

1698. *February 26.* ABERCROMBY, Petitioner.

ABERCROMBY, the notary, who had acknowledged his prevarication in giving up Bargenie's contract of wadset for a little money, as mentioned 5th January 1698, [Lord Bargeny against Kennedy and Ferguson;] and having been sentenced to stand at the Tron, between eleven and twelve, and have his ears nailed thereto, he intercedes to have the sentence commuted to banishment, and he would enact himself never to return without license, both under the certification of a pecuniary mulct and that he should undergo the foresaid ignominious punishment.

The Lords granted his request; but deprived him of his office of notary, and declared him infamous, and incapable of any public trust.

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1698. *February 8 and 26.* RAMSAY OF CAIRNTOWN *against* JAMES CARNEGIE.

*February 8.*—RAMSAY of Cairntown, as trustee for the Earl of Northesk, pursues James Carnegie of Phineven and Kinfauns, with his sister, for payment of sundry debts on the passive titles; wherein sundry acts of litiscontestation are extracted, and probation led. Phineven discovering, that in the summons, at first, he was only convened *nomine tutorio*, but that afterwards they cutted the libel, and convened him *nomine proprio*, as vitious intromitter with his brother Kinfauns's means, and caused the messenger take back the former execution, and give a new one, to meet the said amended libel; Phineven gives in a petition, representing this forgery, and craving Cairntown may be ordained to abide at the said false execution, and he will improve the same, not only by way of exception, but also *via ordinaria*, having raised an action of improbation.

ANSWERED,—This came too late; for improbation of the executions should be proponed *initio litis*, and not after litiscontestation; and his practising on the messenger, and eliciting declarations from him, cannot prejudice Cairntown, whatever they may operate against the messenger himself.

REPLIED,—Falsehood is *omnium exceptionum ultima, et nunquam concluditur in causa falsi*; and though after litiscontestation it cannot be taken in by way of reply, yet it cannot be refused *via actionis*.

The Lords considered Cairntown had already used it, and so was liable on the Act of Parliament 1621, against users of false writs; and to put it in his option to abide at it, was to allow him to resile, and make the action fall; and though they did not allow to abide at such executions *qualificate*, yet the Lords had permitted them to protest their getting it from a messenger, and that using it should not import their accession to the forgery: but would not stop Cairntown's process on this alleged discovery, but let both go on together.

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*February 26.*—ANDREW Jamieson, messenger, who had executed Ramsay of Cairntown's summons against Carnegie of Phineven, (mentioned 8th current,) is examined in presence, and his declaration shown to him; wherein he acknow-

ledged the execution was false, in so far as it bore he had cited him to compare *nomine proprio*, for his own interest. He now tergiverses, and pretends that declaration was elicited and emendicated from him by Alexander Jafry, Phineven's agent.

The Lords considering his prevaricating variation, and that one of the witnesses had already denied his being present at the giving of that execution; they put him in close prison till the other witness should be likewise examined.

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1698. *February 26.* ROBERT DOUGLAS, in the Name of The EARL of MORTON, against SIR WILLIAM BRUCE of KINROSS; and MITCHELL of BRAEHEAD against BOSWAL of AUCHINLECK.

THIS day two appeals or protestations for remeid of law to the Parliament were given in. The *first* was by Robert Douglas, in the name of the Earl of Morton, his brother, against Sir William Bruce of Kinross, about his decret of declarator of his irredeemable right to the lands of Aberdour and Smithfield; though the Lords had declared the same purgeable by payment of his debt any time betwixt and Whitsunday 1699.

The *second* was by one Mitchell of Braehead, against Boswal of Auchinleck, about the lands of Bogwood, wherein Mitchell pretended the benefit of a possessory judgment, which the Lords had repelled, together with the adminicles adduced by him for proving the tenor of a disposition which Mitchel alleged was lost during the late siege of Londonderry in Ireland.

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1698. *June 7.* M'GILCHRIST against STUART of AMBERSMORE.

THE Lord Northberwick, as President nominated, and Probationer, reported the following causes in presence of the Lords, in order to his trial; and afterwards was approved by the Bench, and admitted on his taking the oaths.

The first cause was at M'Gilchrist's instance, against Stuart of Ambersmore, doctor of medicine, for payment of a sum whereto he was constituted assignee. The DEFENCE was,—Your title is null, being an assignation to a bond granted to a wife, designing her such; and the sum, *jure mariti*, falling to the husband, her assignation could give no right. ANSWERED, *Imo.*---By a missive-letter you promised me payment. REPLIED,---That was on a supposition you had a valid right; and must be taken, *in terminis juris*, to imply a tacit condition.

*2do.* ALLEGED,---If need be, the pursuer is willing to confirm before extract, *tanquam in bonis*. ANSWERED,---That cannot supply the nullity of the assignation; but the confirmation, in form, should have preceded the intending of this action.

The Lords did not find the letter sufficient to sustain the defect of the assignation; but found the offer of confirming before extract, enough to validate the title and sustain process: as, where an extract of a bond in the English