

bell of Kilberry, who was apparent heir to his goodsire, who stood infest in the said lands. It being REPLIED, That the tolerance was only probable *scripto* ;— It was DUPLIED, That the apparent heir compearing, and owning the defender's possession, there was no necessity of a tolerance.

The Lords found, That there was no necessity of a tolerance to be produced in writ ; seeing the pursuer did not allege that he or his authors had ever been in possession.

Thereafter it was ALLEGED, That the apparent heir of Kilberry could have no interest to defend, because he could not allege that he or his predecessors had been in possession these forty years bygone ; and so the right was prescribed ; especially in this removing, which was a possessory judgment : but he ought to have intended a removing at his own instance. It was ANSWERED, That the pursuer not being able to allege possession, in effect the removing was only *adipiscenda possessione* ; wherein Kilberry having as good right as the pursuer,—*viz.* his predecessor's seisine, which was long prior, and whereupon, in a double pointing, at the tenant's instance, he would be preferred,—he had a good interest to compear and debar the pursuer in this removing.

The Lords, before answer, ordained all parties to produce all rights which they or their predecessors or authors had of the same lands ; and to condescend and prove, if any of them ever had possession in the manner thereof.

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1669. December 3. THOMSON *against* IRVING.

THOMSON, having obtained a decret before the commissaries of Aberdeen, against Irving, for payment of 100 merks ; as likewise ordaining him to stand barefooted at the parish kirk, and in face of the congregation, to crave pardon for calling him a thief and robber :

The decret was SUSPENDED upon this reason :—That he had pursued Thomson before the sheriff for the same crimes ; and, by the depositions of the witnesses produced, it appeared that the facts were proven. It was ANSWERED, That, notwithstanding of these depositions, Thomson was assoilyed. To which it was REPLIED, That the sheriff's decret was given by collusion ; and the suspender offered yet to prove the said crimes.

The Lords found the letters orderly proceeded for the sum of money decerned ; but did ordain the acknowledgment of the offence to be before the commissary court ; in respect that the sheriff's decret was not quarrelled either by reduction or a summons of error, and refused to receive any new probation.

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1669. December 8. CAMPBELL of ORMSAY *against* The LAIRD of MACNAUGHTAN.

In a spuilvie, pursued at Ormsay's instance against this Macnaughtan, as heir
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to his father, which was alleged to have been committed *in anno* 1645; there was a DEFENCE proponed upon the Act of Indemnity; and that the defender offered to prove, that his father, the time of the alleged spuilie, was an officer of the army, under the late Marquis of Argyle. It was REPLIED, That the pursuer offered him to prove, that the defender's father did apply the same to his own use and behoof.

The Lords, notwithstanding, sustained the defence; in respect that never any pursuit was intended against the defender's father or himself, for the space of twenty-seven years: and found, that it would be of a dangerous preparative to sustain such a pursuit, after so long a time; it being impossible for the defender to condescend and debate upon the way and manner how such goods were employed; and that it was enough to offer to prove, that he was a standing officer for the time, and did take away the goods libelled, by soldiers under his command.

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1669. December 9. KINCAID against VISCOUNT of KENMORE.

THE Viscount being charged upon his bond, to make payment of 700 and odd merks, did SUSPEND, upon this reason;—That the bond was qualified,—*viz.* That he was only obliged to give surety for payment thereof out of the money due by him to his father, who was principally bound to the charger; whereas it could not be instructed that he was debtor to his father; but, on the contrary, he produced the contract of wadset, whereby it appeared that he had lent a greater sum to his father nor the said wadset.

The Lords, notwithstanding, found the letters orderly proceeded; and found it sufficient that the Viscount had given bond, acknowledging that he was debtor to his father, and found necessary to prove the same by his oath.

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1669. December 11. SHAW against CALDERWOOD.

IN a competition for preference, Calderwood, founding his right and title upon a disposition of the lands controverted, the same was offered to be proven to be false of the date; which being sufficiently proven *per testes insertos*,—It was then DEBATED, Whether or not the writ, being false in the date, was false *in totum*, and could be made use of as being of the date, when it was truly subscribed: As to which point both parties did adduce practicks, *pro et contra*.

The Lords did find the disposition to be false *in totum*, in this case; seeing the true date was after that the granter was *in lecto ægritudinis*, and it was made of a prior date of purpose, that it should not be quarrelled upon that ground: that wherever the same was done *dolo malo, et ex proposito, falsum in datum*, makes the whole to fall.

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