

the process, and approving what they had done, that it was with his own consent, and not compelled, yet it was answered, That his age was easily influenced, and so his declaration not to be regarded. *Vol. II. Page 467.*

*December 17.*—The Lords resumed the complaint, mentioned *supra* 30th November 1708, made by the Lady Gordonston against Mr Kenneth Gordon, for abstracting her son ; and the Lords' warrant, then given them for arresting them, having overtaken them at Newcastle, in their way to Oxford, the mayor and other magistrates stopped them, in obedience to the Lords' order showed to them, and put them under bail to return to Edinburgh ; which they accordingly did. And young Gordonston appearing at the bar, and declaring he was carried away without his consent, and Mr Kenneth producing letters from two of his tutors, authorising him to dispose of his education as he saw best, and that his father had ordained he should be bred at Oxford ; yet, this being contrary to the obligation signed by Mr Kenneth himself, obliging him to allow him to stay with his mother till he was fourteen years of age, the Lords repelled the same. And Mr Kenneth submitting to the Lords' censure, and demitting his office as tutor and manager, they took no notice of his voluntary demission, but pronounced their judicial sentence, finding he had malversed in his office ; and therefore they deprived him of the same, and from any benefit or pension he might receive or enjoy thereby. And, being a member of the house, and so more immediately subject to the Lords' jurisdiction, they suspended him from the exercise of his office, as an advocate, during their pleasure. And, as to the expenses he had put the Lady to in recovery of her son, they remitted to the Ordinary on the Bills, to hear them thereupon. The Lords thought his demission and craving pardon no sufficient expiation for such a fault.

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1708. *December 22.* BOYLE and MONTGOMERY, &c. *against* CHARLES STRAITON, Brewer in Grange.

THE taxmen of the town of Edinburgh's imposition of two pennies Scots on the pint of ale either brewed or imported within the town, pursue Straiton for what ale he brewed and vented or sold within the town of Edinburgh ; and, during the two years of their tack, referred what he had imported in that space to his oath.

ALLEGED,—By the law, all such processes prescribe within three months ; so he is obliged to swear no farther back, nor burden his memory therewith : for, by the 12th Act, 1669, all processes anent embezzling customs or excise must be intended within three months, otherwise not receivable. And, by the English Act of Parl. 1689, no information can be made against a brewer, unless it be entered within three months after the offence, which is to avoid frequent swearing : especially seeing they have other checks and remedies, by gauging and surveying ; or, if imported from the country, they may stop at the port till it pay.

ANSWERED,—The excise duty to the queen does so prescribe ; but this is a duty given to the town for paying their debts, and falls not under the excise.

2do, If they were pursuing for penalties or seizures of the ale, such penal actions might, indeed, prescribe within three months; but this pursuit is merely *rei persecutoria*, for the single duty of two pennies per pint; and they have so many ways of stealing it in to the town, that there is no possibility of watching them; so the only remedy is by oath. And the Acts of Parliament cited, both Scots and English, relate only to concealments and embezzlements, and the fines thereby incurred; which they are not insisting for.

The Lords were sensible that this was a very hard and unequal way of trial; for, though they could not quarter, yet they made it effectual by one of the bailies giving a decret, and immediately pointing the poor brewer's house for it. Yet they thought *egebat constitutione imperiali*; and therefore repelled his defence founded on the three months' prescription, and ordained him to depone; the Lords finding they could not remedy it, they being only interpreters and appliers of the law, and not the legislators. *Vol. II. Page 474.*

1708. December 24. CALDWELL'S RELICT *against* CAPTAIN DUNBRAIKEN.

THE relict of Caldwell pursues Captain Dunbraiken, in the Town-guard, for payment of several particular sums libelled against him, and referred to oath: And a day being taken by his advocate to produce him to depone, the term is circumduced against him, and the decret extracted: Whereon he gives in a SUSPENSION, on thir reasons,---That he never heard of the cause, and was at London the time of the circumduction, as a testificate and declaration, given in by him, bears: and, looking now on the libel, he finds a good part of the account is for a debt owing by Alexander Henderson, wherein he has no manner of concern, save that he married his widow: and that the decret is stolen out against him in the crowd of many other debtors, there being eight called besides himself, expressly contrary to the regulations discharging any more but six to be put in one summons.

ANSWERED,---She oppones her decret *in foro*, where a day is taken to produce him; so that all the defences now proponed are competent and omitted, so not receivable by the Act of Parl. 1672. And his testificate bears, he was at London in June, whereas this circumduction was in February, when he was within Scotland; and if such sham excuses were once allowed, no decret on circumduction would stand fast. And, though it was a good dilator that more than six were accumulated in one summons, yet, not being proponed, it is plainly passed from; for, *quilibet potest renunciare favori pro se introducto*.

The Lords thought a decret, where no defence was proponed against the debt, but only a day at random taken, was the slenderest of all decreets and easiest loosed, where there was no other probation but by oath. Therefore they reponed the Captain; but modified ten dollars to be immediately paid to the charger for the expenses he had put her to; and though a part of the debt was his wife's former husband's, yet the pursuit might be just if she represented him by any passive title. *Vol. II. Page 475.*