

and so pursues him to count and reckon; and, on production of his instructions, obtains a decret against him, ordaining him to grant a discharge of the debt as fully paid; and, he having raised a reduction of the said discharge, after a litigious debate, Thomson's heirs are assoilyied. But Young thinking his affair mismanaged, he raises a new process against them, for payment of the 600 merks as yet resting; and they opposing not only their discharge, but likewise their decret, he offered to prove, by their oaths, that the said discharge was extorted from him, by casting him unwarrantably in prison; and they not consenting to his liberation, (he wanting wherewith to procure a suspension and charge to set at liberty,) he was concussed to give the said discharge ere he could obtain his liberty.

REPLIED,---That, after a decret *in foro*, no such allegiance could be now received, especially so summarily, without a reduction.

But the Lords, considering his poverty, did not put him to the tedious and expensive way of reducing, but thought any writ might be taken away by the party's oath on the head of *vis et metus*. But suspecting it to be calumnious, they first ordained Young to give his oath of calumny, if he had reason to say the debt was yet owing; and then referred to the Ordinary to examine the defenders on the reason of concussion and force, as he should find cause.

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1706. February 5. The MAGISTRATES of INVER^vARY against WILLIAM THANE of BLACKHALL.

The Magistrates of the Town of Inver^vary, and William Thane of Blackhall, raise mutual declarators of molestation, as to their possession of a muir adjacent to them both, in which the town claimed an exclusive property, and he only craved a servitude of pasturage and commonty. And a conjunct probation being allowed and advised, the Lords found the Town of Inver^vary had proven immemorial peaceable possession; and that Mr Thane's witnesses had, at the furthest, only proven thirty-five years'; and the Town had proven frequent interruptions: and therefore decerned in favour of the Town's right, and assoilyied them from the other's declarator, and modified 100 merks of expenses, to be paid by him to the Town, as *temere litigans* and calumnious. Against this interlocutor he reclaimed by a bill, representing that his witnesses would have proven forty years' possession, but the probation being on a commission, they were examined at the said burgh, where the town-clerk and others dashed and concussed his witnesses, so that they had not the freedom witnesses ought to be in; and therefore craved a reëxamination, either before the Lords themselves, or at Aberdeen by the sheriff, as both indifferent in the place and person. And for the interruptions proven, they were not in the terms of law, neither by way of summons nor instrument registrate; *et aliquid non omnino fieri, et non legitimo et habili modo fieri, æquiparantur in jure*; whereas there is nothing here but the petulant and momentary interruptions of herd-boys driving off their neighbours' goods; which is no more than if a stranger going by had hounded them off. And, *in anno* 1619, his predecessors threw down a dyke the Town were building there.

And it is evident there can be no expenses decerned against him, seeing he had probable grounds of pleading.

ANSWERED,—His witnesses were not overawed by any; and such allegiances cannot be received now in a concluded cause; and interruptions *via facta* are never refused; and who knows better their master's bounding than herds? and, allowing that deed of his author's, there is eighty years' prescription run since 1619.

The Lords refused the bill, and adhered to their former interlocutor.

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1706. *February 7.* LORD BELHAVEN *against* LORD DAVID HAY OF BELTANE.

LORD Belhaven being to inclose some ground in a park, for making his dyke regular, he pursues Lord David for two acres of his adjacent lands of Beltane, that they may be adjudged to him, conform to the 17th Act of Parliament; and offers him either as much ground equivalent, or money to the value of what shall be taken in.

ALLEGED, *1mo*,—This was depending before the justices of peace of the district of Dunbar, and so there was *lis pendens*, which could not be transported to the Lords, except by an advocacion; so that my Lord Belhaven could not insist now before the Lords.

ANSWERED,—That which was tabled before the justices of peace was only a complaint, which was never litiscontested, and so might be deserted: likeas, since King William's death, there has been no commission for justices of peace renewed throughout the kingdom; and the Lords and sheriffs, in their respective shires, are as competent as they; and it was a mistake to think the justices privative in the first instance.

The Lords repelled this dilator, and sustained process.

2do, ALLEGED,—This privilege was only introduced for such as inclosed four acres of ground yearly, conform to the 41st Act 1661; which my Lord Belhaven had not done. ANSWERED,—That Act gave the inclosers an encouragement to be free, for nineteen years, of cess, for all such ground; but the Act in 1669 bore no such limitation. The Lords also repelled this.

3tio, It was CONTENTED,—Belhaven could not insist, seeing he produced no right to the land he was inclosing. ANSWERED,—When the ground comes to be adjudged or exchanged, then he shall produce his right; but at present his possession was title enough.

The Lords repelled this dilator, he producing his infestment *cum processu*; and appointed some of their number to perambulate and visit the ground, and to take trial and probation of the value of the ground sought to be inclosed, and how it might be done with the least inconvenience to Lord David Hay, and what compensation should be made to him, either in land or money, for what should be judged necessary to be taken from him.

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