

what is done, and not by a *propositum in mente retentum*; but here the tailie is actually altered; *ergo* it was intended; and this cause cannot be shored up by such weak props, for the letter is only a compliment *et verba officiosa*; and his testament cannot convey a fur of land, which Mr John, as a lawyer, knew very well; and whatever he intended, *non fecit id quod potuit*; and the tailie being broken, these indications and conjectures of his will, however favourable to Matthew, can never make the tailie reconvalesce.

The Lords thought there were presumptions enough that Mr John designed Matthew Cumming to be his heir, but he had not done it in the habile way; for if his last infestment had borne, that, failing heirs of his own body, then to the heirs contained in his former infestments, that would have kept the tailie in being; but being conceived simply to return to himself, and his heirs whatsoever, that could admit no other construction but that the tailie was innovated and passed from. And some of the Lords observed, that, next to his own heirs to be procreated of his body, he brought in his brother Francis and his heirs, which evidences that he had the tailie then in his view; for he expressly assumes Francis one of the members of it, and pretermits the rest. And therefore the Lords repelled Matthew's grounds, whereby he craved preference to the whole; and found the said Margaret, as heir-portioner, had right to the half.

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1701. December 26. JOHN INGLIS *against* His TUTOR DATIVE, &c.

JOHN Inglis, merchant in Nairn, having fallen melancholy and unfit for business, his friends took out a brief of idiocy against him, whereupon he was retoured, on the verdict of fifteen sworn men, to be *rei suæ non satis providus*; and thereon a tutory-dative was obtained from the Exchequer, with this quality, So long as his weakness and silliness continued. Time having dispelled these clouds and vapours, he becomes as capable of business as he was formerly; whereon he raises a declarator of his convalescence, concluding a reduction of the retour and tutory on that head; and whereto he cites his nearest of kin, and procures declarations, bearing his present fitness and capacity of managing, as much as any other prudent man of his circumstances: and he craves a commission to the Sheriff of Nairn to try his present condition of mind and judgment, and to report; in regard he was not able, in respect of his age and the winter-season, to come to Edinburgh.

The Lords found a verdict of a sworn inquest could not be taken off, neither by subscribed declarations nor by a commission to others to try; but that the cognition and trial behoved to be taken before the Lords *in præsentia*, by various questions and interrogatories; and therefore refused a commission; but allowed probation to be taken of his being now habit and repute prudent and provident, and fully reconvalesced; and appointed him to sist himself before the Lords, in the beginning of June next, that the trial might proceed *causa cognita*. Some thought, in case of utter inability to travel, a commission, in such an extraordinary case, might be granted; otherwise such a man's liberation from the imputation of idiocy should want a remedy, and he be deprived of the liberty and free disposal of his goods, moveable or immoveable: But the Lords required his per-

sonal attendance before them, as the great inquest of the nation, for inspection and trial; otherwise a patched-up report might be procured by designing persons, in executing a commission, bearing the man's recovery where it is not true.

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1701. *December 31.* DAVID FRENCH, &C. CREDITORS of EDMONSTON of CARDEN, *against* ARCHIBALD ROBERTSON, Factor of Carden.

DAVID French, and other Creditors of Edmonston of Carden, against Archibald Robertson, factor thereof. They craved he might be liable in annualrent, within a year after the rents fell due, which was allowed for ingetting of them, conform to the Act of Sederunt in July 1690.

ANSWERED,—He was ignorant of that Act, it never being intimated to him; and the Act itself has never been in observance, and was only calculated where there were great balances in factors' hands, and not for small rests; and which he could not lend out upon annualrent, because he knew not how soon creditors might get precepts and warrants upon him; and so he behoved to keep it to answer their payments.

REPLIED,—The Act cannot be in desuetude in so short a time; neither has it ever been proponed upon and repelled; and the Act is most just, that they should not *lucrari* to the damage of the Creditors; and the Act *non distinguit* whether the balance be great or small.

The Lords found the Factor liable in annualrent, in terms of the Act of Sederunt; and so confirmed it by a decision.

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1701. *December 31.* WILLIAM CUTHBERTSON *against* ISABEL REID and JAMES BAR.

WILLIAM Cuthbertson, merchant in Tranent, pursues Isabel Reid and James Bar, Albany herald, her husband, for £219, as the price of goods delivered by him to the said Isabel Reid's father, before the Sheriff of Edinburgh; and adducing two witnesses to prove the delivery of the goods, Bar OBJECTED against them, That they could not be received, because they had appeared partial, and too zealously concerned, in having come from Dunse, where they dwell, to Edinburgh, on a letter wrote to them by Cuthbertson, the pursuer, desiring them to come, to the effect that he, finding them in town, might give them a citation to be witnesses in his action against Reid; and so, being ultroneous, were not receivable; and though they acknowledged, upon oath, that he had invited them in, and accordingly they had come and got their copies to appear as witnesses, yet the Sheriff had received them as habile and competent. Bar raises advocacy, in respect the Sheriff had committed iniquity in sustaining them.

ANSWERED,—All he did was legal,—to write to them, to know when their other business would call them in to Edinburgh, that, on their incoming, he might cite them; seeing they lived without the Sheriff's territory, and so could not be cited without a supplement.