

and the pursuivants, his brethren, and decerned to pay £1000 Scots to Geils Douglas, relict of James Hamilton, under-clerk, for suffering Mr George Campbell to escape, though he had accepted to execute a caption at her instance against him, on the pretence he would not break up Mr William Thomson, writer to the signet, his chamber-door, where he then lay hid ;---he raised suspension and reduction of this decret on sundry reasons ;---the first whereof was, That, by the 46th Act of Parliament, 1587, the Lyon was only judge competent to messengers' malversations in their office, but not as to the civil effect of the party's damages ; as was decided, 13th February 1668, *Grierson against MacIlroy*.

ANSWERED, 1mo.---By the 21st Act, 1672, the Lyon's jurisdiction was now extended : Besides, John Hog did here prorogate, and acknowledge the Court, by compearing and proponing other defences than a declinature.

REPLIED,---He did advocate the cause upon incompetency ; and, it being remitted by the Lords, he behoved to enter *in causa* ; and yet all he proponed was only against the malversation.

The Lords remitted to Lord Phesdo, who heard the cause, to call for the advocacy and remit, and try the grounds thereof ; and, if the whole cause was remitted ; and if he defended only against the malversation, and not against the party's damages, except in so far as the same was a consequence of his prevarication ; that, from these circumstances, it might appear whether it was *a non suo iudice*, or if he had submitted to and homologated the Court.

*Vol. I. Page 723.*

1697. *January 20.*---Phesdo reported Mrs Hamilton against John Hog, messenger, mentioned 20th June 1696. The Lords now repelled the reason of reduction upon incompetency, in regard he had not declined the Lyon's jurisdiction in any part of the process ; and the very advocacy he raised did not run upon incompetency, but iniquity. But the Lords sustained his other reasons of reduction as sufficiently relevant to turn the Lyon's decret into a libel, *viz.* That sundry of his bills and defences were not inserted in the decret, and that it was without probation of the fact of his suffering the rebel to escape ; for, though it was answered, That he all along in his defences acknowledged the same, yet, seeing this was only drawn by inferences, and not by a direct confession, therefore the Lords reponed him so far as yet to oblige the pursuer to prove her libel.

It was moved, Whether decreets *in foro* of inferior courts, being opened on a nullity, had the privilege introduced by the late regulations in favours of the decreets of Session, that it shall operate no farther but only to redress that nullity, and all the rest of the interlocutors to stand : It was thought they had not ; ---but this point was not decided.

*Vol. I. Page 758.*

---

1697. *January 26.* ROBERT CAIRNS *against* PATRICK THOMSON.

MERSINGTON reported Robert Cairns, wright, against Patrick Thomson, late deacon of that trade : it being a suspension of a decret of the Commissaries of Edinburgh, decerning Patrick to crave Robert Cairns's pardon in a public meeting of the trades in the Magdalen Chapel, in regard he had there publicly called him a rabler and a robber ; and likewise decerned him, beside the *palinodia* and recantation, to pay £100 of expenses. The reasons were,

That what he said was after provocation,---Cairns having called him unmannerly, and since that time having given him atrocious language ;---in which case lawyers say, That such injuries and offences, as well as the penalties following thereon, *invicem compensantur*. 2do. They were not uttered *animo et libidine injuriandi*, but *ex justo dolore* ;---and, l. 3, sect. 1, *D. de Injur. Provocatus ad iram non proprie committit injuriam*. 3tio. The calling one a rabler is of late but reputed a sport ; *et qui per jocos quid facit injuriarum non tenetur*. See *Decius ad l. 48, D. de Reg. Jur.* Besides, he immediately retracted what he had said ; and *Tiraquil. de Pænis Temperandis, cas. 28 et 60. numb. 2*, allows three days for such retractations.

Cairns, the charger, opposed the probation in his decret, which evidently proved *animum injuriandi* on his part, and took off these topics of *jocus, ira, et justus dolor*.

The Lords adhered to the Commissaries' decret, and found the letters orderly proceeded ; but, finding there was much pique and humour on both sides, they ordered the charger to give in twenty merks of his expenses to the poor.

*Vol. I. Page 760.*

1697. *January 26.* SCOT, Relict of ELLIOT of GRANGE, against AIRLY of BLACKHILL.

MERSINGTON reported Scot, relict of Elliot of Grange, and Airly of Blackhill, ---being a competition for preference. The relict claimed both the liferent of 600 merks *per annum*, and likewise of a house, orchard, and acres in Jedburgh. The creditor contended, By the contract of marriage thir were not separate provisions ; but the last was only in farther implement and security of the first *pro tanto* ; for it run in thir terms after the obligation for the 600 merks by year :---“ And farther, in implement, and for the fulfilling of his part, to dispone to her the foresaid house, &c. but during her viduity only.”---Which Blackhill interpreted to be in implement of the first part of the contract, and for her better security.

ANSWERED for the widow, It was a clear addition over and above the former, it having a distinct period, *viz.* her viduity, which the first has not.

The Lords were divided in this, as being dubious, and a *casus arbitrarius de conjecturata mente defuncti*. But the plurality found it an addition to her jointure, and not a security given her only *pro tanto*. *Vol. I. Page 760.*

1697. *January 27.* DICK and CHRISTIE against JOHN SAWYERS.

PHILIPHAUGH reported Dick and Christie, in Stirling, against John Sawyers, factor for the creditors of Bruce of Newton, upon a contract, by which he had sold to them 500 bolls of bear, crop 1695. His reason of suspension was,---Before I could deliver and fulfil my bargain, I was turned out of my factory by the Lords, on a bill given in by some of the creditors ; and so, my title and right to uplift failing, I cannot be liable, it being *factum impræstabile* to me.

ANSWERED, 1mo.---You have obliged yourself in absolute warrandice to us,