them, in money, black cattle, and other goods, upwards of 6000 merks; which was far more than any thing they could crave for their journey.

This oath coming to be advised, it was ALLEGED for the Lady,—That it sufficiently proved her libel; for it acknowledged he had wrote that letter, and had invited them home on his expenses.

ANSWERED,—The oath must not be divided, but taken complexly as it stands; by which it appears, his sole motive was the recovery of his son's health; and to come alone, (her company being unfit for him in these circumstances:) but this he did not obey for sundry years; and none can imagine his offer was to be perpetual, that he would bear the charges come when ye will. And, *esto* it were so, he has paid double, by remitting money and goods beyond what they could have demanded on their journey's account.

REPLIED,—It is true he did not come home at that precise time, not being then able to travel; and, by posterior letters, Bradisholm still continued to invite his son home; which must be understood with the same quality and offer made in his first letter, it not being expressly retracted. And, as to the other quality of the sums remitted, No regard thereto; because, 1*mo*, Extrinsic, and must be proven *aliunde*, and not by his own oath. 2*do*, Though *debitor non præsumitur donare*, yet this holds not in parents where there is an antecedent *debitum naturale*, to which it can be ascribed. 3*tio*, Bradisholm sent his second son to London, who staid long with his elder brother; and so, the father being bound to aliment him, he must allow him compensation thereon.

DUPLIED,—The qualities adjected to his oath cannot be separate; for it is all one as if he had deponed, I owe my son nothing; for I paid him by money I sent him up: which undoubtedly would have been intrinsic.

The Lords stated the votes distinctly: 1*st*, If their not coming on the first invitation exonered and liberated him of his offer; or if, by the posterior letters, it was still continued? And the Lords found it was still obligatory. Then, 2*do*, Whether the money and goods sent must be imputed to this debt, so as it needs no other probation, but is intrinsic? The Lords found it behoved to be otherwise instructed than by his own oath, and that it was an extrinsic quality. Then the Lords were proceeding, in the *third* place, to modify a sum on account of that journey. Bradisholm offered to prove his advancing the foresaid money *scripto*, and produced bills under his son's hand, acknowledging the receipt thereof: Which allegeance being new, the Lady's procurators did take them up to see. *Vol. II. Page 375.*

1707. *July* 4. CAVERS, Elder, *against* CAVERS, Younger; and DR SINCLAIR and CAVERS Punished for Insolence.

THE Lord Jedburgh having divided and tailyied his estate, part of it to my Lord Lothian's eldest son, and the rest to Cavers's eldest son, and, failing him, to his brother *ordine successivo*:—Cavers, elder, gives in this tailyie to be registrate in the record appointed by the Act of Parliament 1685, anent tailyies, and craves it may be, *per expressum*, burdened with the composition he had paid to the Duke of Douglas, superior, for changing the holding from ward to feu, and with the casualties which had fallen off before. Doctor Sinclair, as factor

for young Cavers, now out of the country, gives in a counter bill, alleging none had interest to crave its registration but himself, and craving it might be given up to him as his own evident, and that he may be decerned to denude, seeing he has taken the new charter in favours of himself, without regard to the terms and irritancies of the tailyie.

The Lords remembered that they had several times registrate tailyies, at the desire and application of the remoter branches and substitutes, though the first institute did not insist; and thought a father, as administrator to his children, might meliorate their condition without their knowledge, by changing the holding; but that his claim for the composition came not in properly to be considered here.

Then the question arose, Whether it should be registrate at the instance of the father, who first applied, for the behoof of all his children, or on the son's bill, who was the first institute, or if it should proceed upon both their applications. And while the Lords are reasoning on this, Cavers and Dr Sinclair, standing together at the bar, fell to hard words: Cavers calling the Doctor an incendiary, who blew the coal betwixt his son and him; and the Doctor calling him a liar,—he, in a passion, told him he was a rascal, villain, and rogue. The Doctor retorting, that none would say so but he that was a rascal himself; whereon Cavers threatened, if he had him elsewhere, he would spit in his face. This rude and disrespectful behaviour being observed by the Lords, and that insolencies of that kind might grow to a greater height, if not punished; and that, in such cases, *principiis obstandum*, and the honour and dignity of the bench, the supreme judicatory of the nation, must be maintained, they removed the parties; and having examined the bystanders, and found the expressions sufficiently proven, and which were not much denied by the parties themselves, they sent them both to prison; but declared that, seeing Cavers was the first provoker, and *causam dedit rixæ*, they would consider what farther censure to inflict upon him.

