

1698. November 10. SIR GILBERT ELLIOT, JAMES LEVISTON, and OTHERS, Burgesses of Edinburgh, *against* The MAGISTRATES of EDINBURGH.

SIR Gilbert Elliot, James Leviston, and many other Burgesses of Edinburgh, who were fined, in 1683 and other times, for absenting from the church, baptizing their children with Presbyterian ministers, and other church-irregularities, pursue the present Magistrates of Edinburgh for repetition of these fines on the act rescissory in 1690. For proving their payment, some of them produced decreets under Alexander Gay, then clerk-depute, his hands, bearing their absolver, in regard they had paid in their fines at the bar rather than go to prison or be denounced. Others had discharges from John Trotter, the Town's collector. It was OBJECTED against the *first* instruction, That it could not prove the Town received these sums, seeing the assertion of a clerk can bind no debt on them without an act of their own, by their set and decreet-arbitral, and, at most, could only reach Gay and the Town's procurator-fiscal, unless they instructed they were *in rem versum* to the Town's use. Against the *second* it was OBJECTED,---Trotter had only a limited commission to uplift the imposition on ale, &c. or some other branches of the Town's revenue and common good, but no warrant to lift thir fines: unless they produce his special commission, or prove he has counted to the Town, or delivered them in to their treasurer, his receipt can never exoner them, especially seeing he died considerably in the Town's debt.

ANSWERED,---They *bona fide* paid; and the Town may seek their relief from those persons whom they trusted, or their representatives.

There was a question moved by some of the Lords, If it was not more just that the Magistrates then in office, when thir fines were exacted, should be liable to refund, or instruct what came of them, if applied to the Town's use or not, rather than the Town and present Magistracy, who were innocent of the matter? But it occurred that James Fleming, then Provost, and the other Magistrates then with him, were cited *incidenter* by a diligence in this process; yet they were not heard on their special defences: Therefore the Lords allowed them a diet to be heard. It made it favourable, on the pursuers' part, that most of them who were able offered to mortify their fines to an hospital, or some other pious use.

*Vol. II. Page 12.*

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1698. November 11. JAMES WATSON *against* GEORGE MOSSMAN.

THE mutual charges between George Mossman and James Watson, printers in Edinburgh, founded on indentures passed between the said George, and Patrick Watson, brother to the said James, and probation led thereon, were this day advised. George had charged his apprentice with some malversations, as purloining some books and money, and lending some of the types and instruments of printing to his brother James, which belonged to his master; and thereon hot words following, he thrust away his apprentice, and he, by way of instrument, required him to take him back again, who refused; and thereon being charged, George suspends on this reason, That he was not bound to receive

back an unfaithful servant; and that, by his means, he wanted sundry types, and the hand of the Rudiments, &c. : Watson denied that these were committed to his charge.

The Lords, before answer, allowed a conjunct probation anent the way and manner how the tools, printing stamps, irons, and instruments were kept; and if they were committed to this apprentice's sole care and trust; or if there was a promiscuous management and oversight of the haill apprentices and journey-men, and how these instruments came to be abstracted, or if they were lent, and with whom they were found, or how they were returned; and to prove his damages through his master's refusing to take him back again, &c. And the mutual probation being this day advised, the Lords thought apprentices are not to desert their service for every castigation or reproof their master gives them; and though the master be somewhat unreasonable and harsh, yet that is no sufficient cause to dissolve the indentures. Yet, on the other hand, there is a great difference between an apprentice and an ordinary servant: the one may be turned away at pleasure, at least at term-day, without obliging the master to give any reason for his so doing, but he may not act so arbitrarily with apprentices, who being gentlemen's sons come for education; so it must not be in that case *beneplacitum arbitrium* but *rationale*; and every fault in an apprentice must not be made a reason to thrust them away. And in this case they found no such malversation proven on the apprentice's part as was sufficient to warrant George, the master, to put him away; so that some inclined to cause him enter home again to his service; but neither of them being very desirous of one another, the Lords declared them free, and to discharge each other of the indentures; but finding the master in the wrong, they decerned him to repay the 100 merks of apprentice-fee, and modified the damages to another 100 merks, which they ordained the said George Mossman likewise to pay; and found the letters at the apprentice's instance orderly proceeded for the same.

*Vol. II. Page 13.*

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1698. November 17. GEORGE PITCAIRN, Commissary of Dunkeld, *against* SIR THOMAS DALZIEL of BINS.

GENERAL Dalziel dying, and leaving a considerable moveable estate, a competition arose betwixt the Commissaries of Edinburgh and Dunkeld, who should confirm his testament; and Dunkeld being preferred by a decret *in foro*, Sir Thomas Dalziel of Bins, his son, did enter into a minute of contract with Mr George Pitcairn, Commissary of Dunkeld, in August 1688, by which he took him obliged to confirm it when required; and he became obliged to pay 1000 merks in full of all dues. Sir Thomas being charged on this, he suspended on this reason, That, by a supervenient law, *viz.* Act 26, 1690, the necessity of confirmation was taken away; and as he could not be forced to confirm, so neither to pay the sum due upon that account; and so it became *indebitum et sine causa*.

ANSWERED,—Whatever might be pretended if he had not entered into an agreement, yet, it being now *res transacta*, he cannot be liberated; nor does the Act of Parliament rescind or annul any pactions or transactions of parties.

The Lords repelled the reason, and found him liable. *Vol. II. Page 15.*