

1694. *December 8.* DAVID EDGAR *against* CARNEGIE of BALNAMOON.

THE Lords advised the first article of falsehood in the improbation of a discharge pursued by David Edgar against Carnegie of Balnamoon, That Sym, the writer of it, was there designed, in 1658, servitor to Sir John Carnegie of Balnamoon; whereas they had adduced probation that he was then Commissary Nicolson's man, and was then come to Balnamoon. But a mutual probation being granted, the Lords found it more pregnant and positive that he was then Balnamoon's servant.

The next was, *comparatione literarum* of other subscriptions of Sym and Hercules Cramond, the granter of the discharge. But the Lords found, though there was some diversity, yet it is so lubrick a trial, that, *per se*, it is not illative of falsehood; seeing men's hand-writ will vary in a short time, even by the change of a pen, or the temper of the body, or through carelessness and inadvertency. The Lords sustained the discharge, and assoilyed from the improbation.

Some witnesses' testimonies, that had been adduced by the pursuer, were amissing; but as they were related, by their informations, it was thought they would not alter the case.

Then they pleaded the writ was null, by the 175th act, 1593; because the writer of it was not right designed. The Lords found this was not the case of the Act of Parliament. *Vol. I. Page 649.*

1694. *December 11.* JAMES SCOT of BENHOLM *against* COUTS, FERRIER, &c.

JAMES Scot of Benholm, against Coutts, Ferrier, and other merchants in Montrose, anent a bargain of victual. The price of the boll of bear in the contract was £5 : 3 : 4 Scots, but with this quality, that, being to be transported to Holland before the 1st of April, if they got more than £21 Flemish for the last of it, then he was to get 10s. Scots more on the boll; and, if the market fell low, so as they got less, he was to suffer the like abatement: *ita est* it never arrived, but the ship was cast away, (though the merchants had insured the cargo;) so they suspended, and craved an ease; for they passed from the first reason, that the victual should perish to him, and be on his risk; for the Lords found the merchants were proprietors of it. As to the defalcation, they ANSWERED,—That it was not provided for by the contract; seeing the case there mentioned was the arrival of the ship, which never existed. Yet the Lords thought this fortuitous event included therein; for it were an odd thing to give them abatement as the markets ruled, if the ship had arrived, and to give them none if it perished; especially seeing it bore "wind and weather serving;" and that Benholm, the charger, by a letter, seemed to undertake the hazard. Therefore the Lords directed a commission to Holland, to try what was the greatest price Scots bear then gave, that his might be regulated thereby, either as to augmentation or diminution.

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