

the clerk being lately dead, and none put in his place, he only supplied that defect; the design of a clerk being only to see if the decreet be extracted conform to the minutes which he had attested; and he was not to take advantage of them, but was willing to repon them yet to their oaths, and to insist only against those that were most notoriously guilty.

The Lords thought this decreet had not so much as the visage and scelet of a decreet; and that it was given without Sir John Shaw's knowledge, he being then out of the country, and who would have no accession to what looked like oppression: Therefore they turned the decreet to a libel, and reponed such of the defenders as he now insisted against, not only to their oaths, but to all their other defences *in causa*. *Vol. II. Page 386.*

1707. July 25. PRINGLE *against* THOMAS REID.

A COMPLAINT being given in by Pringle againt Thomas Reid, sheriff-clerk of Haddington, That, after he had received payment of a house-maill, he had assigned it to one Mackaulay, and charged in his name, though he disowned it; and put Pringle to suspend on this reason, That he had paid it to Reid, the cedent, and produced his discharge:—This appearing by the papers in process, though he exculpated himself by sundry rigorous proceedings of Pringle's against him, and so *ars deluditur arte*; the Lords thought the fault greater in him, who was bred about the house. And some moving to deprive him of his office of sheriff-clerk, it was at last carried, That he should be fined in 200 merks, and go to prison till he paid it, and longer, during the Lords' pleasure, that it might terrify others from attempting such tricks again.

There was nothing modified to Pringle, because Reid had privately transacted with him, and taken off his interest; so what was done was for the vindication of public justice, or the *vindicta publica* only. *Vol. II. Page 387.*

1707. July 26. ROBERT PATERSON, Commissary of Aberdeen, *againsi* SIR SAMUEL FORBES of FOVERAN.

I REPORTED the complaint Mr Robert Paterson, commissary of Aberdeen, against Sir Samuel Forbes of Foveran; who having unfortunately broke his leg, and employed Andrew Skeen, chirurgeon in Aberdeen, to cure it; and he craving his wages and salary, and they not agreeing on the quota; Skeen pursues him, before the Commissary of Aberdeen, for payment, and obtains a decreet against him for 450 merks; which Foveran attempted twice to suspend, but the bills were refused; whereupon he was forced to make payment, and procured Skeen the chirurgeon's discharge.

Some of the reasons in the bill of suspension carried reflections against Commissary Paterson, viz. :—That Skeen, the pursuer, had capitulated with him as judge, to decern for an exorbitant sum, that he might get a part of it to himself: and that the Commissary said to Skeen, You may kill *impune*, by applying corrosive plasters to his leg; for we see physicians kill *cum privilegio*, and

the earth covers their faults : Why may we not then fine him soundly, seeing you may kill ? Whereupon the Commissary thinking his fame and reputation touched, he put in a petition, craving reparation of the injury done him. And Foveran being thereupon cited, and no formal defence proponed, but only insinuations, that, if need were, they could be proven, though *veritas convitii non excusat* ; and that it was alleged to be the daily practice, in reasons of advocacy and suspension, to charge commissaries and other inferior judges with injustice, partiality, and iniquity in their sentences ; and these expressions were never quarrelled, nor made a crime : And to say a party capitulated with a judge to make him sharer, does not import his acquiescence, but only implies the party made such an offer and proposal : and if the judge rejected it, then he is wholly innocent :

The Lords would admit of none of thir excuses, but ordained him to come to the Commissary-court of Aberdeen, and crave him, publicly, pardon, under the penalty of £50 sterling if he failed ; also, to pay the Commissary 500 merks for his damages and expenses. Some thought the *palinodia* and recantation would go ill down ; but the Lords made it a part of his censure and punishment.

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1707. July 29. JAMES CARNEGIE *against* CHARLES CARNEGIE.

CHARLES and James Carnegies, sons of the deceased Laird of Phineven. Charles takes brieves of the Chancery, directed to the sheriff of Forfar, to serve himself heir to his father, on his mother's contract of marriage. James gave in a bill of advocation, craving the service might be advocated from the sheriff to the macers, upon irritancy, in respect their father, knowing the incurable palsy his eldest son laboured under, that he was neither able to speak nor walk, had disposed his estate to James, his second son, as most fit and capable to represent him, with the burden of an aliment to his elder brother, and wherein the second was infest : so this service was designed only to be a title to vex his second brother by reductions and other processes ; which ought not to be indulged nor encouraged.

ANSWERED,—My right of succession, *jure sanguinis*, can never be taken from me : However my father upon misprision has past over me, yet this cannot impede my service ; for, *1mo*, My father died last vest, and you are only infest since his death ; *2do*, Your right is base, and so I must be served in the superiority, if I get no more ; *3tio*, My infirmity is but temporary, and may be cured ; and so the cause of my father's preterition ceases ; and I may have children in marriage, who cannot be prejudged.

REPLIED,—The base infestment cannot be confirmed, which cuts off your right of superiority ; but, to take off all pretences, they are willing to hold him as heir and infest, and to produce the disposition from the father, and debate *instanter* ; and, if the elder brother reduce it and prevail, he offers to dispoise the estate to him : though the father is the fittest judge of his children's merits, and has kept within the line, he being a son of the same marriage ; whereas, the preferring a son by another bed would not be so favourable.