

monies it appeared that the river of Clyde was their old march, (though rivers are bad neighbours, and unfaithful boundaries, as Lucan says of the Po,) and that there happened a *mutatio alvei* forty or fifty years ago, which was only proven by one positive witness that it was done by a sudden irruption and out-breaking of the water by a speat; so that Sheilhill ALLEGED it was by a tacit alluvion; which Justinian, § 20, *Instit. de Rer. Divis.* calls *incrementum latens*, adjecting the same *pedetentim* and insensibly to my ground. But the Lords found Bonynton's probation more pregnant, both in respect of the witnesses' age and their *causa scientiæ*; and therefore adjudged the property to him. Some of the Lords proposed, That the evidences on either hand being obscure, whether the change had happened by a water-cut or by alluvion, therefore it might be declared commonty betwixt the parties; which the Sheriff was now empowered to divide by the new Act of Parliament 1695; as is the frequent practice of judges and lawyers in dubious controverted cases, and by them called *judicium rusticorum*; like Solomon's decision of dividing the child. But the Lords preferred Bonynton. *De scindenda difficultate per rei divisionem inter partes contendentes, vide Vinnium ad § ult. Instit. Qui et ex quibus causis manumittere non licet.*

Vol. I. Page 693.

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1695 and 1696. HALDEN of GLENEAGIES against His VASSALS.

1695. February 19.—HALDEN of Gleneagies against his Vassals, for relieving him of a proportion of the Commissioners' fees to the Parliament. ALLEGED,—By the 113th Act 1587, these expenses are only ordained to be paid by the freeholders; and it seems reasonable that none, save those who hold of the king, should be liable. ANSWERED,—This is expressly derogated from by the Act of Parliament 1681, *in fine*, making all heritors liable. But, in regard there had been a former interlocutor, when thir same feuars had been pursued by Colquhoun of Craigton, their commissioner to the Parliament, assoilyeing them; the Lords ordained it to be heard *in præsentia*.

Vol. I. Page 670.

1696. January 1,—The Lords advised the debate between Halden of Gleneagles and his Vassals, mentioned 19th February, 1695; whether they were liable to relieve him of a proportional part of the Commissioners' fees to the Parliament, effeiring to their valuations; which he founded on two grounds: 1mo. A clause in their feu-rights, obliging them to relieve their superior of all taxations effeiring to their lands. 2do. On the Act of Parliament 1681, ordaining all heritors whatsoever to contribute for the Commissioners' expenses, except only the vassals of noblemen, bishops, and burghs; which made barons' vassals liable, not falling under any of the branches of the exception.

ALLEGED, 1mo. That, being pursued by the Commissioners for Dumbartonshire on this same head, they were assoilyied by the Lords, after a report made by Halcraig; and so it was *res judicata*; and though *inter alios*, yet it was *super eodem medio*. 2do. That, of old, every baron coming to Parliament, they got no expenses, seeing they appeared *jure proprio*, and not by representation: and though there was an Act made by King James I. easing the small barons, yet it never took complete effect till the 114th Act, Parliament 1587; and then the Commissioners' charges are only laid on the freeholders and king's vassals:

and so it continues by the 35th Act 1661, and never seems to be altered till the Act 1681; which, when thoroughly considered, neither innovates nor derogates from the former laws, however that clause may be inadvertently conceived; seeing these expenses ought to affect none save such as are capable to elect or be elected; though it was contended, that gentlemen's vassals being represented in Parliament, either by their master or his delegate, (as every foot of ground is there represented by somebody, conform to the ancient feudal custom,) they ought to bear a proportion of their fees, in respect of the *dominium utile* enjoyed by them. The feuars having alleged, that, by a solemn interlocutor, in July 1687, when Sir George Lockhart was President, the sub-vassals were assoilyied from a pursuit of this nature, intended by Seaton of Tough, as one of the Commissioners of Stirlingshire against them; the Lords desired to see the grounds on which that decision proceeded, before they should determine this general important case; seeing that practick was subsequent to the Act 1681, and sundry of the then Lords of Session were members of Parliament at the making of that law, and so might be presumed to know its meaning best.

*Vol. I. Page 694.*

1696. *January 2.* DAVID FRENCH *against* CATHCART OF DRUMJOAN.

ARBRUCHELL reported David French, Writer in Edinburgh, against Cathcart of Drumjoan, for payment of 300 merks contained in his father's bond in 1656, granted to William Mitchell, to whom David had confirmed himself executor. ALLEGED,---This was a most suspected contrivance, seeing he offered to prove, by the pursuer's oath, he got this bond from Mr James Cathcart, now of Carbiston; which being acknowledged, then he offered to prove, that Mr Francis Cathcart, Mr James's father, was agent for the debtor; and, it is to be presumed it was lying beside him as his client's paper, being paid and retired; and that David French and Carbiston had made a bargain betwixt them to divide the spoil.

The Lords remembered that Mary Erskine, relict of Robert Kennedy, pursuing Cullaine, they had found that a bond lying beside Robert, (who was Cullaine's agent,) with a blank assignation thereto, was to be presumed to be a retired writ for Cullaine's behoof; therefore they ordained David French, *ex officio*, to depone if he got it from Carbiston, or on what terms; and he confessing, then, before answer, appointed Carbiston to be examined, if he found it amongst his father's papers, and if he has any documents or evidences to instruct to whom it belonged, or how he came by it; and allowed the defender to prove that Francis Cathcart was his father's ordinary agent. Though this appears dangerous, to take away clear bonds on presumptions, yet the date being near forty years old, and purchased in by an agent, the Lords thought the truth might be brought to light by such a trial and expiscation.

*Vol. I. Page 695.*