1706. *July* 30. ELISABETH STRACHAN *against* BAILIE NAIRN.

STRACHAN against Nairn. Complaints being made to Bailie Nairn in Dalkeith, that one Elisabeth Strachan, dwelling there, was a common resetter of thieves, and stolen goods, and particularly of one Mary Cockburn, a notour thief, there is a process raised against her at the fiscal's instance; and, on probation, she is incarcerated, and her goods seized on: whereupon she raises a process before the Lords, against the said Bailie, for wrongous imprisonment, and so much *per diem*, conform to the Act of Parliament 1700, and likewise for spuilyie of her goods.

ALLEGED,—She, being attacked and convicted for reset of theft, was not in the terms of the said Act, which related mainly to state crimes, and excepted thefts; as to which the procedure was allowed to be the same as it had been formerly; and it was proven she was a seducer of servants and children to pilfer and steal, and a resetter of such persons. And, as to the spuilyie, it was done by virtue of a decreet and *authore prætore*, and so could never be a spuilyie.

ANSWERED,—He could never incarcerate her till he first subscribed a warrant, condescending on the causes of her imprisonment, and give her a double of it; none of which was done. And her receiving Mary Cockburn to lodge in her house was no crime, not being conscious to her dishonesty, neither is it proven. And though his seizing on my goods might not be a spuilyie, yet there is ground enough for having her goods restored, and her damages refunded: which is small enough reparation for the injury done her good name and fortune.

The Lords found her not in the case of the late Act of Parliament 1700, anent wrongous imprisonment; and found no spuilyie; and therefore assoilyied from both the branches of the libel. *Vol. II. Page* 347.

1707. *February* 8. The LADY KILFAUNS and JOHN CARNEGIE, her Son, *against* The LAIRD of KILFAUNS.

THE Lady and her son being creditors to Kilfauns in £1000 sterling, and being donatars to his liferent-escheat, they pursue his tenants, in a special declarator, for payment of their rents; who having deponed each upon his own possession, and what he was resting to his master the time of the citation, some of them deponed, That, at their laird's desire, they had become debtor to one of his creditors prior to the citation, and promised to pay him; and which quality was urged as sufficient to assoilyie them.

But the Lords considered, That, if the tenant had either made payment or granted bond, or if decreet had been obtained against him for it, any of these three might have exonered him; but it being only a naked promise, the same might be understood conditional, unless some middle impediment intervene, as the donatar's citation did here; and though it was alleged this would make the tenant twice liable, yet the Lords thought not; and if he were pursued on his promise, his payment to this pursuer as donatar would liberate him. See the

like case, marked both by Lord Stair and Dirleton, 11*th December* 1674, *Home and Elphingston* against *Murray*, betwixt an assignee and an arrester.

Others of the tenants deponed, That, since the citation, Blair of Kilfauns had exacted their rents from them, and made them to pay it in to him.

The Lords found this was not *bona fide* payment, and refused to allow it; but, if the Laird would compear, and allege he had a locality and aliment out of the estate, wherewith the escheat was burdened, they would deduce and allow it out of the first end thereof.

Some of them deponed, they owed half a salmon for their share of a coble-net and liberty of fishing in the water of Tay.

The Lords thought this could be no otherwise cleared than by decerning them once in two years to pay a salmon; and, seeing they could not deliver *ipsa corpora* for bygones, therefore they modified a merk for the price of the salmon, in regard one of them deponed, that that was the price exacted; though a conventional price with one makes no rule to the rest. Those who deponed on bolls of victual, the fiars of the year were appointed to be produced for regulating that. But the threaves of straw having no certain price, one threave this year being of more value than two another year, a diligence was granted for liquidating them, if they insisted thereon. *Vol. II. Page* 348.

1707. *February* 20. BROWN *against* The TOWN of EDINBURGH.

THE Town of Edinburgh having fined one Brown, for keeping and setting of chairs and sedans for hire, whereas they had given the sole privilege thereof to one Mrs Hay and Thomas Dunnet her husband; Brown suspended on this reason, That such a gift, being a monopoly, was contrary to law, and ought not to be allowed; and it were singular, if the Town of Edinburgh could assume that power which the Queen and Parliament did not. And, by the same rule, they might authorise two or three gardeners to sell kail and leeks, or other pot-herbs, and discharge all others; and so in other trades and species of goods: which is absurd.

ANSWERED,—The Town has been in use to gratify decayed burgesses with such gifts as thir; and she was ready to serve as cheap as any other.

The Lords thought the preparative bad; and therefore sustained the reason of suspension, and assoilyied him from the fine. *Vol. II. Page* 351.

1706-7. *February* 28. WILLIAM MORRISON of PRESTONGRANGE *against* MR HUGH CRAIG, Minister at Gallowsheills.

MR Hugh Craig having granted bond to Dame Jane Morrison, the said Prestongrange's sister, and relict of Sir John Nisbet of Dirleton, for 1843 merks; she, in November 1695, being on deathbed, called for Mr James Kirkton, minister of Edinburgh, his wife, and delivered her Mr Craig's bond in thir terms:—That, on Mr Craig's paying 100 merks to one Gemmil, a kirk-beadle, she should then burn his bond. The Lady dying, Prestongrange, as her executor, pursues