

1661. *December 4.* WHITE *against* PATRICK CROCKAT.

WHITE, a Fletcher in Falkland, convenes Patrick Crockat in Alyth, libelling That he coming to his house to lodge with some other drivers, he had in his custody 600 merks, which he shewed and intimated to Patrick; who bound and obliged him by word to secure him while he was in his house, and promised to go betwixt him and all hazard. He libelled it was taken from him that night out under his bed by the said Patrick; at least he was seen often to come into the chamber in the night: and so, by the law, concluding restitution. The defender denied the libel. The question was anent the manner of probation.

It was found in the Inner-House that that part of the libel bearing the pursuer to have had money with him in a bag when he came to that house, [was] probable by witnesses; which if he proved, they would allow him *juramentum in litem* anent the quantity. For the other part anent the promise, they found it only probable *scripto vel juramento*, together with the intimation.

*Act.* Maxwell. *Alt.* Dinmuire. Jo. Hay, C.

*MS. folio 51.*

1661. *December 6.* ALLANE *against* MUIRE and GIBSONE.

MUIRE being addebted to ——— in L1000, a creditor of his, knowing that one Allane was owing to Muire 50 merks for the price of a horse, arrests that sum in his hand, and gets a sentence against him to make it furthcoming: Allane having past his promise to one Gibson, another creditor of Muire, before the arrestment; who recovers sentence against him upon his confession. They both contending for the sum, he to whom the promise was given before the arrestment was preferred to the arrester, and the debtor found only liable in single payment of the sum.

*Act.* Heriot. *Alt.* Eleis. Jo. Hay, C.

*MS. folio 51.*

1661. *December 20.* DIRUR (DEWAR) *against* The Countess of MURRAY.

THE Countess of Murray having set a tack to Ja. Dirur (Dewar) for payment of 1200 merks, with a clause irritant, that in case it should happen two terms to run in the third unpaid, that then she should eject and remove him, and meddle with his corns and cattle, without any hazard of spulyie or ejection; and that *brevi manu*, without a declarator. The Countess having ejected him and meddled with his goods, she is convened for spulyie and ejection, having neither pointed his goods nor got declarator on the clause irritant. ALLEGED, *Quilibet potest renunciare juri pro se introducto; et prout unumquodque contrahitur, sic etiam dissolvitur.* That he had renounced the benefit of a declarator in the tack, and in the mutual

contract was content the lady should eject him without a declarator: and that *beneficium non confertur in invitum*; as, *et volenti non fit injuria*.

REPLIED,—that just as in clauses irritant for not payment of a feu-duty there is a necessity of a declarator, though dispensed with, even so here. ALLEGED, There was a disparity, because in clauses irritant that are provided by an express law of feus, there is necessity for a declarator by reason of their importance, tending to take away heritage: but in conventional clauses irritant, betwixt master and tenants, there is no necessity; but the master may *brevi manu* eject, it being so provided betwixt them, especially where there is no third party lesed by the ejection.

The Lords assoilyed from the ejection, in respect of the contract. It was also alleged that the Countess had accepted of a part of the tack-duty after the committing of the clause irritant; which they found she might do without prejudice of the ejection.

*Act.* Nisbet.

*Alt.* Gilmour.

*MS. folio 51.*

1662. *January 1.*

BRAID *against* JO. BRAID.

ONE Braid pursuing a declarator of escheat on the crime of adultery committed by his brother, Jo. Braid; ALLEGED, No declarator because no escheat for adultery unless the party had been convicted of the crime before an assise in a Criminal Court: *ita est*, there is no doom produced against the defender, bearing him to be convicted; *igitur*, Reply not relevant, because, by the act of Parliament, any man that is found guilty of adultery, his escheat falls; but the defender has not only taken a remission, but has made his repentance before the kirk, and judicially confessed the same.

The Lords found neither his confession before the kirk, nor his repentance for that crime, was relevant in law to make his escheat fall; yea not his remission: and generally found no ecclesiastic confession of any crime relevant to infer any punishment in their body, far less in their estate; lest men, for fear either of their life or estate, should be hardened in their sin, and scared from confession. Which was well decided. *Referente Domino Stair.*

*Act.* Yeoman. *Alt.* Chalmers.

*MS. folio 51.*

1662. *January 1.* Colonel LOUTHIAN *against* THOMAS FAIRHOLME.

COLONEL LOUTHIAN *against* Thomas Fairholme. Mr. Williamsone having drawn a bill on Fairholme to pay L.500 Sterling to Louthian, he did neither accept nor refuse it, but sent his man to him with 1000 merks, as he alleged, in lent money. Louthian, as if he had accepted the bill of exchange, gave him a discharge or receipt in part of payment of the money contained in the bill, which Fairholme's servant brought to him from the Colonel; yet since declares he had