

1700. *January 12 and February 1.* The MASTER of BALMERINO against JOUSSIE'S CHILDREN and ALEXANDER GIBSON.

*January 12.*—THERE was a competition for preference, betwixt the Master of Balmerino, and the Children of Bailie Joussie, and Alexander Gibson, on the estate of North-Berwick Sir William Dick granted to Sir John Smith, for 46,000 merks out of the said lands, whereon he was infest base, and confirmed the 5th of August 1652; which right was acquired by Balmerino. Sir William did also give a wadset, out of these lands, to Mr John Inglis of Crammond and Bailie Joussie, for £30,000 Scots; and, upon their infestment, they obtain a decret of maills and duties before the Sheriff of Haddington, bearing date the 12th of August 1652, seven days posterior to Sir John Smith's confirmation, but mentioning three several citations to the tenants; and so it must be presumed that the first execution of the process of maills and duties has preceded the confirmation of Sir John Smith's base infestment. The Master of Balmerino having intended reduction and improbation of Joussie's right; and the Sheriff's decret being produced, he craved certification against its grounds and warrants.

ANSWERED,—In so far as concerns the minutes of process, executions, and judicial acts, they cannot be obliged to produce them *post tanti temporis intervallum*, as thirty or forty years,—these minute papers easily perishing,—no more than certification can be granted against letters or executions of apprising, after so long a time.

ANSWERED,—If the Sheriff's decret were now quarrelled as null, for want of the executions, then it were competent to say, We are not obliged after so long a time; but when the case is, that my confirmation is prior to your decret, and so I am preferable, unless you reply, That the citation on your decret was prior to my confirmation, then you must certainly produce the prior execution, and no presumption can take away my anterior confirmation: even as letters of pointing the ground, and their executions, with intimations of assignations, (though papers of small import,) need not be produced *post aliquod temporis intervallum*; yet, if founded on to claim preference, they must be as precisely kept and produced as either charter or seasine. And though *qualitas quæ inesse debet, inesse præsumitur*, and that things are presumed to have been *solenmiter acta*, yet, where preference is craved thereon, they must necessarily be instructed.

The Lords found, in so far as concerned the certification, they were not obliged to produce them; but reserved to the reasons of reduction the decision of that question, Whether Joussie and Cramond behoved to produce the executions, when they come to allege preference, because I had given the first citation to the tenants before your confirmation; or if the decret's mentioning their being thrice cited did fairly presume the first execution was prior to Sir John Smith's confirmation, without any farther, after so long a time.

*Vol. II. Page 80.*

*February 1.*—The Lords determined this point; and found the decret, bearing it proceeded on three citations, after so long a time, was now probative, without producing the executions themselves; and so preferred it to the confirmation; but it was stopped till a new hearing.

*Vol. II. Page 81.*