

Thomas Nairn of Craigton, their brother, bearing, That their father left a great estate in moveables without making any distribution of it amongst his children ;—that they all lived in common, for many years, in a universal society and communion of goods ;—and their elder brother, now deceased, intromitted with the whole, though each of them had a share equal to his ; and he, having administrated in trust, bought the lands of Craigton with it, upwards of £200 sterling of rent, and refused to count to them for their share ; whereupon they employed Mr Thomas, then the second brother, to pursue him, which he accepted by taking an assignation from them, and giving a back-bond to be countable ; and declaring, before Mr James Fraser of Brae, minister, and sundry others, that his brother designed to cheat both him and his sisters of their father's executry, but he would bring him to an account. *Medio tempore*, the elder brother dying, and Mr Thomas succeeding as heir to him, he gives back the assignation, and retires his back-bond, and then refuses to count to the sisters ; and would now repudiate the trust he accepted when a younger brother ; because, by the devolution of the succession, he was come in his brother's place ; and so would continue the fraud his brother intended.

ALLEGED,—That a trust of this nature could not be now proven, after his brother's death, by witnesses, but only *scripto vel juramento* of the defender, and particularly the emission of words, which were of most dangerous consequence.

ANSWERED,—In such a complex trust it was impossible to prove it without an expiscation of the whole circumstances, *ex officio*, by examining the debtors if they did not pay the whole sum to their defunct brother, by taking this defender's oath of calumny, whether he did not undertake the pursuit, and accepted an assignation under a back-bond, by calling Brae and others to depone, before whom he expressed himself on this point ; and, though *nuda verborum emissio* be not probable by witnesses, yet qualifications of trust for discovering matters of fact are.

The Lords, finding a complication of probabilities here, allowed the pursuers, before answer, to adduce what probations they could, *ex officio*, for evincing this trust ; though, where the circumstances are not pregnant, they only admit it probable *scripto vel juramento* of the defenders alleged to have been intrusted. *Vid. Stair, 10th January 1672, Deuchar. Vol. I. Page 691.*

1693 and 1695. CHANCELLOR of SHEILHILL *against* SIR JAMES CARMICHAEL of BONNYNTON.

1693. *January 10.*—The Lords found, The former probation, being only taken before the coming in of the summons, to lie *in retentis*, he could not be hindered now to adduce, upon his act of litiscontestation, what farther probation he pleased ; and that he was not concluded ; and that the fear of suborning could not debar him. *Vol. I. Page 543.*

1695. *December 26.*—The Lords advised the probation taken, before answer, in the mutual declarators of property pursued betwixt Carmichael of Bonnynton and Chancellor of Sheilhill, of the haughs called the Park-holm. By the testi-

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.*

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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*.

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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: