

This answer was SUSTAINED. *Second* reason is, that it was to put out of horse in the 1648 which he never did, and so it was *causa data*. This was sustained.

Act. Hamiltone.

Advocates' MS. folio 87.

1671. *January 28.*

GIBSONE *against* LAURIE.

THIS being a controversy betwixt thir parties about a piece land, Laurie intended a declarator of his right to the same before the Sheriff of Dumfries; in this action they are settled by friends, that Gibsone should consent to a decret of declarator, and Laurie should pay him for his right he had in that land 1600 merks. Accordingly he compears, and, (as the decret bore,) specially consented thereto. Then Laurie raises a summons for the mails and duties of that land before the Lords; and having obtained decret, charged Gibsone thereon; who suspended upon obedience. Of thir two decreets Gibsone intents reduction; and when they obtrude the pregnant and strong homologations aforesaid, viz. that he consented to the decret of declarator and raised suspension upon obedience, so that he can never be heard to come against that now.

To this it was ANSWERED, That with the clerk's leave the assertion of a clerk can never bind consent upon Gibsone unless they can show where he gave them warrant to insert that consent in their decret under his hand; and truly it were of very dangerous consequence if such a clause cast in only by the by were sustained as sufficient to deprive any of their rights or heritage, seeing *quod meum est sine facto meo ad alium transferri non potest L. 11. D. De regulis Juris*: but here there is no *factum* on Gibsone's part. *Item*, The Lords found the clerk's assertion not enough in L. Colonel Osburne's case; Durie also has a case somewhat coincident *25th January, 1635, Bell and the Lady Mow.** (See *Stair's Decisions, 16 July, 1661, Osburne. See 27th July, 1678.*) Next the consent was but given by his procurator, whereas to make it relevant it should have been interposed by himself. As for the suspension, all that it can import is, that being altogether ignorant of the law, and such as could not get caution, and being most desirous to have a suspension, he thought this the most clear and the most easy way to get the same by offering obedience; but he noways meant the same, but allenarly this, that in case after the discussing of all his reasons the Lords should find the letters orderly proceeded against him, that then he should give obedience.

They were to have the Lords' answer upon both.

Vide 9th February, 1609, Clerk. Vide infra, 31st January, 1671, Blair, and Papon there cited.

Act. Wallace.

Alt. Lockhart.

Advocates' MS. No. 115, folio 87.

* *Vide No. 236, [Louthain, &c. against Presbytery of Edinburgh, 4th Nov. 1671.]* Amongst the Romans and since, great confidence was reposed in clerks and such public persons, but piece and piece that trust has much diminished.