

1693. February 9.

LADY MARY MAXWELL against RODGER GORDON of Troquhen.

THE LORDS found the act 1661, anent debtors and creditors, extended to this old wadset granted in 1627, when annualrents were at ten per cent. and so he was bound to compt for the superplus mails and duties more than paid the annualrents of his money, as it was restricted to six of the hundred ever since the date of the Earl of Nithsdale's requisition in 1662, and offer to find caution on his ceding the possession; though it is very hard on such a dubious contract, which looked not like a wadset, but only had a reversion, and that this pursuer, nor any other, would not be liable to pay him his principal; which is a great defect in our law, that singular successors will force me to compt, who are not bound to state themselves personally debtors to me in the balance that shall be found due in the event of the compt. See Stair, 16th June 1671, Lord Lovat against M'Donald, Stair, v. 1. p. 734. *voce* REDEMPTION.

1694. February 14.—THE LORDS found him not accountable for the superplus duties above the annual rent of his wadset sum, from the date of the offer made, in regard he had a probable ground for thinking himself not accountable, in respect of the quality of his right, but only from the date of the Lords interlocutor in January 1693.

*Fountainball, v. 1. p. 557. & 608.*

1703. November 30.

FAIRHOLM against BAILIE WARRENDER.

LORD PHESDO reported Fairholm against Bailie Warrender. James Fairholm, and other managers of the manufactory at Edinburgh, acquaint Bailie Warrender, on 19th of October last, that there were some unlawful prohibited goods hid in two private houses in Edinburgh, and craved his concurrence to search and seize the same. He delaying on the account it was night-time, being past seven o'clock, and dark, and doubting if he was obliged; they took instruments against him, and exhibited a complaint to the Lords, founded on the 8th and 12th acts of Parliament 1700, commanding magistrates, when required, to give their concurrence without delay. The Bailie's defence was, *in mo*, That he was not required in the terms and meaning of the acts of Parliament, which must not be understood *Judaice* but *civiliter*. What if they should crave concurrence from a Bailie in the middle of the night, at two o'clock of the morning, when asleep in his bed, may he not justly refuse them access till next morning? What if they require him to go search the Chancellor's house at midnight, the informers being persons he knows not, (in no public character), and if they malverse in the execution, and break up cabinets, and carry away bank-notes, instead of prohibited goods, and afterwards withdraw from all punishment, what disorders

No 13.

A wadsetter found not accountable for bygone superplus duties, the nature of his contract being *dubious*.

No 14.

A magistrate having neglected the particular regulations laid down by an act of Parliament, was acquitted of the fine, *propter probabilem ignorantiam juris*.

No 14.

may follow on such nocturnal searches? And our old act of Parliament ordains all men to retire home to their houses after the ringing of the bell, which was then at nine o'clock at night; (*vid.* act 144. Parliament 1436.); and every man's house ought to be his sanctuary under silence and cloud of night, the poet saying truly, *nox nil moderabile suadet*: Neither can the magistrates be answerable to prevent tumults and rabbles, if such execution were allowed in the night-time. And, on these grounds, the LORDS, on the 10th of November last, found Sir William Hope's ejection illegal, because before the sun.\*—*Answered*, As the Lords are the interpreters of the laws, so their great rule must be the legislature's meaning to make the law effectual, which will be rendered elusory if magistrates be allowed to scan the sense of every word, and shift the execution on the pretence of inconveniencies that may arise; for that is to make them wiser than the law; and to what end is the word *indilate*, without delay, inserted in the act, which has a known fixed signification, of a precise immediate obedience to be given it: And the vigour of all these laws is in present execution; for, if goods imported from England be, under the covert of law, taken into such a house, and discovered on this fresh pursuit, if concurrence be not given, they may be transported ere next morning to another place; and all nations allow such inquiries at any time, secrecy and celerity being the life of such executions. Justices of Peace give warrants for searching for stolen goods, even in the night-time; and, in England, the excisemen can enter breweries, and break up doors, if refused access at any time; and there is nothing without some inconveniencies attending it, but where the heaviest fall, these must necessarily preponder.—THE LORDS thought it unnecessary to determine whether concurrence might be required at any time of the night, the case before them being only, Whether the Bailie did warrantably in refusing and delaying, when required betwixt seven and nine at night; And the Lords found, in that circumstantiated case he had not obeyed the act of Parliament; for the plurality of the Lords thought, that magistrates might be required to give their concurrence at any time, whether by day or night, except from ten to five in the morning, which is presumed to be the usual time all sober people are in bed, and ought not to be disturbed.—The Bailie's *second* defence was, He was not obliged to give his concurrence, because they did not specially condescend on the houses they craved to be searched, neither by designing the place of the town, nor the inhabitant; and they might as well seek a general concurrence to search all the houses of the town.—*Answered*, They condescended sufficiently, that they restricted themselves to two houses; neither might the informer know the name of the master of the family; and though he had, it might be unfit to divulge it, lest private notice be sent them to abscond and withdraw the goods, which totally evacuates and disappoints the law; and though this may seem to reflect on the magistrates, as supposing them not faithful in executing their laws; yet they being tender to bring their neighbouring burghesses to trouble, it may be more their interest that they be not acquainted with the particular houses.—THE LORDS found the informers were not bound to de-

