

den upon him for his wife that is minor ; against which he can never be reponed, be his lesion never so great, seeing he was *major, sciens et prudens*.

The Lords adhered to their former interlocutor, in finding the rents and annual-rents discharged ; but that they must compensate *pro tanto* the articles of the Cornet's discharge.

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1705. *December 7.* The PROCURATOR-FISCAL OF ANNANDALE *against* GEORGE CARRUTHERS of Holmains.

THE Procurator-fiscal of Annandale, having pursued George Carruthers for 1000 merks, as the fine imposed by the Act 34. Parl. 1. Charles II. for an irregular marriage ; which act was ordained by the Act 12. Sess. 5. Parl. King William, to be put to execution at the instance of the procurator-fiscal of the jurisdiction where the parties guilty should be questioned : and the said defender (whose estate and residence is in the parish of Daltoun, and stewartry of Annandale,) having procured a discharge from the minister of Daltoun, acknowledging his having given satisfaction to the parish ; and a testificate from the kirk-treasurer of Edinburgh, where the marriage was celebrated, bearing receipt of the poors' dues, and a discharge of the pecuniary mulct, for not marrying at the ordinary time in the church :—

The Lords found the fine should be applied to pious uses within the parish, with the burden of the pursuer's expences, to be modified by the Lords ; and found the minister could not discharge ; and therefore repelled the defence, upon payment made to him.

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1706. *January 3.* SIR ANDREW KENNEDY of Cloburn, *against* SIR ALEXANDER CUMING of Culter.

SIR ANDREW, thinking his liferent right to be conservator of the Scots privileges in the Netherlands unjustly invaded, by Sir Alexander Cuming's procuring a gift and commission of the office from the Queen ; raised a reduction of the said commission before it past the Seals, and a declarator of his own right and possession. Sir Alexander's gift being afterwards expedite under the Great Seal, he presented it to the States-General, and the town of Camphire, who received him, and recorded his commission.

At the calling of Sir Andrew's summons before the Lords, he first insisted for declaring his possession ; and decerning Sir Alexander to desist from troubling him in the exercise of the office, so long as his commission stood unreduced.

ALLEGED for Sir Alexander,—That himself was in the possession, by virtue of a gift from the Queen, proceeding upon a legal cognition, by her Majesty, of Sir Andrew's malversations; who was competent to judge him in that matter, by the 82d Act, Parl. 6. James IV., and by the nature of his office, being a foreign minister.

REPLIED for Sir Andrew,—That the property and rights of the subject ought to be determined by the established judicatures of the nation. The Act 1681, asserting a cumulative jurisdiction to the Sovereign, being rescinded by the 28th Act, Parliament 1690: therefore, though offices granted *durante bene placito*, may by her Majesty be disposed of, and revoked at pleasure; liferent offices cannot be taken away, upon the head of malversation, but by the sentence of an ordinary Judicature. Yea, all grants from the Queen, being obtained *periculo impetrantium*, upon the application and suggestion of private persons, are under the control of her judicatures, if conform to law. So grants relating to her Majesty's revenue, are subject to the review of the treasury and exchequer; and the Lords of Session are her council and judges as to gifts concerning private rights. So that Sir Alexander's gift is null, as against the claim of right; which declares all forfeitures before sentence, that is, of a judicature, to be contrary to law: and his possession, after Sir Andrew's reduction and declarator, was unwarrantable, and downright intrusion. As to King James the Fourth's Act of Parliament, it was made before the establishment of the College of Justice, when judicatures for cognoscing upon right and property were not fixed. Nor are the words to be taken disjunctively; for the King's council represents his person; and to answer before them, is to answer before the King. Besides, *non constat*, that the conservator's office was then conferred *ad vitam aut culpam*: and the act obliges only the conservator, when he sends a procurator for him, without coming home, to certify the King, or his council; but does not determine the manner of cognition of things laid to his charge.

DUPLIED for Sir Alexander,—Sir Andrew's process could not render Sir Alexander's possession unwarrantable. Because, 1. It is executed as a reduction and declarator, without a word of possession: and the filling up of a conclusion afterwards, could not interpel him so as to make his possession unwarrantable, no more than a reduction and declarator could hinder a person to complete a disposition by a charter and seasin, and obtain maills and duties before an inferior court; or could hinder the decreet of a baron baillie (the meanest judge) removing a tenant to take effect, until it were suspended or actually reduced. And, therefore, Sir Alexander might well attain possession from the States of Camphire, who were most capable to give it, upon her Majesty's gift founded upon a previous cognition; which is all the necessary solemnity in such a case, and of more weight than the authority of any inferior judge. 2. If Sir Andrew was not in possession, Sir Alexander's possession must be warrantable: but *ita est*, Sir Andrew was not these several years in possession, by holding of courts or personal attendance, which the nature of the office and terms of his acceptance obliged him to. Nor can Sir Andrew found upon his son's possession, who is no pursuer in this process, and whom he hath been careful to separate from himself, by refusing to answer for his behaviour before the burrow-commissioners at Camphire. 3. Sir Alexander's possession was attained upon the Queen's right in a natural way, although Sir

