1704. *December* 12. JAMES SCOT *against* ALEXANDER BELCHES.

JAMES Scot, sheriff-clerk of Edinburgh, being accessory to the slaughter of one David Alexander, betwixt Leith and Edinburgh, in 1696, and having fled, he was denounced fugitive in the criminal court, and his place gifted to Alexander Belches; at whose admission his brother John Scot compears, and protests against it; taking instruments in the hands of Robert Thomson, clerk-depute, and of John Inglis, notary, whom he brought along with him, conform to the 81st Act Parliament 1540. And the said James having, on letters of slaynes and an assithment, obtained a remission of the crime, and relaxed himself from the fugitation, he intents a declarator against the said Alexander Belches, for being reponed to his office of sheriff-clerk, and for having all the profits and emoluments of the office refunded to him, since the date of his protest: and, for the better founding his process, he gives in a bill, craving Mr Inglis and Thomson may be ordained, conform to the foresaid 81st Act, to give him forth the extract of his instrument taken in their hands, against the said Alexander Belches' illegal and unwarrantable admission into his office.

To which it was ANSWERED by Robert Thomson,—That he acknowledges there was such an instrument taken, and whereof he has a minute standing in the sheriff-register; and he is willing to give it precisely in the terms as it there stands, but Mr Scott would have him adject other things thereto; and as to Mr Inglis, it is so long ago, that he has little or no memory thereof, and of such instruments he kept no protocol; and if he should now extend it, the witnesses would not sign with him; and it should have been required sooner.

The Lords found Robert Thomson was not obliged to give out the instrument in other terms than as it stands recorded in the sheriff-court books as its warrant, unless they would offer to prove, by his oath, that it was disconform to the *res vere gesta*, and what was *actum et tractatum* at the time.

When this declarator comes in, several questions will occur; as, first, Whether the office of sheriff-clerk can fall under a single escheat? Where the horning proceeds for a civil cause of debt, it has been found the office is not thereby lost or extinct, 6*th February* 1666, *Archbishop of Glasgow* against *the Commissary-clerk of Dumfries;* but where the denunciation is for a criminal cause and capital crime, now acknowledged by taking the remission, there may be more debate. 2*do*, *Esto* he had access to his place *pro futuro*, it may be contended, that Mr Belches was *in bona fide* for the bygone profits of the place, notwithstanding the protestation against his entry; and that it was so found by the Lords, 13*th February* 1624, *Thomson* against *Law*, marked by Dury; where the Lords assoilyied from the intermediate fruits, though the gift was reduced, as *bona fide percepti et consumpti*, in respect of the other's silence all that time.

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1704. *December* 16. RORY MACKENZIE *against* The EARL of MARCHMONT.

MR Rory Mackenzie, secretary to the African company, raises a process for wrongous imprisonment against the Earl of Marchmont, late Lord Chancellor,

as subscriber of the warrant for his commitment, Sir Gilbert Elliot, clerk, for giving out the extract, and Sir Patrick Johnston, then provost, for ordering the keepers of the tolbooth to receive him; libelling, That, on the 20th of March 1701, the Privy Council having apprehended Thomson and Auchmuty for printing a copperplate reflecting on some of the members of Parliament, and suspecting the said Mr Rory accessory thereto, they committed him to close prison; and he having applied by bill the next day, and offered bail to appear and abide his trial, the same was laid aside, and he kept in prison for twelve days thereafter; contrary to the express tenour of that excellent law of *Habeas Corpus*, for personal liberty, in 1701, requiring a written subscribed information to precede the commitment, and the mittimus to bear the special cause; whereas here there was no previous subscribed information, and the warrant was made general, for wicked and pernicious practices against the government; and therefore craved they might be condemned in £2000 of fine, imposed by the Act, for imprisoning an unlanded gentleman, and for £33 half a merk for each day he was detained after his offering bail; and to be incapable of all public trust.

ALLEGED, 1*mo*,—No process against Marchmont; because, 1*mo*, All parties concerned and having interest are not called, *viz.* the members of Privy Council met at that sederunt, where his imprisonment was ordered; 2*do*, What he did was as president of the court, *et ratione officii*, to sign their orders; and so cannot be personally liable. And as for Sir Gilbert Elliot, he alleged he was but a servant, and bound to obey their orders, and not to dispute them; and there is no clause of the Act comprehending him.

