

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and their application to the Parliament was only to get some exorbitant extraordinary clauses in his gift and admission rescinded;—such as, that he should not be cited upon less than four weeks, and see his accuser, &c.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.

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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 homologies are not inferred from such remote conjectures as nods, insinuations, or taciturnity.

The Lords found the oath did not prove the acceptance of the agreement ; nor that the qualifications of the fraudulent silence amounted to make Mr Dallas liable in the same.

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1696. *February 4.* CHARLES JACKSON and his CHILDREN *against* SIR JAMES COCKBURN of that ilk.

THE Lords found the count produced, fitted betwixt Andrew Houston, one of the copartners, and Sir James, behoved to be the rule of counting in this process, both *quoad* charge and discharge ; unless Sir James would produce the books, or some other more authentic document, to convell the same ; in regard ye cannot use it for the charge and reject it for the discharge ; for that were *idem approbare et reprobare.*

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1696. *February 4.* TWEEDDALE and PIRIE, Litsters in Edinburgh, *against* the other LITSTERS Incorporated with the Walkers and Bonnetmakers.

NEWBYTH reported Tweeddale and Pirie, litsters in Edinburgh, against the other litsters incorporated with the walkers and bonnetmakers. The Town-council of Edinburgh, on a recommendation from the Parliament 1681, granted a seal of cause to the litsters, uniting them with the bonnetmakers, and so giving them the privileges of one of the fourteen deaconries ; whereon they attempting to discharge thir pursuers from exercising their trade, they raised a declarator, ALLEGING,—They were in the actual exercise and possession of their trade at the time of the said erection, and so could not be prejudged nor debarred during their lives. ANSWERED,—The space of three months after the patent was limited for their incoming to be members ; which they having neglected, they ought not to be received now.

The Lords found, They being freemen before the seal of cause, they ought to be assumed yet, and that without trial or examination ; but not their prentices : And found, They might debar any who had taken on them to exerce this trade after the erecting of the said incorporation ; else seals of causes would signify nothing.

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1695 and 1696. VEITCH *against* CARLILE of BOYTACH and GORDON.

1695. *February 28.*—IN a competition between Veitch and Carlile of Boytach, it fell to be debated, How far this was a nullity in a decret, that it bore the defender was personally apprehended, and was holden as confessed ; and