\* Fountainhall, v. 2. p. 189. *vide* LEGAL DILIGENCE.

scribe the houses, inhabitants, or master, where they craved the search to be made.—3tio, *Alleged*, He acted *bona fide*, and, by probable ignorance, seeing the clause of this new act of Parliament was dubious, and he might rationally stumble, especially having the town assessor's advice for him; and, by the 83d act of Parliament 1426, judges are commanded to determine *secundum scientias suas*, which he did.—THE LORDS affoizied the Bailie from the fine of 500 merks imposed by the law, and found his excuse relevant as to bygones; but expected these acts would meet with punctual execution hereafter. See LEGAL DILIGENCE.

*Fol. Dic. v. 1. p. 106. Fountainhall, v. 2. p. 194.*

No 14.

1709. December 3.

Sir JOHN M'KENZIE of Coull, *against* The MAGISTRATES of INVERNESS.

IN the subsidiary action at the instance of Sir John M'Kenzie, against The Town of Inverness, for payment of 600 merks due by William and Duncan M'Intoshes to Sir John, upon this ground, That the Magistrates, when required by a messenger, refused to receive the debtors into their prison, by virtue of a caption at Sir John's instance against them.

*Alleged* for the Magistrates: That they could not warrantably incarcerate the said persons, because the ground of debt whereupon the caption was raised, stood suspended.

*Replied* for the pursuer: When the defenders were required to incarcerate his debtors, there was no principal suspension produced to them, but only an attested copy under the hand of the messenger who executed and intimated the same, which could not warrant them to disobey the authentic letters of caption: For, when the Sovereign's will is intimated in the form of law to Magistrates (who are but executors of the law) they are obliged to obey till the Sovereign's countermand be shewn in the form of law. Which is so far true, That Magistrates of a burgh cannot dismiss a prisoner after incarceration, upon instruction, that the charge was satisfied and paid before, without a warrant from the Lords of Session.

*Duplied* for the defenders: They knowing that the caption was countermanded by a suspension of the debt, were not *in tuto* to obey the caption; for it is not the intimation of the suspension to them, but the expeding of it at the signet, that takes off the effect of the caption: And the production of the attested double was at least a probable ground for them to demur to put the caption to execution, and doth sufficiently purge all contempt of authority.

THE LORDS found, That the seeing the double of a suspension, attested on the back by the messenger who intimated the same, was no sufficient excuse for the Magistrates for not obeying the letters of caption; but, in respect the action was subsidiary, remitted to the Lord Ordinary to hear the Magistrates upon any reason of suspension against payment of the debt, that they could instantly verify.

*Fol. Dic. v. 1. p. 106. Forbes, p. 361.*

No 15.  
Magistrates were found liable *subsidiarie* for a debt, having refused to receive the debtor into prison. An attested copy of a suspension had been shown to them; but they ought to have regarded nothing except the suspension itself.