ANSWERED,—The Earl being convened on a delinquency, and for breach and violation of a law, all the actors were liable *in solidum*; and the pursuer was not to inquire who were present at the quorum, but is only concerned to notice who signed his unjust commitment. And as to Sir Gilbert, the Act bears not only the judge and officer of the law to be liable in the punishment, but also all others subscribing the same; under which class he must certainly fall: and there was reason to make it so, that the superior judges, having power to imprison, might meet with no obedience from the subordinate officers, who finding themselves liable, and that the command given would not excuse them, it was the most effectual check could be fallen on to prevent such oppression by wrongous imprisonment, else this just and necessary Act may be easily eluded and frustrated.

Mr Rory gave in a declinature against my Lord Cesnock, who declined himself in his father's cause; but it was contended, he might sit and vote in so far as concerned Sir Gilbert's part of the process. Others said there was a *contingentia causæ* in both. Then he declined Lauderdale, Halcraig, and Crossrigg, as being three of the sederunt present when he was sent to prison.

The Lords, before answer, ordained an extract of that day's sederunt to be produced, and granted diligence against the clerk of the council for that effect. Which being signified to the Lords of Secret Council, they conceived this to be an encroachment upon them, a sovereign and coördinate court, nowise subject to the Session; and therefore discharged their clerk to give out any such extract. And some of them said, they were not to answer for their actings to any but the Queen and Parliament; and if any judged themselves lesed by their wrongous imprisoning them, they ought to seek redress only before themselves. Others thought this a bad remedy, and that the Act of Parliament was made to prevent the arbitrary power of the Council; and, if these might not be pursued before the Ses-

sion, then the valuable Act might be little worth. Some observed, that the Parliament where that Act was made, rising on the 2d of February, and the Acts not being published and proclaimed for some days after, there were scarce forty days run when his commitment was ordered on the 20th of March, and so the Act did not oblige nor bind. But the interval of time relates to the other lieges, but not to the makers of the Act, who can never pretend ignorance.

It was alleged that the crime specified in this mittimus being capital, his offering of bail was justly refused, it not being a bailable crime. Others thought the warrant too general, for pernicious practices, and that they should condescend more specially, else the offer of bail may be always eluded by inserting a capital crime. And as he was found altogether innocent, and the suspicion against him groundless, so the Lords of Justiciary, on the trial of Thomson and Auchmuty, the principal actors, found them only liable to an arbitrary punishment, and that the crime was nowise in its nature capital. *Vol. II. Page 247.*

1704. *December* 19. GRANT of CORRIEMONY *against* LAUCHLAN MACINTOSH of that ilk.

Macintosh granted a blank bond, for 1960 merks, to Lieutenant-colonel Grant, and he fills up Robert Grant his natural son's name therein; who charging, the other suspends on compensation for a liquid debt due by the Lieutenant-colonel to him. ANSWERED,—This is not *inter easdem personas*, the charger being the son, and the compensation craved being for a debt of the father's. And on this the decreet goes out against Macintosh, on the last of July 1687. He now raises reduction and declarator against them, wherein he offers to prove his ground of compensation to be clearly *inter eosdem*, because he produces a back-bond under Robert's hand, acknowledging his name was only inserted and borrowed for the Lieutenant-colonel his father's behoof, to whom the bond was delivered blank; and this being *noviter veniens ad notitiam*, and not *dolose* omitted by him, but has been deceived by the Lieutenant-colonel's stratagem, therefore it is yet receivable.

ANSWERED,—He oppones his decreet of suspension *in foro*, where it is either competent and omitted, or proponed and repelled. Likeas compensation must be instantly verified, and cannot be proponed in the second instance; as appears by the 141st Act, Parliament 1652; yea farther, the Lords found a decreet in absence did exclude compensation, *25th July* 1676, *Wright* against *Shiels*.

REPLIED,—That Act of Parliament is no more but the ordinary exception of competent and omitted, which takes not place in decreets of suspension, as Stair observes, *lib.* 4, *tit.* 1; and the Lords, on the *18th of June* 1662, *Earl of Marishal* against *Brae*, found the said Act of Parliament did not extend to decreets of inferior courts, because competent and omitted is not receivable against such decreets; and Haddington, *voce Compensation*, in the case of *Ogilvy and Napier*, *20th November* 1610, says, the Lords thought the said Act of Parliament was wrong printed, or wrong understood, seeing compensation may ofttimes be proponed after sentence.