

tion of the sist till the 23d ; till which was done I was *in bona fide* to point for payment of a just debt owing me by a bankrupt tenant seeking to cheat me.

ANSWERED,—The sist was intimated in the usual form in all such cases, at the reading of the minute-book, and by Pourie's advocate and agent taking out a double of the bill, and making answer to it, who were obliged to acquaint him of the sist. Likeas, he knew, before ever he pointed, that Trons was gone to Edinburgh to seek a suspension, and yet he proceeded, and broke open doors without special letters to that effect, and pointed plough goods in labouring time ; which both the Roman law and ours declare a spuilie.

REPLIED,—As to the first pointing, it being the day immediately after the sist, it was, *per rerum naturam*, impossible it could come to his knowledge. And *quoad* the second, though there intervened five days, yet he is ready to depone nobody acquainted him therewith ; and it was very hard to make him liable for invincible ignorance ; neither is there any law obliging his doers at Edinburgh to send and acquaint him upon the first in-giving of a bill of suspension. And, as to the pointing of labouring goods, the Act of Parliament 1503 has a plain exception, unless there be as many other goods on the ground as will pay the debt.

DUPLIED,—They did not plead his pointings so high as to import a positive contempt of the Lords' authority, seeing he might be ignorant of the stop, but only to infer restitution of the pointed goods, seeing he knew he was negotiating for a suspension, and ought not to have anticipated *lite pendente* ; during which time *nihil est innovandum* : and here, *scire et scire debere in jure æquiparantur* ; and, he trusting to his agents, must answer for their care and diligence : *qui per alium quid facit per se facere videtur*.

The Lords thought, if the tenant would find caution for the rent, they might order the whole goods to be restored ; but, he not being able, they made a great distinction between the first and second pointing : for, *quoad* the first, he could know nothing of the sist, being the very next day ; but the second was at that distance of time that he might have been very well advertised ; and his doers having neglected it, they sustained the sist to infer restitution of the goods taken away by the second pointing, seeing, at that time, he either did or might have known of the sist. And whereas it was urged he might have sent the sist immediately away to intimate, the Lords considered the poor man was in no safety here at Edinburgh ; for, not having the sist to show, a messenger might have clapt him up in prison ; and he had no present remedy till his bill was returned again to stop it.

*Vol. II. Page 436.*

---

1708. *February 25.* LORD ROSS *against* PATRICK HOUSTON.

LORD ROSS being a sixteenth partner of a ship, he and the other partners put in Patrick Houston, as supercargo, and loaded it with coals and other goods, and advanced a stock purse of L.104 sterling, and sent it to Lisbon : and from that he got a freight to Amsterdam, and from it to London, where he sold the ship for L.701 steriing. Patrick not having counted to my Lord Ross, for his part of the profits, he pursued him before the High Court of Admiralty, for L.140 sterling, as his proportion and share : and the process having been taken up to see by William Leggat, Patrick's procurator ; and he failing to find cau-

tion *judicio sisti et judicatum solvi*, he is decerned and holden as confessed on the libel, in April 1699. He, shortly after dying, my Lord raises a process against George Houston, his son, on the passive titles: who repeats a suspension and reduction of the decret against his father, on these grounds:—*Imo*, It was null, as destitute of all manner of probation; neither his commission as supercargo being produced, nor the alleged freights he got, nor his selling the ship: And, upon the matter, is a decret purely in absence, taken out against him when he was sick; and died shortly after.

ANSWERED,—The decret was most legal, in so far as you being personally apprehended, and, after taking out the process, refusing to find caution, the judge could do no other but hold you as confessed, my probation being clearly by your oath; which you declining to give, was a plain acknowledgment of the truth of my claim, and that you could not on oath deny the libel. And now, my mean of probation being totally lost, you cannot plead to be free of the decret.

REPLIED,—The mean of probation is yet extant: for he may get a diligence (when the decret is turned into a libel,) to recover the commission, with the invoices and bills of loading; and he may yet prove, by the skipper and his crew, what freight he got from port to port.

DUPLIED,—It is so far from being incumbent on me to prove these articles, that law burdens you with the production of them. Must I go and search, *per omnes regni angulos*, for people that are either dead, or abroad? I need say no more but I have a decret holding you as confessed.

