

1700. *June 26.* The LAIRD of INNES *against* The DUKE of GORDON.

THE Laird of Innes pursues the Duke of Gordon for exhibition of some writs belonging to Mr Harry Buchan ; and whereunto Innes has right by progress :

Against which it was ALLEGED, *1mo.* No process till wakened ; the process neither having a *partibus* nor any judicial act marked upon it within the year, and so is sleeping. *2do.* No process on the confirmed testament, because the sum, being heritable, was not confirmable.

ANSWERED to the *first*,—That there is an out-giving by Innes, the pursuer's advocate, to the Duke's, marked on the process, which is eight days within the year and day ; and though, by their keeping it up longer than six days, its return is without the year, yet the out-giving is a sufficient interruption to stop the annual prescription and sleeping ; *et non debet lucrari ex proprio dolo et culpa.* To the *second*, It is *jus tertii* to the defender ; *2do.* The assignation makes it moveable ; *3tio.* The bygone annualrents are moveable and confirmable ; and so his title and interest in these is sufficient to sustain the exhibition, reserving all defences against delivery.

REPLIED,—Where there is no judicial signature, (as here,) the instance must perish ; and was so found in the reduction upon an inhibition pursued by *Cockburn* against *Sir George Hamilton* : And, as to the *second*, The confirmation can no more be a title here than it would be if he were pursuing for exhibition of the rights of lands.

The Lords repelled both the dilators.

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1700. *July 2.* DAVID OGILVIE of POPILHALL *against* SIR ANDREW RAMSAY.

MR David Ogilvie of Popilhall pursues Sir Andrew Ramsay in a declarator and molestation, for encroaching on a piece of ground and haugh adjacent to his mill ; and, for his active title, he produces, besides his general infetment, a decret-arbitral, pronounced on a submission between John Hepburn of Waughton, then heritor of Pophill, and the pursuer's father in 1647, adjudging that ground to him.

ALLEGED for Sir Andrew, That, since the date of that decret, he has prescribed a right of commonty and pasturage, by forty years' possession ; which he offers to prove. *2do.* A decret-arbitral is but a personal right, and can only militate against the party-submitter and his heirs ; but Sir Andrew is a singular successor to Waughton by apprisings, and so the decret cannot meet him.

ANSWERED to the *first*, There can be no prescription in this case, *1mo.* Because the pursuer offers to prove he was minor many of these years, which must be discounted ; *2do.* His mother liferented the lands till of late, which must also be deduced from the prescription. And, as to the *second*, If Sir Andrew instructed property by tilling, or other such deeds, there must be some pretence that the decret-arbitral could not exclude him ; but all he claims is only a commonty and servitude of pasturage, as to which the decret-arbitral is sufficient against him.