

No 17.

defence. Captain Forbes does not plead that ignorance of the law is any excuse, or that any person who transgresses a clear public statute can be presumed to be *in bona fide*; but what he maintains is, that, if he has transgressed, he has been misled by the legislature itself, by the general opinion of the country, and by the decision of this Court in the case of Wick, 1st January 1729, Sinclair *contra* Dean of Guild of Wick*. He saw himself appointed a commissioner in the county, under a character inconsistent with the notion of his being an heritor, or having valuation in the county; and, by the case of Wick, he saw that persons named *ratione officii* were entitled to act without any other qualification; and it has been the practice, in most counties, that persons named *virtute officii* have acted without any other qualification, and free from apprehension of being liable in penalties: Where a statute enacts penalties, it inflicts them as a punishment for a transgression; and it would be contrary to justice to inflict punishment where there was no intention to transgress.

'THE LORDS altered the last interlocutor, and found Captain Forbes liable in the statutory penalties.'

For Sir John Gordon, *Lockhart, Alexander Wight, and Robert Blair.*
For Captain Forbes, *Ilay Campbell, et Alii.*

Elphinstone.

Fac. Col. No 108. p. 372.

SECT. IV.

How far the Command of a Superior infers *Bona Fides*.

No 18.

Although a decree of spulzie and ejection was obtained against a husband and his wife, as joint actors; yet it could receive no execution against the wife or her executors.

1561. *March 21.*

ANDREW WARDLAW *against* The LAIRD of TORREY'S HEIRS.

AN decree of spulzie and ejection being obtenit aganis the husband and wife, as wife and conjunct person with him, and being present with him the time of committing the spulzie or ejection, sould not refave execution, nather in all nor in part, aganis the said wife or her executouris; albeit scho in his lifetime, and lang befor the committing of the said spulzie was *præposita negotiis mariti*; bot the executioun of the said decree aucht and sould come haillelie upon hir said husbandis landis, guidis and geir, becaus the husband sould answer for all his wife's deidis *civiliter*.

Fol. Dic. v. 1. p. 106. Balfour, (HUSBAND and WIFE.) p. 94.

No 19.

Found, that though a wife was accessory to a spulzie committed by her husband; yet, aiter his de-

1565. *Nov. 9.* MR JAMES CREYCHTOUN *against* MARTINE CREYCHTOUN.

THE wife may not be callit or forfeit as wife after his husbandis deceis, for spulzie committit be hir husband, and be hir in his company, alledgand hir to

* Examine General List of Names.

have affistit him thairintill; becaus the husband is principall and heid over his wife: The same thairfoir is understand to be done be him principallie and allanerlie; and thairfoir his airis and executouris sould be callit thairfoir.

Fol. Dic. v. 1. p. 106. Balfour, (HUSBAND and WIFE.) p. 94.

No 19.
cease, she
could not be
pursued for
it.

1565. November 17. BRYSON against SOMERVILL.

ANENT the action pursued by Janet Bryson against Janet Somervill, and William Sharer, her son, for a spulzie committed by umquhil David Sharer, her husband, and herself, and their son being in company with them; it was *alleged* for the said William, That in time of the said spulzie committed by his father and mother, he was within the age of twelve years, and but alleged to be in company with his said father; and so not being *doli capax, et in patria potestate, non potuit contrahere obligationem.*—It was *alleged* by the said pursuer, that the said William was past ten years, and therefore might be called for the said spulzie, because he was *doli capax, quia in proxima erat pubertati et malitia potuit supplere ætatem*; neither the woman nor he could be excused, by the man being father to the boy, and husband, *quia omnes in pari delicto parem pœnam sustineant, et cum hisce actio ex maleficio orietur, omnes tenebat.*—It was *alleged* by the said William, because the said pursuer alleged him to be of ten years and not fourteen, therefore he should be affoizied: Whilk allegiance of the said pursuer was repelled; and the allegiance of the said defender admitted; and the said defender affoizied frae the spulzie, for the causes foresaid.—It was *alleged* by the said Janet Somervill, That she should be affoizied frae the said spulzie, because it was alleged in the pursuer's libel, that umquhil David Sharer her husband, and she in company with him, committed the said spulzie; so on noways should she be called after his decease, she neither being called after as heir, or executrix to him, but allenarly upon her own deed, done in company with her own husband in his time, he being her principal head; Whilk allegiance of the said Janet, defender, was admitted, and she affoizied frae the said spulzie. The like was practiced before, in my Lady Crawford's case, who being pursued for the spulzie of _____, was absolved, because her husband was there; and my Lady Ratie, pursued by ane Bruce, was absolved for the samen reason. See HUSBAND and WIFE.

Fol. Dic. v. 1. p. 106. Maitland MS. p. 69.

No 20.
Found in conformity with
the above.

1679. November 6. JOHN WILLIAMSON against MARION CLERK and Sir PATRICK THREAPLAND.

IN an action pursued by John Williamson, Sheriff-clerk of Perth, against Marion Clerk, and Sir Patrick Threapland, for his dismissing her out of prison when he was Provost; and therefor concluding payment of the debt against him: The

No 21.
In a subsidiary
action for
payment of a
debt, the