

1698. *February 26.* ABERCROMBY, Petitioner.

ABERCROMBY, the notary, who had acknowledged his prevarication in giving up Bargenie's contract of wadset for a little money, as mentioned 5th January 1698, [Lord Bargeny against Kennedy and Ferguson;] and having been sentenced to stand at the Tron, between eleven and twelve, and have his ears nailed thereto, he intercedes to have the sentence commuted to banishment, and he would enact himself never to return without license, both under the certification of a pecuniary mulct and that he should undergo the foresaid ignominious punishment.

The Lords granted his request; but deprived him of his office of notary, and declared him infamous, and incapable of any public trust.

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1698. *February 8 and 26.* RAMSAY OF CAIRNTOWN *against* JAMES CARNEGÝ.

*February 8.*—RAMSAY of Cairntown, as trustee for the Earl of Northesk, pursues James Carnegy of Phineven and Kinfauns, with his sister, for payment of sundry debts on the passive titles; wherein sundry acts of litiscontestation are extracted, and probation led. Phineven discovering, that in the summons, at first, he was only convened *nomine tutorio*, but that afterwards they cutted the libel, and convened him *nomine proprio*, as vitious intromitter with his brother Kinfauns's means, and caused the messenger take back the former execution, and give a new one, to meet the said amended libel; Phineven gives in a petition, representing this forgery, and craving Cairntown may be ordained to abide at the said false execution, and he will improve the same, not only by way of exception, but also *via ordinaria*, having raised an action of improbation.

ANSWERED,—This came too late; for improbation of the executions should be proponed *initio litis*, and not after litiscontestation; and his practising on the messenger, and eliciting declarations from him, cannot prejudice Cairntown, whatever they may operate against the messenger himself.

REPLIED,—Falsehood is *omnium exceptionum ultima, et nunquam concluditur in causa falsi*; and though after litiscontestation it cannot be taken in by way of reply, yet it cannot be refused *via actionis*.

The Lords considered Cairntown had already used it, and so was liable on the Act of Parliament 1621, against users of false writs; and to put it in his option to abide at it, was to allow him to resile, and make the action fall; and though they did not allow to abide at such executions *qualificate*, yet the Lords had permitted them to protest their getting it from a messenger, and that using it should not import their accession to the forgery: but would not stop Cairntown's process on this alleged discovery, but let both go on together.

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*February 26.*—ANDREW Jamieson, messenger, who had executed Ramsay of Cairntown's summons against Carnegy of Phineven, (mentioned 8th current,) is examined in presence, and his declaration shown to him; wherein he acknow-