

1714. *February 5.* The EARL of MARCHMONT *against* MR. JAMES HOME of Aytoun.

IN the action of mails and duties, at the instance of the Earl of Marchmont against Home of Aytoun, mentioned *supra*, 8th December, 1713; the defender alleged now, that no process could be sustained upon the pursuer's adjudication; in regard the debt which was the ground thereof, was contracted before the defender's father (whom he the defender doth noway represent,) was Laird of Aytoun. 2. The adjudication was led after he had lost the estate of Aytoun, by assuming the title of Earl of Home, upon which irritancy the defender stands retoured and infest as heir to Mrs. Jean Home; so that the adjudication can no more affect the lands of Aytoun than if the Earl of Home had disposed them, or lands belonging to a third party had been adjudged from him.

ANSWERED for the pursuer,—1. If an heir of entail, not tied up from contracting debt, *de facto* enter and be infest, the estate is affectable for his debts contracted before as well as since his entry; though something might be said against burdening the estate for debts contracted by the heir, after he was denuded, and his right declared to be irritated and void. 2. Though the adjudication was led after the defender's father had assumed the title of Earl of Home, yet it was before the defender's retour as heir to Mrs. Jean Home, upon the irritancy incurred by his father; at which time there was no other proper contradictor against whom the creditor could adjudge but the Earl, who then stood infest and in possession.

The Lords repelled the defence, and sustained the adjudication.

*MS. page 23.*

1714. *Feb. 19.* MR. ALEXANDER M'BEAN, Minister at Avoch, *against* SIR KENNETH M'KENZIE of Scatwell, and Others.

MR. ALEXANDER M'BEAN, being ordained and admitted at Avoch, pursued Sir Alexander M'Kenzie, and other heritors of the parish, for payment of the stipend to him, according to former use of payment to his predecessors in that cure.

ANSWERED for the defenders,—The pursuer hath no title to any stipend from them; because, 1. He was not legally admitted minister, in so far as he came not in by presentation from the patron; and was ordained by the presbytery *tanquam jure devoluto*, after the Act of Parliament, 10 Annæ, restoring patrons to their ancient right of presenting ministers to churches vacant in Scotland, within six months of the said statute; and, consequently, before the presbytery could exercise any *jus devolutum*. 2. The pursuer is not duly qualified, by taking the oath of abjuration conform to another Act, *anno 10. ejusdem reginæ*. 3. His libel concluding a constant modified stipend to him and his successors in office, is competent only before the commission for plantation of kirks and valuation of teinds.

RELPIED for the pursuer.—1. He opposed his ordination and act of admission produced, according to the usual forms of the church, which entitles him to the benefice; and he exerceth the ministerial function in the parish. Again, the present

action being possessory, for payment of by-gone stipends, and in time coming, conform to use and wont; it is not competent to the defenders, in this instance, to object against his title of admission; but they may insist in a reduction as accords. Nay, suppose the defenders were in a reduction, the objection against the pursuer's title is not relevant. Because the *jus devolutum* to the presbytery (which is confirmed by the Act of Parliament,) had taken place; and they had called the pursuer in virtue thereof to be minister at Avoch before the Act restoring patronages was made. Now, seeing the Act doth annul only calls by heritors and elders, and there was no place for such a call in this case, the patron, who succeeded in place of these heritors and elders, hath no pretension to that right which they had lost *jure devoluto*. 2. The defenders have no interest to object against the pursuer's not being qualified, by taking the oath of abjuration, till he be convicted by a sentence of a competent court, where the pursuer may have opportunity of a full exculpation. 3. There is no process here for a modification, but only for payment of by-gone stipends, and in time coming, conform to use and wont; which is most competent *in possessorio*, and hinders not a modification and valuation in their due course.

The Lords found, 1. The defence against the pursuer's admission and possession, not competent in this process. 2. Found the defence founded on his not taking the oaths not competent, he not being legally convicted thereof. 3. They repelled the defence of incompetency of court; and sustained process for the stipend the pursuer's predecessors in office had been in possession of, for by-gones, and in time coming, until there be a constant modified stipend allocated to the pursuer by the commission for valuation of teinds.

*MS. page 28.*

---

1714. *June 11.* ALEXANDER DUNCAN of Straithmartine, *against* JOHN CUMMING, Merchant in Edinburgh.

ALEXANDER DUNCAN of Straithmartine, having raised a process of adherence against Agnes Cumming his lady, before the Commissaries of Edinburgh, about the year 1708; and the Commissaries having sustained the libel, he allowed the process to lie over several years, and then commenced an action *injuriarum* against John Cumming, her father, for L100 Sterling yearly of damages on account of his instigating and enticing and encouraging his daughter to desert and abandon the pursuer, her husband, and harbouring her in his house after she had deserted him.

ANSWERED for the defender,—Damages being libelled against him for entertaining the pursuer's wife, who has unlawfully diverted, it must be first proven that she has maliciously diverted; which only can be cleared before the Commissaries in the process of adherence, which is prejudicial to this imaginary process of damages.