prescription runs not against them while minors, may very well be proponed by the mother *ob connexitatem causæ*, they being *consortes ejusdem litis:* and the mother is not *domina bonorum mobilium;* for, if she were denounced rebel, they would not fall under her escheat; as was found, 21*st December* 1671, *Gordon* against *Irving*. TRIPLIED,---The sole administration and *jus exigendi* is vested in her person; likeas, she has right to a third of the moveables *jure proprio:* and, if this were sustained, its consequences might go too far; seeing creditors have an interest in the executry of their debtors; and, *posito* that one of them were minor, would that afford a defence of minority to the executor?