

1742.

 STEDMAN
 v.
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injuriæ; and from her relying on that defence, it was not to be inferred that her innocence did not afford a sufficient defence, but that the contrivance of her enemies had rendered a defence, founded on her innocence, almost impracticable.

2d, The Commissaries and the Lords of Session ought to have found the *remissio injuriæ* sufficiently proved, as the evidence of the facts upon which it is founded would, in another case, have been sufficient to convict either of the married persons of a criminal conversation.

3d, The Court ought to have allowed the appellant to prove the practices used to suborn some persons to become witnesses in the cause.

Pleaded for the Respondent.—The plea of *remissio injuriæ* set up by the appellant at the very time the respondent was commencing and carrying on the suit, is in itself most improbable, unsupported by any credible proof, and inconsistent with what was proved by witnesses of undoubted veracity; and, from the manner in which it was first proposed, after the defence of cohabitation, though twice insisted upon, had been over-ruled, seems plainly to have been an after-thought of which the appellant was not apprised at the time she first appeared in this action.

2d, Her application to the Court for liberty to bring proof of several allegations, relative to the subornation and corrupting of witnesses, was only resorted to for the purpose of delay, and was in itself without foundation.

After hearing counsel,

It was ordered and adjudged that the interlocutors be, and the same are hereby affirmed.

For the Appellant, *Alex. Lockhart, W. Murray.*

For the Respondent, *Wm. Hamilton, C. Erskine.*

1743.

 WEIR
 v.
 NAISMITH, & C.

WM. WEIR, Esq. of Waygateshaw, . . . *Appellant*;
 ARTHUR NAISMITH, JOHN SYME, CHARLES
 HAMILTON, WM CULLEN, JAS. HAMIL- } *Respondents.*
 TON, WILLIAM ALLAN, and Others,

House of Lords, 3d March 1743.

RIOT—DAMAGES—MAGISTRATES OF BURGH.—At a time of famine, when meal was scarce, a riot took place in the burgh of Hamil-

ton, whereby the appellant's granaries were broken into, and his meal carried off: Held the magistrates, William Cullen and Charles Hamilton, not liable to make good the damages; having not had any accession to, or connivance with, the rioters, but having done all in their power to prevent it: reversed in the House of Lords, and held them liable as having failed and neglected to perform their duty, and connived at the said riot. Also held William Allan and some others liable as having taken a part in the riot. *Quoad ultra* affirmed.

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In 1740, at a time of a famine in Scotland, when meal was scarce and sold at a very high price, the appellant was suspected of keeping up his meal in order to obtain high prices for it; and the inhabitants of Hamilton, incensed by their privations, assembled in a riotous manner, and went in a body, with arms, horses, and carts, to the appellant's house, near Hamilton, broke open his granaries and storehouses, and carried off a large quantity of meal, to the extent of 101 bolls 15 pecks. Nov. 7, 1740.

The appellant, therefore, brought the present action of spulzie, oppression, and damages, before the Court of Session, against a number of persons named, who were active in the spulzie, as also against the respondents, Arthur Naismith, John Syme, William Cullen, and Charles Hamilton, magistrates and councillors of the said burgh.

William Cullen and Charles Hamilton were the magistrates of the burgh of Hamilton for the year 1740; and John Syme and Arthur Naismith were the former magistrates, and then councillors of the burgh.

It was stated, in his libel against the magistrates, that though apprized of the riot, they took no effectual means to quell the tumult, or to protect the pursuer's property; and it was further alleged, that they were the abettors of the violence committed, at least, that they connived at these unlawful proceedings.

The Court, after proof, pronounced an interlocutor, finding the whole parties concerned in the riot liable, and as to the respondents above named (the magistrates, &c.), "Find it not proven, that Arthur Naismith, writer and late bailie in Hamilton, John Syme, late bailie there, or William Allan, servant to the said Arthur Naismith, also defenders libelled against, were anyways accessory to, or concerned in raising or carrying on the said riot or spulzie; but, on the contrary, find it proven, that the said Arthur Naismith and John Syme were noways accessory to, or concerned in the said tumult, Jan. 21, 1742.

