The Lords found, That the defender was guilty of contempt of their Lordships' authority, and found him liable in damages and expenses.

Act. Jo. Kennedy. *Alt.* Ja. Ferguson. M'Kenzie, *Clerk.*

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1716. *December* 5. MICHAEL FRASER, Supplicant.

THE said Mr. Fraser, minister at Doviot, being convened before the presbytery of Inverness, to answer for several treasonable practices, such as aiding, assisting, and abetting the rebels, &c.

He presented a bill of advocation before the Ordinary, founded on the Act 21st, *septimo Annæ*, entitled, an Act for improving the Union of the two kingdoms by the justice-courts of commissioners of oyer and terminer, specially appointed by his Majesty for that effect; but the Ordinary having refused to pass his bill, he next gives in a petition to the Lords, wherein he alleges, That his reason of advocation ought to be sustained, because that no church-judicature being competent to determine in high treason, there can no reason be given why that presbytery should have ordained him to be cited for that effect before them; if it is not that, though they are not competent to high treason, yet that they thought themselves competent to inflict such censures and punishment on the party found guilty as consisted with their authority. But the supplicant alleged they were as incompetent to that as the other: because,

1*mo*, Before they could pretend to punish, they behoved to lead a proof that the petitioner did assist the rebels.

2*do*, That these persons alleged to be so aided and assisted by him were rebels, and guilty of high treason, which no presbytery is competent to do; since this were plainly to determine in high treason.

3*tio*, They behoved to find that the deeds alleged against him imported assistance to rebels, and so were criminal; since, if they were not, he could not be subject to censure or punishment: and, upon all this, they behoved to lead a probation. All which is undoubtedly to determine in high treason; only they are not competent judges to hang and forfeit; but this does nowise alter the case, since, if they are not competent to determine, they cannot be competent to cognosce.

The Lords refused the desire of the petition.

Patrick Grant, *Procurator and Clerk*, ut supra.

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1716. *December* 13. Sir GEORGE MAXWELL of Orchardtown and MAXWELL of Cuill *against* M'LELAND of Barklay.

M'LELAND of Barklay having taken a decreet of removing against Sir George Maxwell, and Maxwell of Cuill, his factor, before the Baron Court of Bargallan,

decerning them to remove from the lands of Black Dumganock, which he had purchased from the former heritor thereof; there was a suspension raised of that decreet; and Barklay's doers having put up a protestation in the minute-book, calling for that suspension, it was accordingly produced, but, by mistake, given to the advocate's servant, who in all other cases was ordinary for both parties, but in this refused to be for either. The suspension fell by, but was afterwards found upon search. Mean time, upon this production of the suspension, the protestation was scored; but a second protestation being put up, still calling for the suspension, (which was not as then found out,) this second one was extracted, and the decreet of removing put to execution.

Upon this there was a complaint given in to the Lords against Barklay by Sir George and Cuill, for contempt of their Lordships' authority, in extracting protestation and executing the decreet, after the suspension was produced at the minute-book.

It was mainly urged for the defender in this cause, That, granting the putting up the second protestation is not exactly agreeable to form, yet custom in such cases maketh law; and the minute-book doth prove it, that custom hath established this form, and that it is always usual for suspenders in such cases to appear, and cause score such protestations, where the suspension hath been formerly produced. And, as it is usual, so in some cases it is necessary; for, if a suspension should be produced, and again return into the suspender's hands, which very often happens, the charger hath no other way to force it out but by a second protestation. Howbeit, the thing being customary, the doing it can never be reckoned a wilful contempt.

ANSWERED for the complainers, 1*mo*, That custom can never support wrong; and whatever the keeper of the minute-book do in supporting that custom, is plainly unjustifiable and unwarrantable. 2*do*, It was denied, that when a suspension called for comes to the hands of the advocate calling for the same, (which he alleged was the present case,) that ever there was a second protestation put up again, calling for the same suspension; for if that were allowed, it were impossible the most vigilant could be safe, but many times might be over-reached: and it would open a door to such frauds as could not well be prevented; since, if a charger be allowed to put up two protestations, he might as well pretend to put up an hundred, which, considering the expense, would be most oppressive.

The Lords found the defender guilty of no contempt of their Lordships' authority, but modified L100 Scots for the complainers' damages and expenses.

This was adhered to upon a reclaiming petition.

Act. Alex. Menzies. *Alt.* Ro. Dundass. Roberton, *Clerk.*

Vol. II. No. 42. *page* 57.

1717. *January* 4. MAXWELL of Cuill *against* M'CLELLAN of Barklay.

THE case betwixt these parties having been already stated, as decided the 13th December last, the complainer now represents a new point in fact, viz. That Bark-