Andrew's office for life were a right of property. In so far as persons have for malversation been turned out of liferent offices within the kingdom, without the solemnity of a process of declarator. Mushet, counter warden of the mint, and Williamson, Sheriff-clerk of Perth, were deprived by the Privy Council, who are not judges of property. The town of Edinburgh turned out Sir William Thomson from being their clerk. Consequently, the Queen may much more reasonably take a summary way with the conservator, who is a minister, representing her Majesty in a foreign state. And so have former conservators been treated; Mr. Nathaniel Edwards was recalled, and Mr. Drummond put in his place; and he turned out again without sentence or declarator; Mr. Harry Wilkie was removed summarily, and Sir James Kennedy put in his room: who all had liferent commissions, as well as Sir Andrew. Her Majesty's right to judge the conservator is not pleaded as founded upon the act 1681, concerning cumulative jurisdiction, but upon former laws and inviolable practice; whereby our sovereigns have power of sending ministers to foreign states, and recalling them at pleasure. And Sir Andrew's liferent gift hath only this further effect, that where other ministers may be recalled *indicta causa*, he could not be exauctorated without a reason; of which her Majesty was judge, as justly claiming the interpretation of her own and her predecessor's grants, according to the rule, *Quem modum esse beneficium sui vellet, ipsius æstimationem esse*, L. 191, ff. *de reg. jur.* Which is a necessary prerogative for the good of her subjects, and preservation of the decent forms and good correspondence with foreign states. For it is not to be imagined that the Dutch could be obliged to prosecute their grounds of complaint against the conservator before the Scots judicatures, and to wait the *remoras* thereof; more than upon a breach of the staple contract by the Dutch, our Queen should address their schepins or other judges. And, therefore, Sir Andrew Kennedy, thinking himself lesed by Sir Alexander's gift, should have applied directly to her Majesty for redress, and not have raised such an unwarrantable declarator.

TRIPLIED for Sir Andrew,—1. The raising a reduction and declarator at the instance of one in possession of the right to be declared, includes plainly his right and possession. And the executions never mention the possession, but only the summons to which they relate: and a person thereby interpellated, cannot but understand that the pursuer intends to claim and establish his right of possession. As for the instances of a disposition completed, and a baron baillie's decret taking effect after commencing of reduction and declarator, they are so many instances against Sir Alexander. For, in the one, he owns that a disposition, charter, and seisin is not sufficient without a decret of mails and duties, and in the other there must be a decret for removing the tenants. Now this is what Sir Andrew, from the beginning, complained of; that his possession was summarily inverted upon a bare title, a gift without a decret or sentence thereon, even after he had interpellated the donator by his declarator; who albeit he might complete his gift by passing the seals, notwithstanding of the declarator, could not take possession without a decret, the office being full. And the executed declarator was equivalent to a suspension, and the only habile remedy in law to maintain Sir Andrew's possession: seeing grants under the Great Seal cannot be suspended. Sir Alexander is in the wrong to allege that the States only can give possession to the conservator; for he derives both right and possession from Scots powers, having only a

tolerance and allowance from the States where he locally exercises his jurisdiction.

2. Whatever has been Sir Andrew's possession, Sir Alexander's can never be good, being plainly usurped at his own hand, without admission by the royal burrows, or qualifying in the terms of law. Sir Andrew's absence, or neglect of the duties of the office, though true, as it is not, would not evacuate his possession; which once attained *retinetur solo animo*, till voluntarily renounced or derelinquished: but only afford ground of malversation. There are several other acts of jurisdiction and deeds of possession, besides the holding of courts, wherein he, his conjunct or depute, have been constantly in the actual exercise of: as granting commissions to vacant offices, giving in memorials to the magistrates of Camphire for convoys, protesting for not sending sufficient convoys, or for not sending them in due time; giving up lists to the magistrates of Camphire of such as have freedom and privilege; giving testificates to skippers, for testifying to the respective custom-houses in Scotland that they came to the staple-port without breaking bulk; appointing Scots commissioners to meet with Dutch vrede-makers, *i. e.* peace-makers, to adjust incident differences betwixt Scots and Dutch, &c.

