

Lords remitted it back to the bailies, because there was litiscontestatio in the cause, though they had raised a blank reduction of that Act; and the Lords found no iniquity in sustaining process against her, notwithstanding of her absolvitor, and her exception of *res hactenus judicata*, because she was now convened by him *super alio medio*. Yet *Petrus de Ferrariis*, and the doctors, think a man by pursuing, *omne suum jus in libellum deducit*, and an absolvitor should terminate all. See 10th Jan. 1627, Thornton. Vol. I. Page 86.

ANENT turning DECREETS into LIBELS.

THERE is a great difference betwixt turning a decret into a libel, and debating the cause as if they were in a libel; for, in the first case, the denunciation, and all the diligence used thereon, falls; in the second it stands, if the letters shall be found orderly proceeded. *2do*, If a decret be turned into a libel, then the cautioner in the suspension is free; but not so in the other case.

Vol. I. Page 87.

1680.

LORD CARDROSS *against* JOHN MAITLAND.

January 21.—JOHN Maitland, second son to my Lord Halton, having married my Lord Kilmawers' daughter, and Stewart of Kirkhill's grandchild, obtains from the King the gift of Lord Cardross (who had married Kirkhill's other daughter,) his liferent escheat, upon a horning, whereof Cardross had paid the debt, but neglected to relax, or to take a gift. The narrative of the gift proceeds upon four or five grounds of equity, *viz.* the great services done by the donatar's father, and his uncle the Duke of Lauderdale, and their predecessors, and other good offices done by them to the Crown. *Item*, For the worthy memory of Chancellor Glencairn, her grandfather. *Item*, Because, contrary to law, the equal half of Kirkhill's estate, by tailies and back-bonds and other such fraudulent means, hath been conveyed away from the Lady Kilmawers and her daughter, (to whom the half of the succession, by the law of God and nature, belonged,) and are enhanced by my Lady Cardross and her Lord. *Vide infra*, 24th February 1680. Vol. I. Page 76.

February 24.—The Lord Cardross having raised an improbation of the charge and execution of horning, whereon his escheat is gifted to John Maitland, (*vide* 21st Jan. 1680,) he gave in a bill, craving a commission for examining the witnesses in the messenger's execution, to lie *in retentis*, lest they should die before June.

The Lords refused it, because it did not appear that they were old or valetudinary. *Vide* 4th June 1680. Vol. I. Page 87.

1677, 1679, and 1680. JAMES HAMILTON of MANNER ELEISTON *against* JOHN ELIES of ELIESTON.

1677. February 8.—THIS day, James Hamilton of Manner Eleiston gave in a complaint to the Secret Council against Mr John Eleis, elder of Eleiston, ad-

vocate ; representing that Mr John had the absolute trust of all his affairs and papers, and drew up what writs and contracts he pleased betwixt them, and entered to the possession of his haill lands, and might have been paid by his intromission ere now ; and he, being a stranger, had not whereon to prosecute his count and reckoning, except a part of his own were allotted him ; therefore craved, during the dependance, they would allot him an aliment, and ordain the charter-kist to be inventaried, &c. (See thir parties, on the 31st of January 1679.)

Though it was alleged that this was altogether a Session business, and nothing to make it competent before the Council, yet the Council (who resolve to enhance all matters, and insignificate both Session and Justice Courts, of which see an observe *alibi*,) referred it so to the Session as they should instantly call the parties, and, without a libel *aliove strepitu seu figura judicii*, name an auditor, and ordain them to count and reckon ; and, with all conveniency, to report what they found in the matter to the Council again : which was to make them judges to counts and reckonings, and that above the Session.

Glendoick being named auditor, and, in sundry meetings, a charge and discharge being produced before him, and objections on either side, there were sundry points whereon he gave them the Lords' answer ; whose interlocutor was this :—28th February 1677, The Lords having heard the report of the Lord Glendoick, auditor, as to the articles after mentioned, and as to that article of the £800 of vicarage-teinds : in regard the subscribed count betwixt them bears expressly that sum to be for the vicarage, and that it is granted by both parties the vicarage is not evicted, they refuse to allow that article to Mr John Eleis, defender, unless he will offer to prove, *scripto vel juramento* of the pursuer, that albeit the count bears the said sum to be allowed for the vicarage, yet it was agreed the same should be allowed for the benefit of the compositions procured by the defender from the pursuer's creditors. And assoilyie the defender from that article anent David Spence, the factor, who is yet owing £800 ; in regard the defender, by the contract, is only liable for his actual intromissions.

