

## P E E R.

1633. July 11. OLIPHANT against OLIPHANT.

**S**IR JAMES DOUGLASS having married the only bairn and daughter of umquhile the last Lord Oliphant, and she being served heir general to her immediate predecessor, who died before her said father, pursues *huc titulo*, as heir to her said predecessor Patrick Oliphant, nearest heir-male in blood to her said father, for annulling a contract made betwixt him and her father, whereby he dispones all his lands, together with the title and dignity of the Lordship of Oliphant to the said Patrick and his heirs-male, which failing, to return to the disponer and his heirs-male, containing a procuratory of resignation; to hear and see it reduced, because it was a paction for honour, which is not *in commercio*, not being allowed by the prince, *qui est fons omnis honoris*, and so is null, and the defender to be decerned to have no right to that title, and that the title pertains to the pursuer as nearest heir *in recta linea* to him, to whom that title belongs, notwithstanding of the said contract. THE LORDS considering, after that the parties' reasons were *hinc inde* heard, and at length disputed in presence of the LORDS, that the pursuer had founded the pursuit upon her claim, as heir to her grandsir, and not upon any succession, as heir to her father, which father was served heir to the same person her goodsir, before his decease; likeas, her father had bruiked the title of Lordship during his lifetime, by riding in Parliament, and by being designed in the infestment of his lands, granted to him by the king (his cousin) with the title of Lord Oliphant, and by doing of all other acts, whereby it might appear, that he was Lord Oliphant, there being no writ more extant, nor patent, to show any erection of it in a Lordship, or whereby he or his predecessors were created Lords, but only the custom foresaids, and such acts as before mentioned; they found, that this use was enough conform to the laws of this realm, to transmit such titles in the heirs-female, where the last defunct had no male children, and where there was no writ extant to exclude the female; and because by the

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Found that a peerage being resigned in the Crown's hands, not *ad remanentiam*, but *in favorem* of a third party, the resigner was actually denuded.

No 1.

contract foresaid, the pursuer's father had disposed the title to the defender, *ut supra*, in, the which there was a procuratory of resignation, albeit the king had not conferred the honour according thereto. THE LORDS found that the pursuer had no right to claim this honour, in respect her father was last possessor, and died in possession, by the acts foresaids, (there being no sasine requisite for the title thereof) and therefore seeing her father had disposed the same, as said is, she could never misken him, who behoved to be reputed as *in tenemento*, and pass to her grandsir in a higher degree, to eschew the deed of her father, whose deed she behoved to warrant, if she pursued as heir to him, or by right competent to her as nearest to him; and therefore the LORDS excluded this pursuer, as not having right to this dignity, seeing the king had not conferred the same upon her, and that her father, as said is, by the foresaid contract had renounced his right thereof; which albeit it was not found by the LORDS to be a sufficient right, to establish the honour in the person of the defender, which no subject can dispose, without the approbation of the prince, which being acquired, then the act convalesces; yet it was found enough to denude himself, and his descendants, ay and while the prince should declare his pleasure, and either confer the honour on the pursuer, or defender, at which the act will take perfection; and in the mean time, seeing the prince had not interponed himself to allow any of these acts, they found, that none of the said parties could claim the said honour, but it remained with the king, which he might confer to them he pleased: For albeit honour be not annailziable by buying and selling, yet the LORDS found, that the party having it, might quite his own interest, which albeit it would not avail him in whose favours he had done it, unless the prince should allow it, yet it was enough to denude him as said is. See SUCCESSION.

Act. Nicolson.

Alt. Stuart.

Advocatus for the King present.

Fol. Dic. v. 2. p. 53. Durie, p. 685.

1710. February 7.

JOHN BRYSSON and CLAUD HENDERSON Merchants in Glasgow, against  
The DUKE of ATHOL.

No 2:

IN the action of forthcoming at the instance of John Brysson and Claud Henderson, against the Duke of Athol, as debtor to Jean Hardie, relict of Hugh Hardie merchant in Perth, James Hardie her brother, and John Hardie merchant in Edinburgh.

THE LORDS found, that Peers are bound to depone in common form, in cases where the libel is referred to their oath, as the only mean of probation.

Fol. Dic. v. 2. p. 53. Forbes, p. 395.