

1696. February 1. The MAGISTRATES OF EDINBURGH *against* ÆNEAS M'LEOD.

THE Magistrates of Edinburgh, designing to turn out Æneas M'Leod, their clerk, gave him a citation upon a libel of malversations before themselves. He presents a bill of advocation on thir reasons, That they were suspect of partiality, in regard they had exhibited a charge against him before the Parliament 1695, which was remitted to the Judge Ordinary; and their attacking him just now, before their own Court, showed a great eagerness to be both judge and party; and the famous practitioner, Robertus Maranta, in his *Speculum Aureum de Appellationibus et Recusationibus Judicum*, allows judges to be declined on less grounds and qualifications than thir.

ANSWERED,—None could doubt but the Town were most competent judges, *in primâ instantiâ*, to their own servants; and their application to the Parliament was only to get some exorbitant extraordinary clauses in his gift and admission rescinded;—such as, that he should not be cited upon less than four weeks, and see his accuser, &c.

The Lords thought there was ground of suspicion, and therefore advocated the cause to themselves, but so as Mr M'Leod should be obliged to answer summarily to the articles of malversation exhibited against him.

In this cause the process against *Sir William Thomson*, Town-clerk, recorded by Stair in 1665, and against *Sir James Rothead*, in 1684, were cited. Though incompetency and iniquity be the main reasons of advocation, yet they are not the sole. Intricacy, suspicion, double rights, &c. are also causes.

*Vol. I. Page 707.*

1696. February 1. DAVID FORBES *against* WILLIAM DALLAS.

MR David Forbes, advocate, pursues Mr William Dallas, writer, on his promise to relieve him of a debt due to him by William Cockburn, father-in-law to the said Mr William; who, having deponed on the promise, acknowledged there was a communing, wherein he took off 1200 merks of the debt; because Mr David passed from an arrestment he had laid on; and that Mr David pressed him to engage for the rest, which he also offered, upon condition of his quitting the annualrent, &c. And being interrogated, If, upon the reading the articles of their agreement reduced into writing, and signed by two witnesses, he had not acquiesced; he depones, He neither approved nor disapproved; from which confession Mr David inferred he ought to be liable, *nam qui tacet consentire videtur*.

Mr William Dallas opposed his oath, denying he had acquiesced in the terms Mr David demanded; and that silence is a *medium participationis* between consenting and dissenting, but sometimes participates more of the one extreme than the other, as here, where Mr Dallas did not judge himself further concerned to repudiate his unreasonable terms; and homologations are not inferred from such remote conjectures as nods, insinuations, or taciturnity.