That what he said was after provocation,---Cairns having called him unmannerly, and since that time having given him atrocious language ;---in which case lawyers say, That such injuries and offences, as well as the penalties following thereon, *invicem compensantur.* *2do.* They were not uttered *animo et libidine injuriandi,* but *ex justo dolore ;*---and, *l.* 3, *sect.* 1, *D. de Injur. Provocatus ad iram non proprie committit injuriam.* *3tio.* The calling one a rabler is of late but reputed a sport; *et qui per jocum quid facit injuriarum non tenetur.* See *Decius ad l.* 48, *D. de Reg. Jur.* Besides, he immediately retracted what he had said; and *Tiraquil. de Pœnis Temperandis, cas.* 28 *et* 60. *numb.* 2, allows three days for such retractations.

Cairns, the charger, opponed the probation in his decreet, which evidently proved *animum injuriandi* on his part, and took off these topics of *jocus, ira, et justus dolor.*

The Lords adhered to the Commissaries' decreet, and found the letters orderly proceeded; but, finding there was much pique and humour on both sides, they ordered the charger to give in twenty merks of his expenses to the poor.

Vol. I. Page 760.

1697. *January* 26. Scot, Relict of Elliot of Grange, *against* Airly of Blackhill.

Mersington reported Scot, relict of Elliot of Grange, and Airly of Blackhill, ---being a competition for preference. The relict claimed both the liferent of 600 merks *per annum,* and likewise of a house, orchard, and acres in Jedburgh. The creditor contended, By the contract of marriage thir were not separate provisions; but the last was only in farther implement and security of the first *pro tanto ;* for it run in thir terms after the obligement for the 600 merks by year :---" And farther, in implement, and for the fulfilling of his part, to dispone to her the foresaid house, &c. but during her viduity only."---Which Blackhill interpreted to be in implement of the first part of the contract, and for her better security.

Answered for the widow, It was a clear addition over and above the former, it having a distinct period, *viz.* her viduity, which the first has not.

The Lords were divided in this, as being dubious, and a *casus arbitrarius de conjecturata mente defuncti.* But the plurality found it an addition to her jointure, and not a security given her only *pro tanto.* *Vol. I. Page* 760.

1697. *January* 27. Dick and Christie *against* John Sawyers.

Philiphaugh reported Dick and Christie, in Stirling, against John Sawyers, factor for the creditors of Bruce of Newton, upon a contract, by which he had sold to them 500 bolls of bear, crop 1695. His reason of suspension was,---Before I could deliver and fulfil my bargain, I was turned out of my factory by the Lords, on a bill given in by some of the creditors; and so, my title and right to uplift failing, I cannot be liable, it being *factum impræstabile* to me.

Answered, 1*mo.*---You have obliged yourself in absolute warrandice to us,

and are tied to pay two merks for each undelivered boll, which will not compense the damage we sustain by the want of the victual. *2do.* You should have suspended that act of the Lords, and represented that *res* was not *integra*, because you had sold the victual; and so you was *in culpa et mora, et loco facti impræstabilis venit damnum et interesse.*

The Lords looked on it as a fraudulent contrivance amongst them, the victual being sold to others for a greater price than the chargers were to have paid: Therefore they decerned against him; though, in the general, such casual events and obstructions, disabling one from performing his bargain, should liberate him from the same. *Vid. l.* 33, *De locati.* But, in all such contracts, they should only give warrandice from their own facts and deeds. *Vol. I. Page* 761.

1697. *January* 28. The KING'S ADVOCATE and some of the VASSALS of SCOON *against* The VISCOUNT of STORMONT.

THE King's Advocate, and some of the Vassals of the Abbacy of Scoon, pursue a declarator against the Viscount of Stormont, Lord of Erection of that Abbacy, That, though he had right to their feu-duties till redeemed, yet he had no right to exact the services in their charters of harriage and carriage, or the like; but the same belonged to the King, their superior.

It was ALLEGED,---No process at the King's Advocate's instance, for he can pursue none of the King's vassals without a special mandate and warrant from his Majesty, else he might vex all the subjects; as was justly decided, *20th January* 1680, *The Earl of Southesk* against *Melgum and Others.* And as to the heritors concurring with the King's Advocate, No process at their instance either; because their seasines were not given out *ab initio* with the process, but dropped in since.

ANSWERED to the *first*, It is only in reductions and improbations that the King's Advocate needs a special warrant; *second*, The feuars' rights are now produced.

REPLIED,---They must show a right before the Act of Annexation 1587.

Sundry of the Lords were clear to sustain process, on the defender's seeing the production in the clerk's hands: But others thought it *mali exempli* that such unfavourable pursuits should be encouraged, (for they found the King's Advocate cannot insist alone;) and they refused process till the titles of the vassals were given out to be seen *in communi forma.* *Vol. I. Page* 761.

1697. *February* 2.

I went to the Outer-House; so the observations will be fewer than at another time.