

of the date of the last signature in December 1687; and yet there was no decret in the minute-book of that day's date; and that it appeared the papers had been once in the clerk's hands: and therefore reponed them against the said decret, and allowed them yet to produce their writs, and to be heard in the competition for preference, as if they were still *in campo*, and as if such a decret had never been extracted; seeing the writs were now given in with their reduction, and lying in the process.

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1703. July 8. LORD HALCRAIG *against* CARMICHAEL of MAULSLEY.

LORD Halcraig having acquired the lands of Miltoun, formerly belonging to Sir John Whiteford; and finding that Carmichael of Maulsley had an apprising and infestment of annualrent thereon, he uses an order of redemption, and pursues a declarator, that Maulsley may be decerned to accept his money and renounce, for disburdening and purging the lands.

ALLEGED for Maulsley, Absolvitor,—Because the redeemable rights he had on these lands were disposed to him by Sir Daniel Carmichael, by way of tailyie, under clauses irritant *de non alienando*, &c. so that he cannot renounce them without amitting the right and incurring the irritancies.

ANSWERED,—That tailyie might bind him up from doing any voluntary deed, but could never stop nor impede the reverser to purge his lands, and redeem these rights by true and real payment, that being the necessary consequence and effect of law; and no deed of Sir D. Carmichael's, by tailyieing under irritancies, could prejudice the heritor to liberate his own lands from rights affecting the same.

The Lords repelled the defence, and found the tailyie could not hinder redemption; but considered that Maulsley was obliged to reemploy the money paid him under the same qualities and irritant clauses; otherwise all such tailyies of redeemable sums might be easily frustrated and evacuated. And though it was contended that none quarrelled his uplifting the sums, and that the next heir of tailyie who had the only interest did not oppose it; yet the Lords thought it *pars judicis ex officio* to look to the reemployment; and allowed the money to be consigned, aye till it were secured in the terms of the tailyie, at the sight of one of their number. The like was lately done in a pursuit, by *Sir John Ramsay* against *Sir James Primrose of Carington*.

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1703. July 16. ALEXANDER WEDDERBURN *against* JAMES RAMSAY.

ALEXANDER Wedderburn, principal clerk of Dundee, against James Ramsay, clerk-depute there, for removing him from the said office. Ramsay's defence was, I have my gift, by act of the town-council, *ad vitam et culpam*, and so cannot be put out without some malversation or fault. And, for proving thereof, he produced an act of council in January 1695, establishing him in that office during life; and that, by Mr Wedderburn's own admission in January 1696, it

appears his gift is burdened with Ramsay's being his depute, and is expressly relative to the foresaid act of town-council, conferring the said office on Ramsay during life; and to be a ratification thereof in a head-court held in April thereafter.

ANSWERED,—The Wedderburns, for fourteen generations, had been clerks of Dundee, and always had the nomination of their own deputies, who precariously depended on them, and were during pleasure; and so was this Ramsay during all the time of the pursuer's father's life. And the act founded on in January 1695 is destitute of all manner of warrant: notwithstanding, by an act of the town-council of Dundee, all their minutes are ordained to be subscribed by the provost, or other preses of the meeting for the time. And Mr Wedderburn does not so much found on his admission in 1696, as on a gift of the said place to him in his father's lifetime in 1685, allowing him to remove the depute, in case they could not agree. And the town-council, by no posterior act, could derogate from that right, neither can he be deprived of it without some fact or deed of his own, importing his consent; which cannot be instanced; for the minute adjected to his own admission is no deed of his, neither did he ever ratify or homologate the same; nor was the deputation ever extended in the terms of that minute; and though Ramsay has continued in possession of the office now these seven years, yet it is not by virtue of that clause, but merely by the principal clerk's tolerance and connivance: and though *magna est consuetudinis autoritas*, yet *non est adeo sui valitura momento, ut vel rationem vincat aut legem*.

REPLIED,—No regard to the gift in 1684, because it was before the office vaiked, Mr Wedderburn's father being then alive, and *in officio*, and so was conferred *in tempus inhabile*; and though the warrant of the Act 1695 be not extant, yet the principal clerk acknowledges he once saw some warrants, but does not particularly know what tenor they were of; and it appears there were many minutes of acts then unsigned by the preses; and abstracting from that act in 1695, the principal clerk's own admission bears Ramsay's right *in eodem contextu* and *corpore juris*, and is margined with his own hand,—“Act in favours of James Ramsay;” and he cannot both approbate and reprobate the same act. And the clerks of session, though the register die or be changed, yet the successor never quarrels their gifts they had during life; and if there be any defect in Mr Ramsay's admission, the principal clerk's right *eodem laborat vitio*.

The Lords sustained Ramsay's defence, and found him not removable without a fault. See Dury, 16th July 1642, *Elder against Mercer*.

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1703. July 24. CHARLES MENZIES, Writer to the Signet, *against* MENZIES of KINMUNDY'S TUTOR and ALEXANDER GORDON of PITLURG.

CHARLES Menzies, writer to the signet, against Alexander Gordon of Pitlurg, and others. Menzies of Kinmundy's estate being overburdened with debt, and the heir being left minor, the tutor obtains a decret of the Lords, on cognition of the debt, allowing him to sell his pupil's estate in whole or in part to the best avail; for doing whereof in the most effectual way, he emitted placarts, and affixed them on the cross of Aberdeen, and other adjacent churches, for a voluntary

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