nor did we think that the rate at which the pursuer sold the wheat, or the damage he paid the Baxters, could be the rule. But we found (which will come to much the same) the pursuer entitled to the difference betwixt the price he was to have paid Bruxie, and the current price at Bo-ness, when Drummond's ship arrived.

## No. 3. 1753, Dec. 14. ELSPETH STEWART *against* AARON GRANT.

AARON GRANT had some cattle stolen from him, for which he sued this woman's husband, called Stewart, and another Stewart, his brother-in-law, criminally, before the Sheriff of Banff. The brother-in-law was by the jury found guilty of outhounding the thieves; but the pursuer's husband was acquitted, that is, the libel found not proved, in 1748. In 1751 her husband pursued him in this Court for damages and expenses, by defaming him and by his imprisonment before raising the criminal libel, and expenses of the trial. Lord Kilkerran allowed a proof before answer of all facts. After the pursuer's death, his widow, (now pursuer) on a decreet-dative carried on the process, and brought a strong proof for her husband's character, but these were facts which seemed to several of us a very convincing proof of actual theft committed by him of one cow from another person, whereof the value was paid the owner, and of his haunting with thieves. When the proof came to be advised, there were two questions, 1st, touching the competency of this process, when no expenses had been given or demanded in the inferior Court; and next, if there was sufficient cause proved to justify this defender from having been a malicious prosecutor. As to the first, the Court agreed that the process was competent as to damages before the trial, because these could only be properly awarded in the Court below; but as to expenses of that trial, the Court was divided; some thought that these expenses were accessory to that process, and could not be demanded by a new process if not sought there, and sundry statutes were quoted, which are marked on the printed state; and we generally agreed that such was the law in expenses of civil processes; and I could see no difference, nor reason of difference, betwixt them and criminal trials;—and upon the vote, it carried that this process for these expenses was not competent.—*Quibusdam renit.* particularly Drummore. Afterwards we found the pursuer entitled to damages, and repelled the defence.—*Renit.* Justice-Clerk, (in the chair) Kames, Woodhall, *et me.*

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# DEATH-BED.

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## No. 2. 1733, Dec. 20. CHRISTIESON *against* KERR.

THE Lords thought the setting a three 19 years tack not an act of ordinary administration, and therefore sustained a reduction *ex capite lecti* of such a tack. There were some other circumstances to prove the lesion, but this was the chief. The judgment was unanimous.