

2do, If they were pursuing for penalties or seizures of the ale, such penal actions might, indeed, prescribe within three months; but this pursuit is merely *rei persecutoria*, for the single duty of two pennies per pint; and they have so many ways of stealing it in to the town, that there is no possibility of watching them; so the only remedy is by oath. And the Acts of Parliament cited, both Scots and English, relate only to concealments and embezzlements, and the fines thereby incurred; which they are not insisting for.

The Lords were sensible that this was a very hard and unequal way of trial; for, though they could not quarter, yet they made it effectual by one of the bailies giving a decret, and immediately pointing the poor brewer's house for it. Yet they thought *egebat constitutione imperiali*; and therefore repelled his defence founded on the three months' prescription, and ordained him to depone; the Lords finding they could not remedy it, they being only interpreters and appliers of the law, and not the legislators. *Vol. II. Page 474.*

1708. December 24. CALDWELL'S RELICT *against* CAPTAIN DUNBRAIKEN.

THE relict of Caldwell pursues Captain Dunbraiken, in the Town-guard, for payment of several particular sums libelled against him, and referred to oath: And a day being taken by his advocate to produce him to depone, the term is circumduced against him, and the decret extracted: Whereon he gives in a SUSPENSION, on thir reasons,---That he never heard of the cause, and was at London the time of the circumduction, as a testificate and declaration, given in by him, bears: and, looking now on the libel, he finds a good part of the account is for a debt owing by Alexander Henderson, wherein he has no manner of concern, save that he married his widow: and that the decret is stolen out against him in the crowd of many other debtors, there being eight called besides himself, expressly contrary to the regulations discharging any more but six to be put in one summons.

ANSWERED,---She oppones her decret *in foro*, where a day is taken to produce him; so that all the defences now proponed are competent and omitted, so not receivable by the Act of Parl. 1672. And his testificate bears, he was at London in June, whereas this circumduction was in February, when he was within Scotland; and if such sham excuses were once allowed, no decret on circumduction would stand fast. And, though it was a good dilator that more than six were accumulated in one summons, yet, not being proponed, it is plainly passed from; for, *quilibet potest renunciare favori pro se introducto*.

The Lords thought a decret, where no defence was proponed against the debt, but only a day at random taken, was the slenderest of all decreets and easiest loosed, where there was no other probation but by oath. Therefore they reponed the Captain; but modified ten dollars to be immediately paid to the charger for the expenses he had put her to; and though a part of the debt was his wife's former husband's, yet the pursuit might be just if she represented him by any passive title. *Vol. II. Page 475.*