

those he got; albeit Muirhead offered to prove that the meal sent at the same time from Scotland gave a much higher price.

As to the *second* head of malversation insisted on, That he returned the ship empty, and did not buy a loading in Ireland, ANSWERED, *1mo.* The seas were then very dangerous, and full of pirates; *2do.* Goods, which could then be got in Ireland, were at a low value, and little or no profit to be had upon them in Scotland. Some were for admitting this to his probation, as relevant to assoil-yie him; but the plurality thought, seeing he acted for him as for himself, that he ought only to give his oath, *ex officio*, whether or no he forbore to buy a cargo in regard the seas were pestered, or that he thought there was little profit to be made by such a return.

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1694. *December 19.* CATHARINE WILKIE and MR RORY MACKENZIE *against* BAILIE GILBERT FYFE.

RANKEILER reported Catharine Wilkie and Mr Rory Mackenzie against Gilbert Fyfe. The Lords opened the decreets *in foro*, found them null, and reponed Bailie Fyfe against them:—*1mo.* Because there was allowed to the said Catharine a third of the moveables to be deduced out of the inventory of the testament, albeit there was none due; the inventory being exhausted by debts, and that her advocate passed from it; as also, that sundry articles, without any probation, were allowed.

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1694. *December 19.* JAMES BAIRD *against* GEORGE INNES of DINKINTY.

JAMES Baird, servitor to Sir James Ogilvie, advocate, against George Innes of Dinkinty, for the spuilie of two horses. The defence was,—I was minor, and they were carrying clay out of my ground without warrant or allowance; and my mother ordered me to seize them.

The Lords thought this sufficient to liberate from a spuilie; but decerned him in restitution of the horses, or their prices, without violent profits; reserving his relief against his mother, as accords.

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1694. *December 19.* CECILIA PAIP, Lady Keilor, *against* RICHARD NEWTON of that ilk.

THE Commissaries had exonerated him in so far as concerned his aunt's portion in Holland, as, by the testament produced, it was left to him.

The Lords found he could have no preference on that head, (she being in a degree equally sib to the defunct;) seeing the same was uplifted and spent by

him, and the equivalent could not be substituted in its place, because the uplifting a sum legated is *inter modos adimendi legata*. But the Lords thought there was equity in the case; therefore recommended to the reporter to endeavour to settle them. *Vol. I. Page 652.*

1694. December 19. MR WILLIAM BLACK, Advocate, *against* DUN of TAARTY.

MR William Black, advocate, against Dun of Taarty, for recourse of warrandice upon a disposition of a fishing sold by Taarty to Gilbert Black, the pursuer's father. The Lords repelled the *first* defence, That it being a fishing on Don, it bore that it was intransmissible to any but burgesses and residenters in Aberdeen; in respect the pursuer was a burgher and resider there at the time of the disposition. But the Lords sustained the *second* defence, *viz.* That there could be no regress, because there was no judicial eviction by any sentence of the Lords in January 1693, reducing a contract of communication passed betwixt the cruive and coble-fishers, whereby this fishing, which cost his father 4,200 merks, would not procure him, if sold, 1200 merks. This the Lords found no eviction:—*1mo.* Because Dun of Taarty was not a subscriber of that contract, though his tenant had the benefit of it as well as others; *2do.* This supervenient reduction was *casus insolitus et improvisus, qui a nemine præstatur*; and that the words of the disposition, “of privileges used and wont,” could not extend to the benefit arising by that contract, so as, that failing, the disponent should be liable to refund it. Some moved, as this was so irregular and ill-grounded a pursuit, that expenses should be modified to the defender. But the Lords forbore, in regard it was clear that eventually the pursuer now was lesed *ultra dimidium justii prætium*, and had an ill bargain. *Vol. I. Page 652.*

1694. December 25. MR GEORGE JOHNSTON *against* MR JAMES INGLIS.

MERSINGTON reported the competition between Mr George Johnston and Mr James Inglis, the old and present minister of Burntisland, for the stipend thereof. The *first* question was, Whether the first sentence against Mr George is deprivation? for, if it was only suspension, that is only *ab officio*, and not a *beneficio*.

The *second*, If the four grounds in the Act of Parliament 1690, restoring Presbyterian government, were so taxative that the church judicatories could depose for no other. For Mr George's libel was for none of them; but that he was admitted and instituted only by one minister, on a letter from the Archbishop; whereas the Apostolical Canons require two or three at least at the imposition of hands. But it was urged, This enumeration of four was not exclusive of others, especially seeing, in that same act, “contumacy” is also made a ground. Yet I remember, when Sir John Monro of Foulis moved that “persecution” might also be added, the Parliament refused it.