

1706. *July 30.* ELISABETH STRACHAN *against* BAILIE NAIRN.

STRACHAN *against* Nairn. Complaints being made to Bailie Nairn in Dalkeith, that one Elisabeth Strachan, dwelling there, was a common resetter of thieves, and stolen goods, and particularly of one Mary Cockburn, a notour thief, there is a process raised against her at the fiscal's instance; and, on probation, she is incarcerated, and her goods seized on: whereupon she raises a process before the Lords, against the said Bailie, for wrongous imprisonment, and so much *per diem*, conform to the Act of Parliament 1700, and likewise for spuilvie of her goods.

ALLEGED,—She, being attacked and convicted for reset of theft, was not in the terms of the said Act, which related mainly to state crimes, and excepted thefts; as to which the procedure was allowed to be the same as it had been formerly; and it was proven she was a seducer of servants and children to pilfer and steal, and a resetter of such persons. And, as to the spuilvie, it was done by virtue of a decret and *authore pratore*, and so could never be a spuilvie.

ANSWERED,—He could never incarcerate her till he first subscribed a warrant, condescending on the causes of her imprisonment, and give her a double of it; none of which was done. And her receiving Mary Cockburn to lodge in her house was no crime, not being conscious to her dishonesty, neither is it proven. And though his seizing on my goods might not be a spuilvie, yet there is ground enough for having her goods restored, and her damages refunded: which is small enough reparation for the injury done her good name and fortune.

The Lords found her not in the case of the late Act of Parliament 1700, anent wrongous imprisonment; and found no spuilvie; and therefore assoilyied from both the branches of the libel.

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1707. *February 8.* THE LADY KILFAUNS and JOHN CARNEGIE, her Son, *against* THE LAIRD of KILFAUNS.

THE Lady and her son being creditors to Kilfauns in £1000 sterling, and being donatars to his liferent-escheat, they pursue his tenants, in a special declarator, for payment of their rents; who having deponed each upon his own possession, and what he was resting to his master the time of the citation, some of them deponed, That, at their laird's desire, they had become debtor to one of his creditors prior to the citation, and promised to pay him; and which quality was urged as sufficient to assoilyie them.

But the Lords considered, That, if the tenant had either made payment or granted bond, or if decret had been obtained against him for it, any of these three might have exonerated him; but it being only a naked promise, the same might be understood conditional, unless some middle impediment intervene, as the donatar's citation did here; and though it was alleged this would make the tenant twice liable, yet the Lords thought not; and if he were pursued on his promise, his payment to this pursuer as donatar would liberate him. See the