

1687. JOHN ELIES of ELIESTON *against* WILLIAM LOCKHART.

February 14.—AT Criminal Court, Mr John Elies of Elieston pursues William Lockhart for the deforcement of Guthry and _____, messengers, employed to bring up Anne Elphingston, William's mother, by a caption, to depon on a diligence obtained by Elieston for exhibition of writs. ALLEGED,—*1mo*, The pannel could not pass to the knowledge of an assize, the dittay not being relevant, in so far as the caption was raised in the last King's time, and should have been renewed. *2do*, It was raised against her when *vestita viro*, viz. Carriber, and now she is a widow. *3tio*, They wanted the concurrence of the Magistrates of Edinburgh and the town-officers. *4to*, The process whereon it was raised, was sleeping. *5to*, It was not libelled that the messenger showed his blazon. *6to*, It was executed in December under night, after sun-set.

ANSWERED,—*1mo*, Whatever informalities were in the caption, he was not judge thereto; nor could this warrant him to beat the messenger. *2do*, The Act of Sederunt, Feb. 16, 1685, continued all diligences raised in the last King's time, because there was no interruption in the Government. *3tio*, If a caption might be executed against her when a wife, it being a fundamental in all policies and governments to attest the truth on oath, then much more now when she was *sui juris*. *4to*, Only captions for debt required the Magistrates' concurrence, where the rebel was to be imprisoned; but not captions for bringing in parties to depon. *5to*, The process was wakened, and so also this caption. *6to*, It is offered to be proven the messenger had the blazon, and showed it. *7mo*, Captions may be executed at any time of the day or night. See M'Kenzie's Criminals, *tit. Deforcement*.

The Criminal Lords inclined to cast the libel, because it mentioned not the blazon; though his breaking the wand of peace is the only symbol requisite to be libelled: but they continued the diet for eight days: and then it was further alleged, that her name was interlined in the caption, and there was no execution against her on the first diligence, and so it was false. But the execution was abstracted.

And, on the 21st of February, the Criminal Lords having advised the relevancy of the libel, answers, and replies, they continued the diet till the third Monday of June, that the parties, in the mean time, might apply to the Lords of Session, and get their opinion on the foresaid objections against the caption, if they be sufficient to elide or mitigate the deforcement or not. See the decision of it *infra*, 17th June 1687. *Vol. I. Page 447.*

June 17.—The case of Mr John Elies and William Lockhart, mentioned 14th February 1687, was decided. It being remitted to the Session, by the Criminal Lords, to determine the nullities of the caption; Elieston alleged he was not concerned in the want of the execution of the diligence and other warrants of the caption; for that it was the clerk's part to keep these; and, *esto* it had been null, this could not authorise William Lockhart to deforce messengers, though it was in defence of his mother; for submission to the King's laws and his apparitors is preferable; *et omnes omnium charitates patria vincit*.

The President inclined to find that such an opposition was only a riot, to subject him to a fine; and not a deforcement, which would have made his escheat fall.

The Lords found the caption null, unless the execution on the first diligence were produced : but allowed Elieston, for adminiculating of it, to examine, like a proving of the tenor, if, when they copied the caption, they did not see the execution conform. And when they were thus put to it, the lads in the clerks' chamber produced a receipt of William Lockhart's, whereby he had borrowed up some executions of that diligence ; which necessarily must be presumed to be this now amissing. This drew William to consent to a submission. *Vol. I. Page 457.*

1687. *June 18.* JOHN LAUDER *against* WILLIAM HENDERSON.

JOHN Lauder, chirurgeon-apothecary in Edinburgh, his action against William Henderson, tailor, for payment of an account of £42 Scots, was advised : it was furnished to his wife when sick : and the delivery and the prices being proven by his own man, and Dr Trotter, and other chirurgeons ; the Lords found the account fully proven, without necessity of taking the pursuer's oath in supplement. And on a bill given in by John, representing how contentious the defender had been, and what expense he had put the pursuer to in discussing a suspension, the Lords modified £20 Scots for expenses of plea.

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1687. *June 18.* LORD KINGSTON *against* LADY BELHAVEN.

THE Lords advised the action pursued by the Lord Kingston against the Lady Belhaven, (whose daughter he had married,) for her bond of provision of £10,000 Scots, which she had renewed in her servant, Mr William Brown's name, and inserted a power to herself to clog and burden it with what sums she pleased, and so made her assignation to carry these burdens.

The Lords found the Lady could not invert the nature of the bond ; and therefore decerned.

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1687. *June 21.* DOUGLAS, Bishop of Dumblane, *against* MOIR.

DOUGLAS, Bishop of Dumblane, raised a reduction of a tack of some feudities and teinds, set by his predecessor, Bishop Ramsay, to one Moir ; because, *1mo*, The tack wants the consent of the Chapter. *2do*, It is to their manifest lesion. ANSWERED,—*1mo*, This is no part of the patrimony of the bishopric, but of the Abbacy of Dundrennan annexed to the chapel royal ; and so needed no consent. *2do*, The rental was truly augmented 200 merks more than it paid formerly, being now 1200 merks, and relieving him of sundry burdens.

The Lords, on Redford's report, before answer to the first reason of reduction, ordained the annexation alleged upon to be produced. And, as to the second reason, bearing the tack to be set in diminution of the rental ; admitted that part of the duply to the pursuer's probation, that, before the expulsion of bishops, before 1637, the teinds set in tack paid a greater rentalled duty, or a greater tack-duty, than the duty of this tack now craved to be reduced.

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