

1705. January 10. MARGARET MENZIES *against* GILBERT LIVINGSTON.

GEORGE Livingston of Saltcoats being lately deceased, Gilbert Livingston, his cousin-german, and nearest agnate, takes brieves out of the Chancery for serving himself heir-male. Margaret Menzies, as sister's daughter to the said George, and heir of tailyie to him by a disposition, raises advocation of the brieves to the macers, and insisted on thir reasons:—*1mo*, That the bailies of Canongate, to whom the brieves were directed, were not competent judges, seeing his claim particularised the lands of Saltcoats, which lie in East Lothian, and not within the jurisdiction of the regality of the Canongate; and so the subject is *extra territorium*. *2do*, The contract of marriage in 1665, tailyeing thir lands to the heirs-male, was entered into when he was minor, and without his curators' consent; and so was *ipso jure* null; and could not alter the former destination of succession, which was *hæredibus quibuscunque*. *3tio*, There was intricacy, and an apparent controversy would arise upon this service: For Alexander Livingston, son to the tailyier, and elder brother to the laird who last deceased, broke the said tailyie, and entered as heir of line conform to the ancient rights and in-festments of the said estate; and so the tailyie to the heirs-male, *confusione*, became extinct.

ANSWERED to the *first*,—If there were any other heir-male competing, they might object it; but Margaret Menzies could never do it: and he behoved to mention the lands, because he came in as heir of provision, by virtue of the tailyie contained in the contract of marriage; and there is no more designed but a general service, to which the bailies of the Canongate are certainly competent. As to the *second*, *Esto* he had been minor when he entered into this contract, yet that is no reason of advocation, but a defence *in causa*, when all the competitors are in the field, and come to debate their interest; and then the validity of the contract will be debated. As to the *third*, *Esto* Alexander Livingston had been served heir of line without respect to the tailyie in his father's contract of marriage, yet that can never be a revocation of the tailyie; for, *1mo*, He was heir-male as well as of line, and so might enter by any of these titles centered in his person. *2do*, He was known to be fatuous, and no deed of his could alter the succession and destination settled by his father in his contract-matrimonial. *3tio*, This is *in causa*, and not *hujus loci*.

The Lords thought it more proper for the macers, to whom assessors might be named in a case of difficulty, and therefore advocated the brieves.

Besides thir two parties, there is likewise a third competitor, *viz.* a son of Alexander Aikenhead's, on a bond of tailyie and disposition, bearing a power to alter, and which, it is alleged, was accordingly revoked.

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1705. January 13. WEMYSS of UNTHANK *against* PATRICK DUNCAN and ANDREW BYRES.

SIR Alexander Erskine of Cambo, Lyon King at Arms, being debtor to Wemyss of Unthank, by a bond of 1000 merks; and he having raised caption

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thereon, and first required Patrick Duncan, messenger in Falkland, and then Andrew Byres, messenger in Coupar, to take him, they refused, at least declined the same, as unwilling to offend their master; whereupon he had taken instruments against them; and, having no other remedy left, gave in a bill to the Lords, representing the foresaid matter of fact, and that it was of dangerous consequence to all the lieges if the execution of justice were this way stopt; therefore craving a summary warrant to cite them, that they and their cautioners may be decerned to pay him his damage, being the sum charged for, because of their contempt and disobedience, and that the Lords may deprive them of their offices for their malversation.

The thing was looked upon as an ill preparative and example; and it being suggested, that, though we deprived, yet he would admit and license them of new; but it was thought he would subject himself to farther censure if he thus attempted to evacuate the Lords' sentence of deprivation. The next inspection that occurred was, How this sentence could be so intimated and published that it might come to the lieges' knowledge, for, without that, they were *in bona fide* to employ them still; and their executions, though deprived, would subsist as valid, being holden and reputed by the law; *Barbarius Philippus, D. de Offic. Prætor.* where a slave being elected prætor, his actions and edicts were sustained *ob bonum publicum*. Some thought the deprivation behoved to be published at the market-cross where they officiate, and likewise recorded in the Lyon's books.

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1705. *January 13.* MACMILLAN and CARSE *against* JOHN MACFARLANE.

AT the same time a parallel case, about publications, was decided betwixt John Macfarlane, writer to the signet, and Macmillan and Carse. They pursued him for a debt, and, referring it to oath, during the dependence they raised and executed an inhibition against him, he having deponed *negativè*; and, coming to be advised, he was assoilyied; and, finding the pursuit calumnious, the Lords modified £50 of expenses; but, the inhibition being registrate, for taking off the effect of that, (seeing records may not be vitiated or altered,) it was thought the keeper might be authorised to write on the margin that the party was assoilyied, by a decret of the Lords, from the dependence and ground of the said inhibition. But, seeing they ought to insert nothing but what is proven, therefore it might be likewise fit that the said John Macfarlane should likewise registrate the decret-absolvitor in the said books, though they are not appointed for decreets, but only for seasines and inhibitions.

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1705. *January 16.* LIEUTENANT JOHN CREICHTON *against* The EARL of EGLINGTON.

THE Earl being debtor to Mr Hugh Montgomery, his brother, in the sum of 2000 merks, by bond, in January 1689, Mr Hugh assigns this to John Creich-