

1686. *March 26.* CUNNINGHAM of AUCHINHARVY *against* DOCTOR CUNNINGHAM'S RELICT.

THE case of Cunningham of Auchinharvy against Doctor Cunningham's relict, now spouse to Denholme of Westshiels, was reported by Marcus. The Lords found, where a woman had a peculiar and reserved liferent from her husband's *jus mariti* by her contract of marriage, she might dispone or assign it *stante matrimonio*, without her husband's consent; (for here his consent could not be got, being fled, as on the plot and forfeited.) This interlocutor was adjusted, with consent of parties, to give Auchinharvey a legal right to uplift the sums.

*Vol. I. Page 410.*

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1686. *March 30.* STEPHEN ARNAULT *against* ALEXANDER HAMILTON and JAMES SCULAR.

STEVEN Arnault in Rowen against Alexander Hamilton and James Scoular, merchants in Edinburgh. After debate, the Lords, before answer, ordain the said Steven Arnault, charger, to condescend who were the creditors to whom the French debts were due, and to instruct that the 70,000 livres were paid to them; and ordain the suspenders to condescend and instruct what eases and abatements the charger got of these debts; and also ordain the charger to condescend what sums he received by virtue of the factory, and what diligence he has done for such of these debts as are resting; and in like manner ordain the charger to condescend how Mr Scoular came to be debtor to the cash in 19,000 livres, and how the stock came to be debtor to the charger for the 6000 livres worth of goods sent to Scotland, and for the £1600, and the cellar-maill; and assigned the 1st of November next to both parties; and in the mean time recommended to three of their number to settle them; for Arnault had charged on a clear bond; whereof they raised suspension, that it was obtained by extortion from them, being in a strange country, and by circumvention, Scoular's estate and effects being concealed from them; and they founded compensation on the factory he had got from them, and on the clause of relief by which he was bound to pay the French debts, and the other grounds above written. And the Lords thinking it hard to reserve their action against Arnault for these compensations, they received them *hoc loco*.

Then, on a new hearing, they ordained the suspenders, Alexander Hamilton and James Scoular, to exhibit upon oath, in the vacance, before these three Lords, all books and papers they have concerning the society and copartnery, that the charger may be thereby able to condescend in the terms of the interlocutor; and also ordain them to give their oath of calumny, if they have just reason to deny that Mr Scoular was sole cash-keeper to the society; and ordain Mr Arnault to give his oath, if he has uplifted any of the debts due in Ireland, and if he has the instructions thereof: and ordained Arnault to give in an account of what articles contained in the factory he has received, and to exhibit the instructions of such articles as he has not received, and that at Rowen, before any whom Mr Hamilton should appoint to receive them. But Mr Hamilton urged, that the charger might condescend on

the diligences he had done for recovery of those debts contained in the factory, and that his acceptance of the instructions should be but prejudice to him to make the charger liable for such of those debts contained in the factory as might have been recovered by diligences. But the answer to this was, that the very title calls them bad and desperate debts; and that this being debated, the Lords took no notice thereof. They also granted a commission to Rowen, to examine witnesses, if Mr Scoular was sole cash-keeper: against which it was objected, that though it fell under the senses, and so was probable by witnesses, that he was cash-keeper; yet it did not that he was sole cash-keeper, because Mr Arnault might also have been cash-keeper. But it were absurd to suppose two.

Mr Hamilton grudged, that Arnault, Scoular's partner, had hooked them into a bargain at Rowen, to give £34,000 as his neat part and result of the effects, upon his assigning them to the whole count-books and annualrents of it; whereas many who are inserted in the count, denied the debts when they came to pursue them, and the Lords assoilyied them from the article of annualrents: so he was lesed by the transaction *ultra dimidium*: and if they would repone him, he offered Arnault the half of all. On the other hand, Arnault urged, that *transactio* was *finis litis*; and if the Lords would find the letters orderly proceeded, he would find caution to count for all thir grounds of compensation.

*Vol. I. Page 411.*

1686. *March 30.* JAMES GRAHAME *against* JAQUES MELL.

BAILIE James Grahame, in Edinburgh, against Jaques Mell in Rowen, who had fled thence for the persecution; and, upon letters from James Grahame, inviting him here, and promising him all security and assurance, had come to Scotland; and yet getting him engaged in a submission, and a decret-arbitral, he was offering to distress his person thereon, though he had goods of his in his hands near to the value of 8000 livres, and the whole claim was but 10,000 livres.

The Lords ordained him to apply by suspension: and Bailie Grahame, by a bill to the Privy Council, pretending that he was about to flee, got a warrant to arrest him. They afterwards made some agreement. *Vol. I. Page 412.*

1685 and 1686. AGNES NISBET *against* ISOBEL and ESTHER SMITH and their HUSBANDS.

1685. *February 21.*—AGNES Nisbet against Isobel and Esther Smiths, and Mr Alexander Bruntfield, and Scot, their husbands, is reported by Carse; and the Lords sustain process at the said Agnes the pursuer's instance. And also find, that the defenders having been silent for several years since the expiration of their respective pupillarities, so that they never did intent action for clearing their tutor-accounts, against Mr Alexander Heriot, their uncle, and late husband to the pursuer, till this process was raised against them by her; that therefore the pursuer must have payment of the debts now pursued for, without abiding the event of a count and reckoning anent her husband's in-