

1707. *November 4.* BURNETS, Tenants of Leys, *against* The MAGISTRATES of ABERDEEN.

LORD Pollock reported the bill of suspension, and charge to set at liberty, at the instance of Burnets, tenants to Sir Thomas Burnet of Leys, against the magistrates and procurator-fiscal of Aberdeen. The case was: They were pursued for killing of red fish, young salmon or smolts, in forbidden time; and, having compeared personally, they acknowledged their fault, and came in will; whereon they were fined in £50 Scots each, and, having delayed to pay, were imprisoned in the tolbooth of Aberdeen: And now craved liberation, on thir reasons:---*1mo*, That the sheriff-depute of Aberdeen, by their order, had discharged their sheriff-officers to trouble or molest thir persons, on account of breach of these penal laws, against killing of red fish. *2do*, The fine was most exorbitant, seeing they could not exceed £10 Scots for that transgression.

ANSWERED to the *first*,—*1mo*, The magistrates of Aberdeen, by their rights and charters from the crown, were constituted justices of the peace on the rivers of Dee and Don, for punishing all transgressors of these just and necessary laws against the destroyers of the fry of fishes. *2do*, The sheriffs could only discharge their own parts of the fine, but not what belonged to the fiscal. *3tio*, This paper could never defend them, for it was dated in 1704; and the transgressions for which they were pursued were all posterior to that time. And, as to the *second* reason, the quantity of the fine was noways exorbitant; for there is a long tract of acts of parliament against this crime, as destructive to our salmon-fishing; and, by the 11th Act 1600, it is ordained to be punished as theft. And there is a most strict and peremptory law renewed against it, by the 33d Act, 1696, wherein, besides their fines, they are appointed to be delivered to the Flanders officers to serve as recruits abroad.

The Lords caused read the decret, and found it did bear their compearing personally and confessing the fault; and that, by their transgressions, and not punctually putting the laws in execution against them, the emoluments of the salmon-fishing were decayed near to the one half; and that the sheriff's declaration signified nothing in this case: and therefore repelled the first reason. And, as to the second, about the fines, the Lords found the practice not uniform through all the shires where salmon-fishing was killed; and it did not appear but the £50 was imposed for more transgressions than one; and therefore repelled the second reason by a plurality, and refused to set them at liberty. Some of the Lords moved, that, this crime being to be punished as theft, the inferior judges had no power to commute or alter it into a pecuniary mulct: But this was not regarded; because the constant practice has been to fine in thir cases; and King William's Act, above cited, determines how the fine should be divided.

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1707. *November 18.* CATHERINE EDMONSTON and STEPHEN OLIVER *against* THOMAS MOFFAT and JAMES SHAW.

Catherine Edmonston, and Mr Stephen Oliver, her husband, gave in a

petition against Thomas Moffat, merchant, and James Shaw, writer, narrating, that she had a bond from James Edmonston for 6000 merks, as her tocher; and he, having, in August last, unhappily engaged himself with Captain Charteris and others at cards and dice, had lost £1500 sterling. She and her husband thought it high time for them to stir; and, having registered his bond, and taken out caption and apprehended him, they caused the messenger bring him first to Mr Oliver's chamber, to capitulate with him what farther security he would give them. And, Mr Moffat having all his bonds and writs in his custody, he was desired to grant a bond, as cautioner, to present him; but he refusing, he went away and employed James Shaw to draw a bill of suspension; which they got passed, without James Edmonston's concurrence or knowledge, and came and intimated it to Mr Oliver; and, he still refusing to part with James, the prisoner, they interposed, and, shuffling with him, bade Edmonston get to his heels; and immediately he fled to the Abbey for sanctuary: by which trick Mr Oliver and his wife are defrauded of their debt, and the further security then offered them.

ANSWERED,—That they knew nothing of Edmonston's being under caption; neither seeing any messenger in the room nor any caption nor concurrence from the magistrates of Edinburgh; so they were *in bona fide* to obtain a bill of suspension passed, and to intimate it; and he was as much warranted to go away, seeing there was no legal restraint to detain him, Mr Oliver having no right to hold him *in privato carcere*, that being *crimen plagii*.

The Lords were clear, If the messenger had been present with the caption in his hand, no passed bill of suspension could have liberated him, unless it had been passed by three, being in vacance time, and bore expressly that he was apprehended by the messenger, though not, as yet, imprisoned. But, this being denied, the Lords allowed the Ordinary to try if the messenger was present at intimating the passed bill of suspension, and if they used any violence in rescuing him when Mr Oliver offered to detain him. And further, to try what writs Mr Moffat had of the debtor's effects at that time, out of which his sister and her husband might be secured, or satisfied for their debt. For the Lords thought, Albeit, in strict law, they might advise him to go away, yet there was too much art and trick in the managing of it.

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1707. November 21. MARGARET PURSEL *against* JOHN PATERSON.

LORD Register reported Pursel against Paterson. Margaret Pursel, relict of one Brown, tenant in Meggitland, pursues John Paterson, jeweller in Edinburgh, for adherence, before the Commissaries, as having got her with child under promise of marriage; and craves that he may accomplish the same.

In that process, witnesses being led and advised, the Commissaries found that it did not amount to a marriage consent; and therefore assoilyied from the adherence; but found strong insinuations whereby he had enticed her into that belief proven; and therefore decerned him in £100 sterling to be paid her for his abusing her, and for the expenses of her in-lying, alimending the child, and its interment. This decret he suspended on this reason,---That it was *ultra petita*, the libel being allenary for adherence; and so, he being assoilyied from that, the