As to the third article, anent the annualrents of the 10,000 merks due upon the wadsets of Shawfield, the Lords find the defender liable only for the annualrent of the said 10,000 merks since Martinmas 1666 ; unless the pursuer will offer him to prove, by the defender's oath, that, albeit the securities were not perfyted till September or November, yet the money was actually paid unto him at the Whitsunday preceding.

Thereafter, Squire Hamilton gave in a petition to the Council, on the 6th of March, showing the Session was up ; the count could not be closed ; and he was necessitous ; and there were 6000 merks in the tenants' hands, lying ready to perish ; and the rent was worth 4000 merks *per annum*, &c.

The Lords, by Atholl's moyen, the President opposing it, modified to him 3000 merks of that which was in the tenants' hands ; and ordained the charter-kist to be exhibited in their clerk's hands, and inventaried ; and Mr John to depone he had abstracted none of the writs.

*Advocates' MS. No. 542, folio 275.*

1679. January 31.—In the count and reckoning betwixt Mr John Elis of Elieston and James Hamilton, (8th Feb. 1677,) James alleging, Elieston had got back a 1000 merks' bond, wherein Mr John was debtor to him in trust, and craved that Mr John might hold account to him thereof ; and this being re-

ferred to Mr John's oath, he deponed the said bond was given him back as a free donation. It being objected against his oath, that, James being his debtor at the time, *nemo præsumitur donare quamdiu debet* :

This being reported to the Lords, they found Mr John's oath did not prove the allegiance, and therefore assoilyied him : for the brocard *debitor non præsumitur donare* is but presumptive, and the probability of it was clearly elided here, by Mr John's positive oath that it was gifted. Though a debtor is not presumed to gift, law doth not hinder him to gift to his creditor, providing he clearly express it. See 12th November 1679, *Andersons*. *Vide Pape and Young 17th January 1679*.

James also alleged, that Elieston had got greater eases from the said James's creditors, with whom he had compounded, than he had stated to him in his account.

This the Lords found relevant, in respect Mr John was obliged to communicate to James the benefit of the abatements ; and therefore ordained Mr John to depone thereanent, in presence of those creditors who gave the compositions. Which he did, and denied that he got any more down than what he had inserted in his accounts. *Vide infra, 19th Dec. 1679. Vol. I. Page 39.*

1679. December 19.—In Mr John Elies of Elieston's case with Hamilton, (31st Jan. 1679,) a sheet of Elieston's disposition to his lady and children, containing his faculty to alter it, was quarrelled, as having been lately inserted by him, and as not being in it *ab initio* ; and so he could not securely pay to Elieston, his children and lady being infest.

The Lords, before answer, ordained the writer and witnesses in the disposition to be examined what they knew of the alteration of that sheet. *Vide infra, 25th February 1680. Vol. I. Page 71.*

1680. February 25.—Upon a bill given in by Mr John Elies of Elieston, the Lords reponed him again to the possession, aye and until he be paid of the sums found due to him by the count and reckoning ; and that notwithstanding the Lords of Privy Council had, at two several times, given Squire Hamilton 3000 merks out of that estate, upon caution to refund it if he were found Elieston's debtor. *Vide supra, 19th Dec. 1679. Vol. I. Page 90.*

1680. February 25. CUNNINGHAM against CUNNINGHAM of ENTERKIN, his Father.

THE Lords inclined to assoilyie Cunningham of Enterkin from his son's pursuit, and found he had fulfilled the contract of marriage to him ; and ordain the son to pay the 50,000 merks of provision to the younger children contained in the contract. Against which provision the son reclaimed, alleging he was then minor, and was circumvened in it. *Vol. I. Page 90.*

1680. February 25. PATRICK HEPBURN against The EARL of Lothian.

THE cause, Patrick Hepburn, apothecary, against the Earl of Lothian, was debated. Lothian had renewed his father's bond with this quality, If Patrick