

1698. *December 20.* GILBERT ELLIOT of STONE-EDGE *against* ELLIOT of HERIOT, &c.

CROCERIG reported Gilbert Elliot of Stone-edge against Elliot of Heriot, &c. This was a reduction and improbation of a disposition granted by himself of some lands. The defences were, *1mo.* I'll not take a day to produce, because you show no right in your person to the subject in controversy. *2do.* I cannot be obliged to take a term in the improbation, because I crave your oath of calumny, if you can deny that the writ is truly subscribed by you; and, seeing you cannot pretend falsehood, 'tis unreasonable to sustain the reason of improbation, whatever may be done in the single reduction.

ANSWERED to the *first*,—He needed no title, seeing he only quarrelled a deed flowing from himself. To the *second*,—He is not obliged to give his oath of calumny on a part, but only upon the whole libel, *quod lis sibi justa videtur*; and though it seems odd to permit a man to insist on a conclusion of falsehood when he knows the writ is true, yet 'tis only to force production, because the certification in a simple reduction is slender; and if such an oath of calumny were once sustained, it would cast the most of the improbations pursued.

The Lords repelled these defences in respect of the answers.

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1698. *December 20.* DAVID OGILVIE *against* FARQUHARSON of FINGEAN.

CROCERIG also reported Mr David Ogilvie, late minister at Birse, against Farquharson of Fingean, for his proportion of £20 Scots, modified and assigned for his grass.

ALLEGED, *1mo.* This designation was not in terms of the Act of Parliament 1663, which speaks only of pasturage, and not of money. ANSWERED,—You were present at the designation, and consented to it as easier for you; and if grass had been designed out of the nearest Kirklands, you behoved to have relieved that heritor *pro rata*.

REPLIED,—Consent *non relevat*; because, not being subscribed, there is still *locus penitentiae*, seeing it introduces a constant servitude upon my heritage. DUPLIED,—Resiling takes only place where the deed requires a subscription under my hand to the accomplishing and perfecting it; which this designation does not.

The Lords repelled the defence, in respect of the answer that he consented to be proven by his oath.

*2do.* ALLEGED,—You can claim for no years since 1689, because you was deprived by the Council for not obeying the proclamation, commanding them to pray for King William, in April 1689; and though the sentence be not till 1697, yet it must be drawn back to its cause.

ANSWERED,—These Acts do not take effect *ipso jure*, but only *per declaratoriam*, when they are applied by the sentence of a judge, and have no retrospect; and the Act of Parliament 1693 gave these ministers a term to take the oaths; likeas it has been found, both to Episcopal and Presbyterian ministers, that they