This proves how necessary the Act 219, Parliament 1594, was, That whoever assaulted another, *pendente lite*, should, *ipso facto*, lose the cause; which exactly quadrates to the genius of the nation, as characterised by Barclay, in his *Icon Animorum*:—*præfervidum Scotorum ingenium*: *quicquid volunt id valde volunt.* Some moved to send them to the Castle; but it was thought that was the prison more proper for the nobility, and the governor might demur: though the Lords may open all the prisons in Scotland in such cases: And, in 1688, the *Laird of Caddel* having affronted the *Lord Boyn*, then a Lord of the Session, they sent him to the Castle. But the Lords this day committed thir two gentlemen to the tolbooth. See the 68th Act 1537, anent such as dishonour the Lords, that they may send them to the Castle of Edinburgh, or any other they please. Some of the Lords were against imprisoning Dr Sinclair, as having got the provocation, in being called an incendiary; and that *jus retortionis* in these verbal injuries is tolerated, as appears from Gayl and Minsinger's Observations. But the Lords found, that the honour and reputation of the bench required they should be both sent to prison; and as what would less widen the breach and alienation of mind that had fallen out bewixt Cavers and his son. The sending the father alone to prison would have irritated more, and made the rupture more incurable and irreconcilable. It was remitted to my Lord Chancellor to take them be-

fore him, and require their parole of honour to keep the peace; and, in case of refusal, to put them under caution of lawburrows, in the terms of law.

The Lords have been in use not only to censure irreverent carriage to the bench, but even injuries done to advocates. I remember *Sir James Keith of Cadham* was fined and imprisoned for threatening and abusing *Sir David Falconer of Newton*, his contrary party's advocate. Then insolent deportment in the Lords' presence deserves a deeper censure and resentment.

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1707. *July* 10. Sir William Menzies *against* Marion Riccart, Spouse to James Clark of Wrights-houses.

Sir William Menzies of Gladstanes being creditor to James Clark of Wrights-houses, and having adjudged, and a process of sale having been raised, he gives in a bill, craving the lands might be sequestrated in a factor's hands during the dependance of the ranking of the creditors. Compearance is made [for] Marion Riccart, spouse to the said James Clark, who alleges, That no sequestration could be granted of her locality, being only the house and yards, and some adjacent tenements and acres; because, when her husband fell into difficulties, she applied to the Privy-Council, showing, that she was provided in a considerable jointure long prior to the creditors' rights, and he having retired out of the country, she and her children could not starve; and therefore craved a small modification of an aliment. Which the Privy-Council, in 1688, accordingly gave her out of the foresaid fund, and which she has peaceably possessed since, and so has more than the benefit of a possessory judgment; and as the Council are in use to grant small aliments to wives in such hard circumstances, so the Lords of Session use not to take away decreets of the Privy-Council.

Answered,—Whatever she might plead if her husband were dead, she can never found upon her liferent-infeftment while he is yet alive; and the Council's decreet is *parte inaudita*, none of the creditors being heard to object against the same, and given in favours of a Papist, who then got whatever they demanded. And though the Session does not meddle with the Privy-Council's decreets, yet where it comes to be questioned, in a competition of creditors, it becomes a civil right, and necessarily falls under their cognizance. And a precarious aliment can never give the benefit of a possessory judgment, though clad with never so long possession: and there was neither law nor justice in giving her the aliment, her husband being divested, long before that time, of the estate, by adjudications led against him; and she has had benefit enough to have enjoyed it these nineteen years unquarrelled. And he repeats his reduction on that head, That her husband was bankrupt before the aliment was settled on her, and was denuded by his adjudication, and those of others, and so can never compete with him.

Replied,—That whatever his reduction might operate, if they were proceeding in the ranking, yet here the question being only anent the sequestration, and if it should extend to the lands and houses she is in possession of, it can never be received summarily to dispossess her *hoc ordine*, but must be reserved to the competition of the creditors, to be discussed there.

The Lords refused to take in Sir William Menzies his reduction *incidenter*