3. It is neither inconsistent with the government nor common sense, that a conservator having a liferent right, should be tried, as to his behaviour, by a solemn process. For a liferent office can no more be taken from a man without a process, than an heritable jurisdiction can. The instances of persons deprived are not to Sir Alexander's purpose. Boswall was preferred to Mushet, by a decret of the Lords of Session; Williamson was turned out by the Privy Council, for an act of high contempt of authority and malversation, libelled and proved; Sir William Thomson was turned off by his proper judges, the town council of Edinburgh, conform to a sentence. As to Harry Wilkie, if he was removed contrary to law, his voluntary acquiescence is no prejudice to the right: besides, he had not taken the test, and the Act 1681, anent the cumulative jurisdiction, was then standing. It doth not appear that Nathaniel Edwards was recalled by the King, but that he renounced the office, and had never been admitted by the burrows; Mr. Patrick Drummond was turned out by the committee of estates for not swearing the covenant, and reponed at the Restoration. The staple concern has not that immediate dependence upon her Majesty as other state-matters: for the staple contract 1612, was entered into with the town of Camp-vere and the royal burrows, and hath been always so renewed, and only ratified by our Sovereigns. And the conservator, though his commission be under the Great Seal, is received and installed, and gets his instructions from the burrows; who are in use, upon presenting the Sovereign's commission, to protest that the admitting thereof shall be without prejudice of their right to name the conservator; whose salary is paid, adjusted, and altered by them at pleasure, without advice from the Sovereign. So that the conservator, who is judge of the Scots colony or incorporation in Holland, has his office during life under security of the same laws as any other judge in Scotland, and is wholly distinct from her Majesty's other envoys or residents in state-matters: and the naming him also resident, is but consequential to his other office of conservator; for expediting whereof, it is necessary, in case of attempts upon the privileges of the incorporate body. As to her Majesty's power of interpretation of her own grants, the meaning of the cited maxim of law is, That she or any private party may qualify their gratuitous concessions in the giving; but a *jus quæsitum* by the

grant receives its interpretation and determination from the nature of the thing and laws of the nation. If there should be no other difference betwixt his office and other residents, than that they may be recalled *indicta causa*, whereas a conservator for life cannot be removed without a reason; it would be under an arbitrary disposal, and upon the matter little better than an office during pleasure. It is no novelty to see foreign states injured apply for redress to the ordinary judicatures. Are not all matters of prize and reprisal so cognosced? And if a foreign state should complain of injustice done by our judges of the admiralty, their decreets would be reviewed by the Lords of Session. The accusations and complaints by Gundamar, the Spanish ambassador, were not judged by King James the Sixth, but in form of process before the King's bench. The Sovereign's part is to make inquiry, and to remit the matter, if probable, to be cognosced by the judges competent. Nor is the inconveniency arising from delay in these matters to be regarded; since the same is alike to all nations.

QUADRUPLED for Sir Alexander,—Though the Judge Admiral determines prizes and other cases relating to foreigners, there are vast disparities betwixt him and the conservator. For the one, and not the other, must by his office stay abroad in the face of the injured; which, after public affronts and breaches, is dishonourable to Majesty. The admiral's principal business is to decide in maritime affairs betwixt subjects; the cases of foreigners, *qua* private persons, falling in by accident only: Whereas the conservator hath chiefly to do with a neighbouring sovereignty, *qua* such; and his jurisdiction over Scottish subjects there, is no more than a pendicle. There is also a special law and custom concerning the conservator, which concerns not the admiral, or any other judge; and the Queen is liable for the misdemeanours of her conservator abroad, but not for her judges at home. A judge at home malversing or committing iniquity, may be allowed to continue in possession till formal deprivation; because, what he does amiss may be remedied by suspension, reduction, protestation for remeid of law, reprival, remissions, &c. Whereas, a conservator's deeds of injustice to the States and strangers there, are only reparable by the Sovereign, who may summarily remove for preventing mischiefs that cannot be redrest. A resident could not indeed be corporally punished by fining, banishment, &c. but in the ordinary form of law; but the privilege of censuring, suspending, or depriving, such a one, belongs to her Majesty; and the studied specialities of the annexed jurisdiction can never deprive her of it.

The Lords found, That Sir Alexander Cuming could not warrantably attain any possession upon her Majesty's gift, after Sir Andrew's reduction and declarator was intended, before the same was determined, or a decret obtained at Sir Alexander's instance declaring his right.

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1706. *January 18.* DANIEL CAMPBELL, Collector at Port-Glasgow, *against* Sir ALEXANDER ANSTRUTHER of Newark.

THE said Daniel Campbell having charged Sir Alexander Anstruther to perform a minute of sale of the lands of Shawfield, and others, about the town of