

ANSWERED to the *first*,---That he denied any deeds of violent resistance were used; but if he was illegally attacked, he might defend his house; for *ubi vis illicita infertur, ei impune resistere licet*; but he used only legal remedies, by applying for a suspension, and obtaining a writ of execution; and the very next morning after it run out he was assaulted ere he could get it renewed. To the *second*, All employers are liable; and if messengers exceed, not only they, but their employer may be convened; and it were absurd to make either the Sheriff or Lyon accountable for the malversations of their mairs or messengers; but here the sheriff-officers were only brought *pro more*; for all was done by Sir William's own servants, who came amongst with him. To the *third*, It was no more than a natural consequence of the illegality of the ejection, to find damages due; otherwise delinquencies went unpunished, and *lucraretur ex sua culpa*; and he ought to have his oath *in litem*, seeing he could not prove every particular chair or other household plenishing he then had.

The Lords found he ought to have reparation of his true damages, as he should instruct the same; and repelled Sir William's defences.

*Vol. II. Page 196.*

1712. *February 29*,---Mr William Gordon of Balcomy gave in an appeal and protest for remeid of law against Sir William Hope, for declaring my Lord Balcomy bankrupt forty years after his death; and for sustaining Mr Mark Lermont's right; though it was offered to be proven, that Mr Robert Lermont his author was paid by his intromissions.

*Vol. II. Page 734. § 9.*

*July 30*,---Mr William Gordon of Balcomy, and George his son, gave in an appeal and protest for remeid of law, against Sir William Hope, because he is not duly ranked on the said estate as a creditor.

*Vol. II. Page 763. § 8.*

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1703. *January 29 and December 7*. The EARL of NORTHESK against LADY KINFAUNS and her SON.

*January 29*,---THE Earl of Northesk having taken forth a diligence in his process against the Lady Kinfauns and her Son, for proving her husband's being his procurator *et negotiorum gestor*; and having cited the Lady Muckarsie, for exhibiting discharges and other writs, for proving thereof; and she having appeared, and deponed *negativè* to the whole, and craving expenses, the Lord Crocerig, then Ordinary on the witnesses, modified to her £32, conform to the days she had attended, and ordained Mr Patrick Couper, the Earl's agent, to pay her: who reclaims by a bill, *Imo*, That in exhibitions of this nature no expenses can be given at all, seeing every one is free to expiscate, where he can find his probation; *2do*, Agents can never be decerned in payment of expenses, who oft times are out of purse for their clients, but only their constituents.

ANSWERED to the *first*,---There may be as much calumny and malice in wrongous citing people on diligences as in pursuing them; and she is upon the matter a witness, and every witness ought to get payment of their expenses. To the *second*, Parties are seldom present, but only their agents and writers, who

are presumed to be empowered and furnished with cash to disburse. And what if the party should dwell in the isle of Sky or the far Highlands, must the witness go seek his expenses from them there? he had better twice over quit it; and it should have summary execution without formalities or delay.

The Lords thought there could be no general rule for the *first*; there being cases where it may be absolutely necessary to call them, and in others the calumny is evident, and so expenses will be due, but not always in all cases. As to the *second*, Some of the Lords thought it hard to burden agents with the payment of such expenses, when they might have no effects nor provisions in their hands; but that the most effectual compulsitor was to refuse process, and stop any farther procedure at that party's instance in the cause, till he paid what was modified: and so if it was the pursuer, he would obey rather than sist his process; and if the defender, then he would be no farther heard in the cause, but decree go against him till he paid.

*Vol. II. Page 176.*

*December 7.*---The Earl of Northesk against the Lady Kinfauns and her Son, mentioned 29th January 1703. It was a declarator, That any eases Kinfauns, his uncle, got out of the debts he paid and transacted, they ought to accresce to the Earl; and the creditors, who gave the eases, being ordained to be examined, before answer, on the quota, and their oaths coming to be advised, who acknowledged sundry years' annualrents to have been then quit by them, the debate arose, If the lady and her son were obliged to allow the same, because Kinfauns, her husband, being made assignee for an onerous cause, his cedents' oaths could not militate against him.

ANSWERED,---The principle of law held good in the general, but had exceptions; as where the party transactor was a near relation, and acted as *negotiorum gestor*, and was now dead, so that his oath on the abatements could not be got; in such a circumstantiate case the Lords had recurred to the creditors' oaths, though it was but a single testimony.

The Lords found, If Kinfauns had been alive, his own oath or writ could only have liquidated the eases he got when he bought in the debts; but that manner of probation now failing by his death, and he being the Earl's uncle, and acting in his affairs universally *tanquam negotiorum gestor*, therefore, without making any general rule, they found the eases proven by the creditors' depositions. But one of them, *viz.* the Laird of Inchsyra, having deceased before examination, and emitted a declarator under his hand anent the ease he gave of his sum; the Lords rejected it, as ultroneous and not probative.

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1703. *December 8.* SIR THOMAS ELPHINSTON'S DAUGHTERS *against* LADY AIRTH and her HUSBAND.

ELPHINSTON, and Robert Allan her husband, against the Lady Airth and her husband. By contract of marriage in 1650, betwixt Sir Thomas Elphinston of Calderhall and Mrs Jean Lauder, daughter to the Laird of Haltoun, there was this clause inserted:---“ And because the lands are provided to the heir-male of this or any subsequent marriage, whilk failing, to his other heirs-male; in which