

No 34.

answered by him, and his procurator; That the state of the process being concluded in the cause, he could not be ordained to give his oath; for, after the cause is concluded, and farther probation renounced, the parties can never thereafter, in any sort, be heard again.—THE LORDS, nevertheless, and notwithstanding of his allegiance, ordained the party to give his oath *de calumnia, et hoc juxta ca 1. De juramento calumnie in C. cujus ea verba sunt, 'si de calumnia seu de veritate dicend. in primo litis exordio non juret (ut debet) poterit postmodum in qualibet parte litis jurare, cum hujusmodi juramenta presitari ab initio de substantia ordinis judicarii non existit.'*

Fol. Dic. v. 2. p. 12. Colvil, MS. p. 351.

No 35.

1582. May. LAIRD OF GADZEARD *against* SHERIFF OF AYR.

THE Laird of Gadzeard in a libel pursued the young Sheriff of Ayr, for the spoliation of certain oxen, and for the harling and goring of certain kye, and for the demolishing and casting down of a mill. There being sundry heads in the summons, Gadzeard desired the Sheriff to give his oath *de calumnia* particularly upon every head of the libel. It was *answered* by the Sheriff, That he ought not to give his oath, but generally upon the whole summons; which was found by interlocutor of the Lords.

Fol. Dic. v. 1. p. 12. Colvil, MS. p. 327.

1583. April.

— *against* MASTER OF GRAY.

No 36.

In a cause of deforcement, though only pursued *ad civilem effectum*, it was found that the defender was not obliged to give his oath of calumny *ne detur occasio perjurio*.

THE Master of Gray being pursued for the deforcing of a messenger, and summoned to give his oath *de calumnia* in the said cause, it was *alleged* by his advocate, That he ought not to give his oath, because the deforcing of an officer was an action of that nature and quality, that would bring on the like pain as if it had been altogether criminal, and was of itself criminal, albeit it was civilly pursued before the LORDS, and the consequence thereof was the tinsel of his hail goods and gear; and in criminal causes, after the practise of the realm, *juramentum calumnie*, is not sought, *ne detur occasio perjurii*; for a man, for safety of his hail gear and life, will swear, peradventure otherwise than he would do in other causes; *quia unicuique licet sanguinem suum redimere, D. De bonis eorum qui ante sententiam mortem, &c. et in L. 18. C. De transactionibus; in ibidem Doctores; et canonistæ noluerunt clericum accusatum de cohabitatione cum concubina jurare; rationem ponit gloss. quod non debet compelli aliquis de quo præsumptio est in contrarium, quia nemini parandus est laqueus.* It was *reasoned, ex altera parte inter Dominos*, That there was in this cause no criminal pursuit or question of life, *aut pœna sanguinis*, but the

question and consequence was only of gear, and there are daily sundry weighty causes and actions intended before the Lords, whereof the consequence will be the tinsel of the party's hail gear, yea and perchance meikle of their heritage; and yet *juramentum calumniæ* is ay sought, when it is asked according to the order of process, et de jure in omnibus causis indistincte præstatur juramentum calumniæ Cod. ibid. L. 1. et 2. et in authent. ibid., et juxta, et in sexto ibid., et text. est expressus in L. 3. § 1. D. De jurejurando, &c. quod in quacunque actione etiam criminali juratur, et tenent theologi, præcipue sanctus Thomas, quod reus tenetur semper in foro conscientia veritatem dicere, et quamvis sit interposito juramento.—THE LORDS, after long reasoning among themselves, found, for the most part, that the said Master should not give his oath *de calumnia* in the said cause.

Fol. Dic. v. 2. p. 12. Colvil, MS. p. 359.

* * * Spottiswood reports this case :

THE Master of Gray having pursued for the deforcing of an officer, the pursuer craved his oath *de calumnia* upon the summons. *Alleged*, He ought not to give it, because the action was criminal, although it was civilly pursued before the Lords, and would infer the loss of all his goods and gear; and by our practique *juramentum calumniæ* is not sought in criminal causes, *ne detur occasio perjurii*. *Replied*, There was no pursuit for life or limb, but only for gear, and there are daily sundry weighty actions and causes before the Lords, whereof the consequence will be the loss of the party's whole goods, and much of of their heritage, and yet *juramentum calumniæ* is always sought in them; *nam de jure in omnibus causis indistincte præstatur juramentum calumniæ*.—THE LORDS found, that the defender ought not to give his oath *de calumnia*.

Spottiswood, (JURAMENTUM CALUMNIÆ.) p. 182.

1610. June 19.

BULMER against WILLIAMSON.

No 37.

HE who has made litiscontestation in a spuilzie, and offering to prove his summons, if the defender urge him to give his oath upon the verity and quantity, it is sufficient to him to swear, that he is informed that the defenders spuilzied from him that quantity, and that he believes the information to be true.

Fol. Dic. v. 2. p. 12. Haddington, MS. No 1899.