

tion or discharge, though personal rights are so. *2do*, Sir James craved preference to Caldton, on this ground, That, before Inverleith's disposition to him, Sir James had intented a process against Inverleith, to denude of the said right, in terms of his father's conveyance of it to his mother; and, seeing *alienatio rei litigiosæ prohibetur, pendente illa lite nihil erat innovandum*.

ANSWERED,—Sir James Rothead's conveyance to his lady being only general and personal, any process against Inverleith, raised thereon, to implement and fulfil that personal obligation, can never, under the pretence of litigiousity, compete with Caldton's real right, now completed by infestment.

The Lords having, in answer to the *first*, ordained Plenderleith, the factor, to be examined from whom he got the papers, and he declining to tell the person who brought them to him, they called him into their own presence; and, having examined him, he declared that Inverleith had sent them to him by one Wilson, whom he had never seen before, but thought he was David Lauder the writer's man, and that the factory was blank; and, before he would suffer his name to be filled up therein, he had taken a bond of warrandice from Inverleith; and which being produced, it bore that unusual clause to secure him, in case it were quarrelled in a reduction and improbation. And Inverleith being likewise sent for, and interrogated, he could not condescend to the person's name that brought Caldton's papers, but craved a time to recollect his memory; and declared he had letters of Caldton's, which he had received from him, lying at home in his cabinet, which the Lords ordained him to produce in the afternoon. And the young man Wilson being called for, it was found he was not the person who brought the factory to Mr Plenderleith; so, from their variation, there arose a suspicion against the verity of the factory: and, till farther inquiry, the Lords committed Mr Plenderleith to close prison, as he who had used a factory suspected of falsehood, and who gave no sufficient account how he received it and the rest of the papers.

The Lords having considered what Mr Plenderleith's malversation in this affair deserved, they fined him in 500 merks, and deprived him from being a writer to the signet.

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1702. July 21. ELIZABETH FULLARTON *against* HUGH WALLACE of INGLISTON.

ELIZABETH Fullarton, Lady Cairnhill, being fined in 1682, in £100 sterling, for conventicles and other church irregularities, she grants bond to one Ogilvie, the procurator-fiscal, with her brother Dreghorn, as cautioner for £50 sterling of it, and gets a discharge of the date of the bond: and, thereafter, pays in the said £50 to Hugh Wallace of Ingliston, then cash-keeper, and obtains his discharge of the bond; and now pursues him for repetition of the said sum, on the 25th Act of Parliament 1695, ordaining all these fines to be restored.

ALLEGED for Ingliston; *1mo*, That the bond bears borrowed money, and so *non constat* it was for a fine; *2do*, The said Act founds only repetition of such fines as were paid to donatars, but here there was no donatar; *3tio*, Ingliston counted for all these fines to the Treasury, and obtained their act of exoneration and discharge.

ANSWERED,—To the *first*, Though the bond bear no relation to a fine, yet it

is obvious that was the true cause of the bond ; for the discharge of the fine is of the same individual date with the bond, and the same writer and witnesses, so they were the mutual causes the one of the other. As to the *second*, the Act of Parliament is opposed, not only mentioning donatars, but also other intrmitters ; which will comprehend this defender. To the *third*, A general discharge will not exoner, unless the special account bear this fine among the rest.

The Lords repelled the first two defences, and found the bond was for the fine, and that he was in the case of the Act of Parliament, though he was not a donatar ; but as to the third, before answer, ordained Ingliston, the defender, to produce his discharge, or any other evidences he would found on to instruct his payment of this fine to the Exchequer ; for, if he had truly counted for it, and paid it in, the Lords thought there was no reason to make him liable to repeat, give it back, or pay it over again.

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1702. *July 23.* The MINISTER and HERITORS of ASHKIRK *against* SIR GILBERT ELLIOT of HEADSHAW.

SIR Gilbert Elliot of Headshaw, Advocate, against Mr. Gordon, minister at Ashkirk, and the other heritors.

Sir Gilbert having obtained from K. William the right of patronage of that church, which conveys the right to the tithes over and above the minister's stipend, there is a reduction of the said gift of patronage raised by the minister and some of the heritors, on this reason, That it was contrary to the 126th Act, Parl. 1593, declaring all gifts of patronage null, unless the consent of the beneficed person in possession be had and obtained thereto ; which was not pretended in this case. At calling, it was craved, that Sir Gilbert, defender, might take a term in the reduction and improbation to produce the King's gift called for.

ALLEGED,---That I cannot be obliged to produce, neither to you, the minister, nor to the heritors, because ye have no title nor interest to crave the same : *1mo*, Not the minister, because he is no beneficed person, but only a stipendiary. *2do*, That Act 1593 is rescinded, and on the matter taken away by the 23d Act 1690 and the 26th Act 1693, where they who were formerly titulars and parsons are now turned to stipendiaries : but the truth is, the minister of Askirk is a mere stipendiary, as appears by his decreet of locality produced. *2do*, As the minister has no interest to force production, so neither have the Heritors, because they produce no right nor infestment of the patronage in controversy, as the defender does ; neither needs the gifting of patronages any previous dissolution, or subsequent ratification of Parliament, they not being annexed to the Crown, nor any Act impeding his Majesty's interposing of patrons betwixt the heritors and himself,—he coming to be patron by the abolition of Episcopacy, and succeeding in their place : neither does the 2d Act of Parliament 1606 take any room here.

The Lords found the pursuers had no interest ; and, therefore, Sir Gilbert was not bound to take a term in the reduction to produce his gift of patronage. The ministers and heritors protested for remedy of law to the Parliament.

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