

probatioun, ressavit thairupon. *Item*, Gif he has anis geven his aith upoh the libel, he may not be compellit to give the samin agane at ony time thairefter in the samin instance.

No 31.

*Fol. Dic. v. 2. p. 12. Balfour, (OATH.) No 7. p. 360.*

1558. February 28. LAIRD OF DRUMQUHASSIL *against* LAIRD OF GLENHEGIES.

No 32.

THE defender aucht and sould, quhen he is requirit be the Judge to give his aith *de calumnia*, sweir upon the hail libel, that he has just cause to deny the samin as it is intentit; and is not haldin of the law to give his aith upon everie particular heid of the samin.

*Fol. Dic. v. 2. p. 12. Balfour, (OATH.) No 5. p. 360.*

1579. February 6. CUNNINGHAM *against* The LAIRD OF KERSE.

No 33.

THERE was a process advised betwixt James Cunningham and the Laird of Kerse. The Laird of Kerse being pursued for spoliation of certain corns, the witnesses proved nothing, or very little, and the most was *deponebant hoc spolium fuisse commissum ex aliorum relocatione sed non interfuerunt facto*; and the Laird of Kerse was summoned to give his oath *de calumnia*, and was holden *pro confesso* without sufficient probation of witnesses. The question was, whether the said Laird holden *pro confesso* without sufficient probation by witnesses, was it sufficient to give *condemnator* of the spuilzie against him? The matter being disputed among the LORDS, they found, by sentence definitive, that the refusal to give his oath *de calumnia* was sufficient cause to give *condemnator*, although the matter was no otherwise proven.

*Fol. Dic. v. 2. p. 13. Colvil, MS. p. 277.*

1582. January. KER *against* KER.

THERE was a process advised betwixt Ker of Mersington, and Ker of the Shaw; at the advising of which; the same being concerning the non-entries of certain lands, and the sowing of the lands during the alleged space of the non-entries being admitted to probation, because Ker of Mersington, who was the pursuer and donatar to the non-entries, was suspected to have subtracted some of the evidents; some of the LORDS, as also the party's self, desired that he should give his oath *de calumnia*, if he had just cause to deny the having or subtracting of the evidents, and writs which was laid to his charge. It was

No 34.

An oath of calumny was ordained to be given, even after the cause was concluded, and all further probation renounced.

No 34.

*answered* by him, and his procurator; That the state of the process being concluded in the cause, he could not be ordained to give his oath; for, after the cause is concluded, and farther probation renounced, the parties can never thereafter, in any sort, be heard again.—THE LORDS, nevertheless, and notwithstanding of his allegiance, ordained the party to give his oath *de calumnia, et hoc juxta ca 1. De juramento calumnie in C. cujus ea verba sunt, 'si de calumnia seu de veritate dicend. in primo litis exordio non juret (ut debet) poterit postmodum in qualibet parte litis jurare, cum hujusmodi juramenta presitari ab initio de substantia ordinis judicarii non existit.'*

*Fol. Dic. v. 2. p. 12. Colvil, MS. p. 351.*

No 35.

1582. May. LAIRD OF GADZEARD *against* SHERIFF OF AYR.

THE Laird of Gadzeard in a libel pursued the young Sheriff of Ayr, for the spoliation of certain oxen, and for the harling and goring of certain kye, and for the demolishing and casting down of a mill. There being sundry heads in the summons, Gadzeard desired the Sheriff to give his oath *de calumnia* particularly upon every head of the libel. It was *answered* by the Sheriff, That he ought not to give his oath, but generally upon the whole summons; which was found by interlocutor of the Lords.

*Fol. Dic. v. 1. p. 12. Colvil, MS. p. 327.*

1583. April. ——— *against* MASTER OF GRAY.

No 36.

In a cause of deforcement, though only pursued *ad civilem effectum*, it was found that the defender was not obliged to give his oath of calumny *ne detur occasio perjurio*.

THE Master of Gray being pursued for the deforcing of a messenger, and summoned to give his oath *de calumnia* in the said cause, it was *alleged* by his advocate, That he ought not to give his oath, because the deforcing of an officer was an action of that nature and quality, that would bring on the like pain as if it had been altogether criminal, and was of itself criminal, albeit it was civilly pursued before the LORDS, and the consequence thereof was the tinsel of his hail goods and gear; and in criminal causes, after the practise of the realm, *juramentum calumnie*, is not sought, *ne detur occasio perjurii*; for a man, for safety of his hail gear and life, will swear, peradventure otherwise than he would do in other causes; *quia unicuique licet sanguinem suum redimere, D. De bonis eorum qui ante sententiam mortem, &c. et in L. 18. C. De transactionibus; in ibidem Doctores; et canonistæ noluerunt clericum accusatum de cohabitatione cum concubina jurare; rationem ponit gloss. quod non debet compelli aliquis de quo præsumptio est in contrarium, quia nemini parandus est laqueus.* It was *reasoned, ex altera parte inter Dominos*, That there was in this cause no criminal pursuit or question of life, *aut pœna sanguinis*, but the