

thereon, and first required Patrick Duncan, messenger in Falkland, and then Andrew Byres, messenger in Coupar, to take him, they refused, at least declined the same, as unwilling to offend their master; whereupon he had taken instruments against them; and, having no other remedy left, gave in a bill to the Lords, representing the foresaid matter of fact, and that it was of dangerous consequence to all the lieges if the execution of justice were this way stopt; therefore craving a summary warrant to cite them, that they and their cautioners may be decerned to pay him his damage, being the sum charged for, because of their contempt and disobedience, and that the Lords may deprive them of their offices for their malversation.

The thing was looked upon as an ill preparative and example; and it being suggested, that, though we deprived, yet he would admit and license them of new; but it was thought he would subject himself to farther censure if he thus attempted to evacuate the Lords' sentence of deprivation. The next inspection that occurred was, How this sentence could be so intimated and published that it might come to the lieges' knowledge, for, without that, they were *in bona fide* to employ them still; and their executions, though deprived, would subsist as valid, being holden and reputed by the law; *Barbarius Philippus, D. de Offic. Prætor.* where a slave being elected prætor, his actions and edicts were sustained *ob bonum publicum*. Some thought the deprivation behoved to be published at the market-cross where they officiate, and likewise recorded in the Lyon's books.

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1705. *January 13.* MACMILLAN and CARSE *against* JOHN MACFARLANE.

At the same time a parallel case, about publications, was decided betwixt John Macfarlane, writer to the signet, and Macmillan and Carse. They pursued him for a debt, and, referring it to oath, during the dependence they raised and executed an inhibition against him, he having deponed *negativè*; and, coming to be advised, he was assoilyied; and, finding the pursuit calumnious, the Lords modified £50 of expenses; but, the inhibition being registrate, for taking off the effect of that, (seeing records may not be vitiated or altered,) it was thought the keeper might be authorised to write on the margin that the party was assoilyied, by a decret of the Lords, from the dependence and ground of the said inhibition. But, seeing they ought to insert nothing but what is proven, therefore it might be likewise fit that the said John Macfarlane should likewise registrate the decret-absolvitor in the said books, though they are not appointed for decreets, but only for seasines and inhibitions.

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1705. *January 16.* LIEUTENANT JOHN CREICHTON *against* The EARL of EGLINGTON.

THE Earl being debtor to Mr Hugh Montgomery, his brother, in the sum of 2000 merks, by bond, in January 1689, Mr Hugh assigns this to John Creich-

ton : who charging the Earl, he SUSPENDS, That he had paid 1800 merks of it ; in so far as his said brother, before the assignation, or at least before the intimation, had drawn a bill upon him for that sum, and which he had accepted and paid.

ANSWERED,—The sum in the bill nowise meets the bond charged on, but relates expressly to a letter of advice ; which letter bears that he had drawn a bill on him for £100 sterling, for which he had his lordship's bond ; and if he made good payment, this should be a discharge to him ; so the bill relates to another bond of £100 sterling, seeing his accepting and paying the bill with that qualified advice clearly acknowledges that the Earl was debtor to his said brother in a separate bond of £100, besides this 2000 merks. Likeas, the bill is before the term of payment of the said 2000 merks bond ; and it is neither probable nor presumable that he would draw a bill to pay before it were due.

REPLIED,—The letter of advice instructed no different debt : For, he that is owing 2000 merks, is certainly owing 1800 merks, the lesser sum being comprehended *sub majore* ; and, though he adds the words, “ for which I have your bond,” that does not necessarily imply a separate debt. And that it shall be held for payment may very well be understood, that he shall allow it in payment *pro tanto* ; and it is impossible for my Lord to prove a negative, that there were no other grounds of debt betwixt them save only this 2000 merks bond.

The Lords thought the presumption lay against the Earl ; but, for clearing the matter, they ordained him, *ex officio*, to give his oath of calumny if he had reason to deny but he was owing 1800 merks to Mr Hugh at the time of the bill, over and above this 2000 merks bond. And, as to the paying before the term, the Lords observed, there was nothing in that argument ; because, though the bill was drawn before the term of payment of that bond, yet it was not made payable till after. Some urged, his oath of calumny would be all one with an oath of verity here, being *in facto proprio* ; but the case not being recent, but sixteen years ago, the Lords thought this expiscation might be tried before answer.

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1705. February 3. JAMES SIMPSON *against* KATHARINE KYLLE and HUSBAND.

I REPORTED James Simpson, merchant in Edinburgh, against Katharine Kyle, and John Gordon, one of the tellers in the bank, her husband. James having sold a parcel of merchant-ware to the said Katharine, in August 1701, who then kept a shop, he took her obligation at the foot of the account, extending to £857 Scots, acknowledging all the articles to be just and truly furnished to her, and to be resting owing by her ; and, on this, Simpson pursues her, and Mr Gordon her husband, for payment.

ALLEGED,—She did not deny the account, nor her signing the obligation ; but neither she nor her husband could be liable ; because what she acted therein was not *nomine proprio*, *sed institoris*, being *præposita* by her father in the administration of the shop, the goods being his ; so the preposition made the debt his, and nowise obliged herself.

ANSWERED,—You having, by a writ under your hand, become debtor to me,