

No 10.

incapacity ; it might be justly said, as it is reported, a judge in England had said in the case of a person accused of theft, whom he inclined to favour by reason of the meanness of the value of the thing that was stolen, being a watch of brass only, and the matter of the watch being beneath that value which the law of England requires for punishing thieves capitally ; and it being *alleged*, that the fashion with the matter did exceed the value foresaid, It is said, that he *answered*, That he would take no man's life for the fashion ; and it were hard, for the fashion and *modus*, and the way of address, to take from so many persons their livelihood, and from their country their service, that was so necessary to them. And that the advocates fault being a joint-withdrawing, they might conceive that the expiation of the same should be by a joint address ; and yet the petition was not joint as to all the advocates concerned, many having given in, and being to give in, several petitions : And as to the matter it was *represented*, That though the petition is general, yet the generals therein contained do imply the particulars that would be satisfactory, seeing the Lords did not pretend to any power, but that which was just, and no violation was intended of their liberties, neither was any innovation introduced or obtruded upon them or their carriage in their station. Upon all which, it was *thought*, That the petition should be transmitted simply, to the effect it might import interruption of the prescription and certification ; any acts of interruption even *quales quales* being sufficient : And the more short that the prescription be, and the higher the certification and prejudice of prescription, as in this case ; the interruption being the more favourable.

THE LORDS notwithstanding found, That the petition not being satisfactory, could not be transmitted to any effect. And yet did declare, that albeit the proclamation was conceived in these terms, viz. that if the advocates should not give satisfaction betwixt and the 28th day ; if they should apply upon the 28th day, their application should be thought to be within the time contained in the act : And that in stile of law, these words, *betwixt and a certain term*, does not exclude the day of the term.

They *declared* also, That the petition being dissatisfactory upon that account amongst others, viz. that they did not offer satisfaction, nor desire to be re-admitted ; that petitions being given in severally, and bearing that they desired to re-enter, and were willing to give satisfaction conform to the King's letter and proclamation, should be received and transmitted as satisfactory.

*Dirleton, No 226. p. 106.*

No 11.

Whether an advocate is bound to answer summarily in matters which regard not his office.

1675. July 3.

MR HENRY MORISON.

UPON a bill against Mr Henry Morison ; it was desired, that in respect he was an advocate and member of the house, he should summarily deliver certain goods entrusted to him by the complainer : And it was *alleged* for him, That the complainer ought to intent an action *in communi forma* ; and, the interest that he

had in the house as an advocate, should give him right to any privilege that belonged to an advocate, but ought not to put him in a worse case than other subjects, who could not be forced to defend upon such bills: And the practice, that the advocates should answer summarily to complaints against them, is only in relation to their trust and office, if they refuse to exhibit or deliver writs entrusted to them: And the trust mentioned in the bill was only to him as *quilibet*, not as an advocate.

*Dirleton, No 290. p. 141.*

1675. December 21. CREDITORS of Wamphray against LADY WAMPHRAY.

THE Creditors of Wamphray having pursued probation of the tenor of a contract of marriage betwixt Wamphray and his Lady, whereby the Lady disposes her estate of Wamphray in favours of her husband and his heirs, constituting him fiar, whereby the estate might be liable to his debts: Witnesses were adduced for probation of the tenor, amongst whom Mr David Dunmore advocate, was adduced as one.—It was *alleged* for the Lady Wamphray, That Mr David Dunmore was not a habile witness, because he had been advocate for the Laird of Wamphray as his ordinar, and so could not be brought as a witness to discover the weakness and secrets of his cause; for suppose that Wamphray should have consulted him how to defend against the probation of the tenor, and had acknowledged there was such a writ, he could not be adduced to depone that he knew that there was such a contract, as being known to him in manner foresaid.—It was *answered*, That the privilege of advocates can only relate to the secrets communicated to them by their clients; but a contract of marriage being so solemn a deed amongst so considerable persons, can be no secret, and therefore advocates have still been put to depone upon the having of writs, though put in their hands by their clients; and therefore, on the like reason, the probation of a tenor being only the probation of the existence of a writ, and what the tenor of it was, he ought to depone: As the Lord Gosford's oath was taken upon the tenor of a decret arbitral, upon production of an information under his servant's hand, when he was advocate, giving direction for the form of the decret arbitral, which the Lord Gosford did remember, and acknowledged that it was so.

THE LORDS ordained Mr Dunmore to depone if he saw the contract of marriage in question, and what the tenor of it was; but would not put him to depone concerning the existence or tenor of it, by what had been communicated to him by his client at consultation, otherways than by the sight of the writ itself.

*Fol. Dic. v. 1. p. 26. Stair, v. 2. p. 388.*

\* \* \* This case is reported by Gosford in the following manner:

The Creditors of the Laird Wamphray, against the Lady Wamphray, in the proving of the tenor of the contract of marriage betwixt the Laird and Lady,

X x 2

No 11.

No 12.

In the proof of a tenor; the defender's advocate, cited as a witness for the purser, bound to depone, whether he saw the writ, and what its tenor; but not to divulge any thing communicated to him, which could not appear from the writ itself.