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“ but rather endeavoured to discourage the same ; and that
 “ their respective horses, and the carts of the said Arthur Nais-
 “ mith were, by force and violence, carried off by the mob, to
 “ the pursuer’s house, and that William Allan, servant to the
 “ said Arthur Naismith, though proven to have been present
 “ with the said mob, yet, was necessarily there attending
 “ his master’s horses and carts, and, therefore, assoilzie the
 “ said Arthur Naismith, John Syme, and William Allan,
 “ simpliciter, from the whole articles of the libel. And also
 “ find it not proven, that William Cullen and Charles Hamil-
 “ ton, defenders, magistrates of Hamilton at the time fore-
 “ said, had any accession to, or concern with the mob, but,
 “ on the contrary, did all in their power to prevent the same,
 “ and to discharge the duties of their office, so far as the
 “ nature and circumstances of the case would admit, and
 “ followed out the pursuer’s own direction, with relation to
 “ the management of the mob, and in doing what they could
 “ to secure his meal, or the value thereof. And, therefore,
 “ assoilzie them likewise from the libel.”

Feb. 6, 1742.

On reclaiming petition, the Court adhered.

Against these interlocutors the appellant brought the present appeal, contending, as to Naismith and Syme, that they must be considered as abettors of the violence, their horses, and carts, and servants being present ; as to Cullen and Hamilton, that they had failed in their duty as magistrates, and for this neglect and failure in the performance of their duty, they ought to be held liable.

After hearing counsel,

Journals of the
House of
Lords.

It was ordered and adjudged by the Lords Spiritual and Temporal in Parliament assembled, That so much of the said interlocutors as relates to William Cullen and Charles Hamilton, late magistrates of the town of Hamilton, and to the respondent, William Allan, be reversed ; and that so much of the said interlocutors whereby it is found, “ That the appellant is liable to the respondents, “ Naismith and Syme, in their expenses,” be also reversed ; and it is hereby declared, That the said William Cullen and Charles Hamilton did not perform the duties of their respective offices, by endeavouring to prevent or suppress the riot and spulzie mentioned in the said appeal, but totally neglected the same, and connived at the said riot and spulzie : and it is, therefore, further

ordered and adjudged, that the said William Cullen and Charles Hamilton are conjunctly and severally liable to the appellant in the present action of spulzie for the avail and worth of the whole quantity of meal specified in the said interlocutor of the 21st January, and also in the whole expenses of process in the said Court of Session; and that the said William Allan was accessory to, and concerned in the said riot and spulzie, and is liable to the appellant in the said action of spulzie for the avail and worth of the whole quantity of meal specified in the said interlocutor of the 21st of January, and also in the whole expenses of this process in the said Court of Session; and it is further ordered and adjudged, that all the other parts of the interlocutors complained of by the said appeal be affirmed; and it is also ordered, that the Court of Session do give the necessary and proper directions for carrying this judgment into execution.

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For the Appellant, *Rob. Craigie, W. Murray.*

For the Respondents, *Wm. Nicol, Wm. Hamilton.*

NOTE.—Unreported in the Court of Session.

[Elchies. Prov. to Heirs, No. 7.]

1744.

THOMAS WATSON, W.S., Trustee for, and Adjudger from, the Apparent Heir of Hamilton of Redhouse, and the other Creditors, } *Appellants;*

WATSON, &C.
v.
GLASS, &C.

THOMAS GLASS, and the other Children of the deceased Mr Adam Glass and Helen Hamilton, his wife, and Others, } *Respondents.*

House of Lords, 5th December 1744.

TAILZIE—CLAUSE, PROVISION TO DAUGHTERS—OBLIGATION—“HEIRS FEMALE.”—An entail bound the heirs of entail “to pay his *daughters and heirs female*,” 10,000 merks. The entailor had only one daughter, and his son, who had succeeded under the entail, having fallen into debt, his trustee objected to pay this provision, on the ground that it was conceived only in favour of such daughter as should succeed as “heir female.” Held her entitled to the provision, and affirmed in the House of Lords.