

1787. January 24. JOHN ADAIR *against* ROBINA and JEAN ADAIRS.

EXHIBITION—

Ad deliberandum, competent on the title of apparenry, in an heir-male.

[*Fac. Coll. IX. 464; Dict. 3992.*]

JUSTICE-CLERK. The very purpose of an action *ad deliberandum*, is, that a man may know whether he ought to enter, and to what?

ESK GROVE. Propinquity must be proved: there is no occasion for a service: on the contrary, the purpose of the action *ad deliberandum*, is to learn the *commoda* and the *incommoda* of the succession. The service to the heirs of line does not exclude the heirs-male.

PRESIDENT. The heir of line is safe, for the heir-male can only demand exhibition of what is devised to heirs-male.

On the 24th January 1787, "The Lords found that the pursuer has sufficiently proved his propinquity, and therefore sustained his title to insist in this action;" adhering to the interlocutor of Lord Justice-Clerk, Ordinary.

Act. G. Wallace. Alt. G. Ferguson.

1787. January 31. JOHN BUCHAN and OTHERS *against* JAMES ROBERTSON BARCLAY.

PRESCRIPTION.

The sexennial prescription of bills of exchange not obviated by a relative writing of equal date with the bill itself.

[*Faculty Collection, IX. 467; Dictionary, 11,128.*]

MONBODDO. I should think that the oath of the bankrupt may be taken.

JUSTICE-CLERK. "Resting owing" may be proved by oath of party: it would be hard were bankruptcy to take away the mode of proving.

HAILES. [This opinion not delivered because the Court seemed at one.] In the modern practice of Scotland, the presumption is in favour of every person called as a witness. In the last century, indeed, we hear of witnesses *omni exceptione majores*, because they were noble or because they were rich. If the debts are good, even in the opinion of Mr Robertson, and if he has a reversion, the petitioners will obtain payment from *him* as from a solvent person: but here we must suppose Mr Robertson to be insolvent; and the question is, Whether an

insolvent person may, by his oath, rank his creditors, and give something to one which will be taking something from another? Has the practice of the Court established this?

On the 31st January 1787, "The Lords found the claim competent; found that the missive letter does not interrupt prescription; but found *resting owing* probable by the oath of the bankrupt; and, as to Margaret Nisbet's debt, remitted to the Ordinary;"—altering the interlocutor of Lord Ankerville, Ordinary.

Act. Allan M'Conochie. *Alt.* Ch. Hay.

1787. February 2. ROBERT BOGLE *against* ROBERT DUNMORE and COMPANY.

SALE.

Property of goods on ship-board transferred on sale by indorsation of the bills of loading.

[*Fac. Coll. IX.* 470; *Dict.* 14,216.]

HAILES. It should seem that Dunmore and Company mean to introduce a new *hypothec* into the law of Scotland under the name of *retention*.

MONBODDO. I am clear for Bogle. The first question is, Whether there was a sale to him, and whether he pursues as purchaser? *Ex facie* there was a sale; and it is of no great moment how the price was to be applied. But, although there had been no sale, the question is as to possession. Monteith, the proprietor and seller, was in possession from the time of shipping, and after the goods were landed: possession is not only *facti* but *animi*. A decision, quoted from Lord Kaimes, expressly says so, on the principles of the Roman law. Dunmore says, that *he* was in possession, and therefore, that he may retain for every debt: he was no more in possession than the letter of lodgings is as to the *in-vecta* and *illata* beyond the hypothec for rent.

JUSTICE-CLERK. This is a very important question. I should be sorry to see the law of Scotland such as it is represented to be by Mr Dunmore. A bill of loading, signed by the shipmaster, obliges himself and his owners to deliver the goods to the proprietor. On a ship's arrival, the owners might dismiss the shipmaster; but could the owners detain the goods for former debts? This would put an end to commerce; for then no man could know on what footing he stood: the same principle has been adopted both by Lord Hardwick and Lord Mansfield.

BRAXFIELD. Possession may be continued *animi*, but it cannot be so acquired. If a bill of loading vest possession, how can there be retention? The corporal possession is in the owner of the ship, whether he acts by himself or by his servants. The owner or shipmaster becomes bound to deliver goods. *Here* there can be no compensation: but retention stands on a different footing than compensation. Compensation must be on liquid grounds, but retention