

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

get the stipend for such years as they served through connivance, aye till they were removed by a sentence.

The Lords likewise repelled this defence in respect of the answer aforesaid.

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1698. *December 21.* The TOWN of ABERDEEN *against* The ABERDEEN BREWERS.

The Town of Aberdeen having obtained an Act of Parliament in their favours, imposing two pennies on the pint of all ale brewed and vended within their bounds; and the Brewers being convened and decerned thereon, they raised suspension and reduction on thir reasons, *1mo.* That sundry of the burgeses entered their protestations against the procuring any such oppressive Act; and their Commissioner to the Parliament ought not to have acted contrary to the known inclinations of the Town, his constituents. *2do.* The Magistrates, in respect of the scarcity, discharged brewing, and took the bear, which was to have been malted, and grinded it into meal; by which, having taken away the mean of our livelihood, our brewing, you are liable to refund our damage, and we must have retention of the Excise.

ANSWERED to the *first*,—Whatever was the manner of procuring the Act, the same cannot be disclaimed now, having all the formality of such Acts. And for the *second*, Necessity has no law: it was better to convert the bear into meal, than many poor Christians to starve; and they can crave no abatement, because their brewing is less than formerly, for then they pay less excise conform to their brewing; and if they had damage, it is not liquidated, and so cannot meet this charge.

The Lords repelled the reasons; but reserved their action for damages, as accords.

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1698. *December 29.* GEORGE DENISTON *against* THOMAS SMITH, Merchant.

THERE were mutual complaints betwixt George Deniston, writer, and Thomas Smith, merchant, wherein George complained, that the other had beat him publicly at the Cross of Edinburgh, for no other cause but that he agented a process for a poor woman against him.

Smith ALLEGED, *1mo.* This scuffle is pretended to have been done three years ago, and so is prescribed *dissimulatione*, when *tales injuriæ statim ad animum non revocantur*. *2do.* It is already judged by the bailies; and he was fined in £50.

ANSWERED,---Our law knew no such prescriptions of riots as three years if not pursued within that time. To the *second*,—The magistrates interposing by their procurator-fiscal was only collusive; and, *esto* this satisfied the *vindicta publica*, yet there being nothing decerned for his vindication and reparation, it neither absorbed nor cutted off his process *ad vindictam privatam*; likeas, by the 38th Act Parliament 1661, anent Justices of the Peace, it is declared, if the