

No. 140.

The third point was Kilmaronock's bill against Mr. Patrick Houston, craving reparation for his defaming him, as corrupting his servant. Alleged, He had probable grounds of suspicion, by Kilmaronock's agent's conversing so much with Mushat, and his being flush of money at that time; and he could guess no other source from whence it flowed, but for betraying him, and gratifying his father's enemies and his own with his papers. Answered, Gentlemen's reputation must not be attacked on conjectures, and exposed on mere hearsays; and both the common law and ours have provided suitable remedies, by fining the party injurer, and making him give an honourable reparation by a palinodia and acknowledgment of his fault; and it is no reproach to any to confess his error. See Sir George Mackenzie's Criminals, Tit. Injuries. The Lords found Mr. Patrick Houston had exceeded the bounds of his duty, and failed in proving what he had rashly charged him with; and therefore ordained him to come to the Inner-house Bar, and publicly crave Kilmaronock and his doer's pardon; and fined him in £100 Scots, to be paid in to the treasurer of the Society for Propagating Christian Knowledge. Mr. Houston, for extenuating his fault, alleged Kilmaronock had as reflecting harsh expressions in some of his bills against him, and so injuriæ mutua compensatione tolluntur; at least he should also be ordained to acknowledge his fault. Law says ignoscendum ei qui retorsione se ulciscitur provocatus. Kilmaronock exculpated himself on the principle of self defence; and alleged that Mr. Houston was the first aggressor in the defamatory and injurious expressions. Mushat was present in the House when the Lords were advising his case, and suspecting the worst, knowing his own guilt, he privily retired and fled; whereupon Smith of Methven his cautioner's bond of 300 merks, for sisting him, was forfeited, and a new order directed by the Lords to macers, messengers, and all other officers of the law, to search for him, and when apprehended to imprison him, ay till he be presented to the Lords again, that they may dispose on him as he deserves; and ordain his sentence to be posted up, and affixed on the doors of the Parliament House, on the Cross, and Trone, and other public places of the city, in resemblance of the French custom of hanging malefactors condemned, but escaping, in effigy, when they have fled from justice.

Fountainhall, v. 2. pp. 537, 614, 704, and 730.

1709. December 17. NEILSON against SIR THOMAS KENNEDY.

No. 141.

Women receiveable as witnesses, *ubi penuria testium*

Gilbert Neilson of Craiggaffie and Sir Thomas Kennedy being in mutual processes anent the right of these lands, it was contended for Craiggaffie, that the night of his father's burial, Sir Thomas thrust him and his wife violently out of his house, and then intromitted with the writs and charter chest, and so might abstract and destroy discharges that would have extinguished Sir Thomas's debts he claims on that estate. And this being admitted before answer to probation, Craiggaffie adduces sundry women to be witnesses for proving his violent expulsion; against

whom it was objected, They were inhabile by law to extinguish debts and civil rights, however they might be allowed to prove a riot; and he can never pretend to have been dispossessed, seeing he was never in possession of that house, in regard his father having given him off a part of his estate, he had riotously mispent the same, which made the father dispoise the rest of his estate to his second son; and *esto* he had been thrust out of the house, and Sir Thomas, with other friends, had inspected the writ; where lies the presumption, that therefore he abstracted the instructions of his own payments? But the truth was, they were sealed up. Answered, The circumstances are such as require expiscation by all sorts of witnesses; for beating and violence is libelled to have been done under cloud of night, and at his father's door and close; who could see this but the domestic servants then about the house? And by the witnesses already adduced, it is proved, that one of Sir Thomas Kennedy's sons stood at the door with a drawn sword, and pulled off Craigcaffie's wig when he offered to return. The Lords finding it was *in re domestica*, and under night, and to prove acts of violence, they allowed the women witnesses to be received.

Fountainhall, v. 2. p. 542.

1711. February 7.

CAMPBELL *against* FARQUHAR.

No. 142.

It being objected against a witness, that the adducer had got bond for a sum of money from the witness, whom he had under diligence for it, which impression might bias him to be partial; the Lords repelled this objection.

Fountainhall.

* * * This case is No. 186. p. 12082. *vide* PROCESS.

1711. November 16.

WILLIAM ARMSTRANG in Bogside, and JOHN IRVING of New-orchyard, his Master, *against* JOHN SHARP of Hoddam and his TENANTS.

In the process of spuilzie at the instance of William Armstrang and his Master, against Sharp of Hoddam and his Tenants, a conjunct probation being allowed to both parties. The pursuer objected against Archibald Currie produced as a witness by the defender, That he could not be received, because both the pursuer and he had sworn judicially before the regality court of New Dalgarno, that each of them dreaded malice, ill-will, and bodily harm of other, whereupon both were put under law-burrows to keep the peace.

Answered for the defender: Archibald Currie's being under law-burrows at the pursuer's instance, is no argument that the former bears bodily malice against the latter; law-burrows being used, not out of malice, but as a legal remedy to defend against oppression; and suppose the witness might fear oppression from the pursuer, that doth not argue that he hates him; seeing our Saviour commands.

No. 143.

One of two persons under mutual law-burrows received as witness against the other, the former purging himself by oath against the other.