

delinquent be not punished answerable to the offence and wrong sustained, then the party may complain to get him more condignly punished.

The Lords repelled the defences, in respect of the answers; and found, notwithstanding it was not *de recenti*, and that it was judged by the bailies, yet neither of these took away his private interest to complain and seek redress.

*Vol. II. Page 29.*

1698. *December 29.* SIR JOHN SHAW of GREENOCK *against* CRAWFURD of CARSEBURN.

SIR John Shaw of Greenock pursues Crawford of Carseburn upon the 19th Act of Parliament 1617, to demolish his dovecote, because he has not ten chalders of victual lying within two miles thereof, as the said Act requires. And a probation having been granted, before answer, to try what kind of dovecote this was, and what rent he had adjacent thereto, and the damages done to Greenock's tenants' corn; and the same coming to be advised this day, it appeared this dovecote was built above a stable, and consisted of 218 holes, besides sundry closed up a little before; and that he had about £1100 Scots of rent there.

ANSWERED for Greenock,—It appeared, by the probation, there was only six chalders of victual of arable ground, and that all the rest of the rents were made up of salt-pans, house-mails, and feu-duties, which could be no sustenance for doves to live on, and did not answer the design of the Act of Parliament, that doves should not oppress other men's corns.

REPLIED,—This cannot be called properly a dove-cote, such as the Act prohibits and condemns, but only a pigeon-house; and, by improvements, he has made his lands now worth £1000 Scots by year, besides the other extrinsic subjects of house-rent, &c.

The Lords considered the process as *in amukationem vicini*, and that few dovecotes had been demolished on this Act, though there be many in some burghs of regalities and baronies, such as Dalkeith, &c. where the proprietor has but little rent adjacent; and yet the Act was reasonable, and could not be said to be in desuetude; therefore they allowed Carseburn a further probation, that he had land rent there, equivalent to the Act of Parliament, before they would decern against him. See Craig *Feudor.* p. 191, who tells, by the customs of Normandy, a land-interest is required in the owner of cunnygars as well as dovecotes, seeing cunnies make as much destruction and waste upon the neighbouring corns, if not more than doves.

*Vol. II. Page 30.*

1699. *January 3.* SIR JOHN SHAW of GREENOCK *against* The CREDITORS of DAVID BRUCE of CLACKMANNAN.

MERSINGTON reported Sir John Shaw of Greenock against the Creditors of David Bruce of Clackmannan, being a reduction and improbation of the rights

of Shaw of Sauchie's estate standing in Clackmannan's person, upon the head of the interdiction.

ALLEGED, *1mo.*---I cannot take a day to produce, because my authors bound in warrandice are not called, *viz.* Kennoway and sundry others. *2do.* I am not obliged to produce any real rights to you, because your libelled summons is only founded on an adjudication.

ANSWERED to the *first*,---You condescending on the authors, I will cite them to the same term *cum processu*. To the *second*,---My charter and seasine is given out, though not libelled on; which is sufficient to compel you to produce your infeftments also.

REPLIED,---Though citing *cum processu* be allowed in other cases, yet it ought not here, because you narrate the progress; and so, knowing them, you should have cited them. To the *second*,---The charter and seasine is posterior in date to the raising and executing the summons, and so is *filius ante patrem*.

DUPLIED,---*Esto* I know the authors, yet, being dead, I can give my oath of calumny I know neither their representatives nor where they live. To the *second*,---The real right must be drawn back to support the summons, even as one is permitted to confirm before extract.

The Lords repelled the two dilator defences, and ordained them either to take a term, or then certification to pass.

*Vol. II. Page 30.*

1699. *January 5.* BRISBANE of BISHOPTON *against* ANDREW SCOT.

SHAW of Bargarran, and Brisbane of Bishopton, being debtors by bond in 1000 merks to John Scot, merchant in Glasgow, and, failing of him by decease, to Andrew Scot, his brother; and the said John being three years absent out of the kingdom, a report came to Glasgow that he was dead; whereon Andrew adduced some witnesses, before the bailies there, of his being habit and repute dead, and thereon registrates the bond as substitute; and, taking out a caption against Bishopton, apprehends him: where he is kept a week or two in the jailer of the tolbooth's house, capitulating, during which time John Scot returns; whereupon he is liberated, and afterwards transacts the debt with the said John, and pursues Andrew for wrongous imprisonment, and obtains a decret against him for £246 for his damage and expense, and £100 Scots of fine to the fiscal.

This decret was suspended on thir reasons:---*1mo.* He was *in bona fide* to believe the debt was his own, having received letters of his brother's death; and so his caption was warrantable, seeing Bargarran was *lapsus*, and Bishopton, a liferenter, *vergens ad inopiam*. *2do.* Bishopton's legal method was to have suspended on this reason,---that the creditor in the bond was yet presumed to be alive *nisi probetur mortuus*. *3tio.* The bailie was precipitant and unjust in taking Bishopton's oath on so absurd and exorbitant accounts for detention for a week or two; and there was neither *dolus* nor *lata culpa* on Andrew's part, but a pure mistake.

ANSWERED for Bishopton,---He was not obliged to suspend a charge so covetous and unjust, where one would anticipate his succession before it fell due; and he offered to pay, Andrew giving him warrandice at his brother's hands if