

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.

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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