

ment in August 1672; he suspended the same upon thir reasons. *1mo*, That being constable of that bounds, he was *in exercitio officii et actus maxime liciti*; and being opposed by a drunken wife, to put in a poor person, who was dying, into a house, he put her by, and she fell over, and that this was all the riot. *2do*, Upon the sense of his innocence, he had obtained a discharge of the said decreet and fine from Mr John Hay and Mr Alexander Seaton of Pitmedden, the two constable-deputes; and opposed the same.

REPLIED,—That the High Constable Court seemed to be sovereign the time of Parliament, and it was *res mali exempli* to have their decreets canvassed or questioned by the Lords. However, to the first, they opposed the decreet. As to the second, the discharge was null, because granted by those who had no power, seeing after they had pronounced sentence they were *functi officio*; and by the commission of deputation they had no right to the fines or emoluments of courts, likeas the deputies in other courts had not the americiaments, but they belonged to their constituents; and here my Lord Erroll had since their discharge assigned this same very fine to James Hay, clerk to that court.

DUPLIED,—*Per l. 37, D. de R. Juris*,—*Qui condemnare potest, potest etiam absolvere*; and this upon the matter was an absolvitor more than a discharge; that they had no other salary but the fines, and so might dispose upon them; that my Lord Erroll's assignation was truly posterior to the discharge, but is antedated; and that judges might discharge thir obventions as appertaining to themselves, was clearly decided by the Lords, as Dury remarks, on the *26th of November 1633, Lindsay*.

Only it was not decided here, because the matter being referred to my Lord Craigie, he called for the probation which was the ground of the decreet, and when he heard nothing proven, he with indignation rejected it. And, really, there was much cause of complaint given to the citizens of the town against that court, not only for being so summary and illegal, but also for their exorbitancy and oppression in their fines. And though the town has ever contraverted this privilege with the High Constable, so that he never possessed any jurisdiction within Edinburgh, peaceably and pleasantly, yet he gained a greater step that session 1672 than ever he could arrive at before, by judging Johnston, the fiddler, and sentencing him to death for killing of his wife; whereas, in so long a tract of time as the ages since he laid claim to that privilege, he could never afford one instance save of one. I believe it was one Reid, a painter, for killing one Allan Walwood, servant to my Lord Cranstonriddell, whom, for slaughter, they had sentenced to die about the year 1640, but he obtained a remission.—See it in the Criminal Register.

*Advocates' MS. No. 412, folio 222.*

1673. *July*.

JO. FORK *against* WILLIAM FYFFE.

JO. FORK, writer in Paislay, having pursued William Fyffe there, before the Commissary of Glasgow, for calumniating him, in having called him a mensworn man, and to get him punished by fining, and to restore him to his good name: of this cause Fyffe raised an advocacion; at the calling whereof, he insisted on this reason, that the Commissary had committed iniquity in repelling an unanswerable defence, viz. that he behoved to be assoylid from that action of scandal, be-

cause it was *res hactenus judicata*, in so far as he having been already pursued before the Bailies of Paislay, at the Procurator Fiscal's instance, for these injurious words, he was assoilyied, in regard he proved to the assize what he had reproached Fork with to be true, and that he had perjured himself in sundry depositions; *nam veritas convitii excusat a convitio*.

ANSWERED,—*Imo, Non apparet*, that the Commissary has repelled that defence, and so, *non apparet* he has done any iniquity. *2do*, If he has repelled it, he has done most justly, because the said decret-absolvitor was contrived, patched up, and carried through, by collusion, *moris, et dicis tantum gratia*, of purpose to assoilyie Fork; the party injured compearing, and utterly disclaiming the said pursuit; likewise, the Bailies of Paislay, mean persons, and in a burgh of barony, were no way competent to a matter of so high importance as perjury, and one of them as sib to this Fyffe. *3tio*, They proceeded *spreto mandato judicis superioris, videlicet*, of the Commissary of Glasgow, who, conform to the power given them by the injunctions, sent and discharged them to proceed in a matter of scandal which was consistorial; and which charge they contumaciously disobeyed. *4to*, All that is vindicated by this decret is only the *actio pro vindicta publica*, which was *res inter alios acta quoad* Fork; and therefore his action and private resentment of the wrong done to him, being distinct from that done to the public, remains yet entire. (*L. 18, in princ. D. de Injuriis. Vide infra, folio 312, Monteith against Stitts, 13th December, 1677; item 24 July, 1678, Mr William Weir and Calander.*) As for the depositions whereupon that decret-absolvitor is founded, the same are of no force or moment to infer any such odious crime objected against Fork, or even to assoilyie Fyffe, as if he had had some probable ground wherefore to think and call him mensworn; because the same are not subscribed by him, nor the judge, nor clerk, nor any other at his command. As to the axiom, *veritas convicii, &c.* it is false where the same is objected extrajudicially, *ingeminat animo injuriandi vel calumniandi*, or are such delicts and crimes as *non interest reipublicæ scire*; which is Fork's case.

Yet, *videtur interesse reipublicæ perjuriam manifestari et detegi. Vide l. 5, C. de Injuriis; l. 2. C. Quando et quibus, 4ta pars; L. 3, C. de officio rectorum prov. Vide Harprecht, ad par. 1 Instit. De Injuriis, No. 98, et seq. item, No. 114, ubi semiplena criminis probatio a calumnia excusat. Vide Tho. Grammat, Decisione 37.*

REPLIED,—That the Bailies of Paislay were very competent judges, because a burgh of regality; as was found in their debate with my Lord Dundonald, where, amongst sundry other privileges, they carried the election of their own magistrates. And though the probation led in that decret-absolvitor was not sufficient, in law, to fix the guilt of perjury, and prove the same upon Fork, and which they used not for that end, yet it was good enough to assoilyie Fyffe from any action of verbal injury for calling him mensworn; and that the more it was rubbed up, it became the more noysome.

Having got the Lords' answer upon this debate, they remitted it back to the Commissary without any expenses: only recommended him to take care of Fyffe's defences.

*Advocates' MS. No. 414, folio 223.*