The *second* reason of reduction was,—Your decret is intrinsically null; because, by the 3d Act 1686, all interlocutors of judges are ordained to be subscribed, under the pain of nullity: but *ita est* the whole signatures of this process, yea the very warrant of the decret itself, is unsubscribed. And, in the late case of the Town of Edinburgh's depriving Mr Andrew Massey from being one of the Regents of the College, the Lords found the decret null, because the interlocutors were not subscribed. And likeways, Lindsay of Wormiston, Commissary of St Andrew's, was reprimanded by the Lords for not signing the witnesses' depositions: all which prove that the Act is *in viridi observantia*; and a *consuetudo irrationabilis* ought not to be sustained in the very face of an Act of Parliament so just and rational, obviating so many inconveniences as formerly occurred by the clerk's minuting interlocutors wrong: and such public laws cannot run into desuetude, as was found 27th January 1681, *Jack* against the *Town of Stirling*; and 15th December 1666.

ANSWERED,—By the constant practice of the Court of Admiralty, attested both by the judges and clerk, no decreets in absence are signed, but only put in the diet-book, which answers the minute book of the Session; and none are signed but such as proceed upon debate. And to quarrel my Lord Ross's decret on this head, is to cast up all the decreets in absence, and to annul them at one stroke: and, whether it be right or wrong, yet the practice and common error must excuse *quoad præterita*, whatever regulation you think fit to make for the future by Act of Sederunt: as you did lately in the symbols of resignation, *supra*, 7th February 1708, *Young* and *Pittedy*; and in the case of *Glendinning* and *Nithsdale*, about apparent heirs' bonds, being the ground of an adjudication; and that of *Duff, Brown, and Forbes of Culloden*, about a wrong infestment; yet the custom of the Town of Inverness supported it. And the very Act re-

quiring interlocutors to be signed does likewise appoint that they be signed by the judge before he go off the bench. Yet this is wholly obsolete, and was repelled in the case of *Ross of Tillisnaught* against *William Turner*. And if all decreets subscribed by the judge after he comes off the bench were reduced, multitudes of decreets would fall to the ground.

The Lords thought the case very strait on both sides; for it would be hard to make Patrick Houston's heirs liable for so great a sum upon a decret in absence: and, on the other hand, the loosing of the decret was to make my Lord Ross lose his whole money, and the only mean of probation thereof: and that it was not enough for Patrick's son bluntly to say, "Prove your libel;" but he ought to furnish what documents he could, that his father had accounted for his intrusions in that trust, as exercitor of the ship. And, therefore, they fell upon this, That George Houston and his curators should give in a condescence, upon oath, of all the evidence they had beside them, after search, of that voyage to Portugal and back to England, and what he made of the cargo, freight, and stock-purse, or by his selling the ship; that it may appear how far he was debtor to Lord Ross or the rest of the owners, and how he could discharge himself of the same. The least effect Lord Ross's decret can have, being to relieve him of the burden of proving these particulars, and transfer the *onus probandi*, for clearing them up, on Mr Houston. *Vol. II. Page 436.*

---

1708. February 27. The EARL of MARR against GABRIEL RANKIN of ORCHYARD-HEAD.

THE Earl of Marr against Gabriel Rankin of Orchard-head. [Orchard-head] holding his lands of the Earl for the reddendo of *decem bollas frumenti* in his charter, the debate arose anent the legal sense and import of the word *frumentum*; the superior alleging it signified wheat, and the vassal, that it was only ten bolls of oats, no wheat growing in that ground.

It was ALLEGED for the Earl,—That *frumentum*, though sometimes in the general it signified any corn, yet, in its strict and proper signification, it was restricted to wheat, as appeared by the glossators and lexicographers on that word: and, *esto* no wheat grew there, that could not be the rule, because, in many places where wheat grew not, they were in use to pay the price of it, though not the *ipsa corpora*; and he and his predecessors had, for a long time, paid the sheriff's fiars, or current country rate for wheat; which sufficiently explained the charter, if there were any ambiguity in it. And Beza, in his translation of the Greek New Testament into Latin, has understood it so, being a great critic in the languages, at the 27th chap. of the Acts, v. 38. "They threw the wheat into the sea;" he renders it *projecerunt frumentum in mare, ad exonerandam navem*: and, in French, *froment* signifies wheat.

ANSWERED,—What the gloss or lexicon say is not much to be regarded, for they give the sense of the barbarous and degenerating times of the Latin tongue: and it is not true even as to them either; for they make *frumentum* to come a *frumine*, and to be a generic term for any kind of *segetes*, as *hordeum*, *avena*, *triticum*, as contradistinct from the *legumina* and pulse, such as pease and beans: and the true Latin word for wheat is *triticum*. The common use of