

bolts of malt, and of the copper and other brewing looms intromitted with by them, and belonging to Mrs Lawrie, and James Rait her husband, whereunto Powrie had right, both by disposition from them and as donatar to James Rait's escheat. Their defence was, That they being then tacksmen of the King's excise, and so owing them a considerable sum of bygones, they had lawfully poinded the same towards their payment.

ALLEGED,—This poinding was not in the terms of the Act of Parliament imposing the excise in 1661, which appoints that all poindings shall proceed upon decreets of the Commissioners, and be appreciated at the next parish church: Which method was not followed here; but a summary order by Halden's son, their sub-tacksman, to some soldiers to go and secure the said James Rait's readiest goods, &c. which was no sufficient warrant whereon to poind; and, though the Act of Parliament dispenses with the solemnity of carrying the goods to the head market-cross, yet it requires that they be apprised at the nearest parish-kirk;—all which was omitted.

ANSWERED,—The rules prescribed by that Act 1661 were observed so long as the Commissioners of Excise stood bound to make up the deficiency in each shire; but, after the Acts 1681 and 1685, whereby the country was liberated of that, it became the ordinary practice for the tacksmen to issue out these summary warrants; and the tacks set to them by the treasury seemed to give them a general allowance.

Some of the Lords were for trying what had been the custom, seeing the manner of in-bringing the King's revenue is more summary and privileged than ordinary debts: Yet the plurality found the poinding illegal and unwarrantable.

The next defence was, That the malt was voluntarily delivered to them by Mrs Rait for payment of the King's dues; and she, being *præposita negotiis*, might do it without her husband's special warrant, being for payment of such an onerous debt, and prior to Powrie's disposition.

ANSWERED, *1mo.*—He offered to prove much of the victual was delivered and sold off posterior to his disposition; *2do.* Her being *præposita* to the brewery might well empower her to manage and administrate, by selling out the drink, or what of the malt she could spare; but not to destroy and consume the hail subject, by giving away the whole malt, with the very cauldron and other instruments of brewing.

The Lords found, This was no regular deed of administration; and inclined to prefer Powrie on his double title of the disposition and gift of escheat. But it was started by some of the Lords, That the tacksmen's diligence of securing the malt, prior to the disposition thereof made to Powrie, might at least be equivalent to an arrestment; after which James Rait and his wife could make no conveyance or right of the same to another creditor to the prejudice of the excisemen. Which point neither being debated nor reported, the Lords recommended it to the Ordinary to hear the parties on the same. *Vol. I. Page 758.*

1696 and 1697. JOHN HOG *against* GEILS DOUGLAS, Relict of JAMES HAMILTON.

1696. June 20.—JOHN Hog, messenger, being deprived by the Lord Lyon,

and the pursuivants, his brethren, and decerned to pay £1000 Scots to Geils Douglas, relict of James Hamilton, under-clerk, for suffering Mr George Campbell to escape, though he had accepted to execute a caption at her instance against him, on the pretence he would not break up Mr William Thomson, writer to the signet, his chamber-door, where he then lay hid ;---he raised suspension and reduction of this decret on sundry reasons ;---the first whereof was, That, by the 46th Act of Parliament, 1587, the Lyon was only judge competent to messengers' malversations in their office, but not as to the civil effect of the party's damages ; as was decided, 13th February 1668, *Grierson against MacIlroy*.

ANSWERED, 1mo.---By the 21st Act, 1672, the Lyon's jurisdiction was now extended : Besides, John Hog did here prorogate, and acknowledge the Court, by compearing and proponing other defences than a declinature.

REPLIED,---He did advocate the cause upon incompetency ; and, it being remitted by the Lords, he behoved to enter *in causa* ; and yet all he proponed was only against the malversation.

The Lords remitted to Lord Phesdo, who heard the cause, to call for the advocacy and remit, and try the grounds thereof ; and, if the whole cause was remitted ; and if he defended only against the malversation, and not against the party's damages, except in so far as the same was a consequence of his prevarication ; that, from these circumstances, it might appear whether it was *a non suo iudice*, or if he had submitted to and homologated the Court.

*Vol. I. Page 723.*

1697. *January 20.*---Phesdo reported Mrs Hamilton against John Hog, messenger, mentioned 20th June 1696. The Lords now repelled the reason of reduction upon incompetency, in regard he had not declined the Lyon's jurisdiction in any part of the process ; and the very advocacy he raised did not run upon incompetency, but iniquity. But the Lords sustained his other reasons of reduction as sufficiently relevant to turn the Lyon's decret into a libel, *viz.* That sundry of his bills and defences were not inserted in the decret, and that it was without probation of the fact of his suffering the rebel to escape ; for, though it was answered, That he all along in his defences acknowledged the same, yet, seeing this was only drawn by inferences, and not by a direct confession, therefore the Lords reponed him so far as yet to oblige the pursuer to prove her libel.

It was moved, Whether decreets *in foro* of inferior courts, being opened on a nullity, had the privilege introduced by the late regulations in favours of the decreets of Session, that it shall operate no farther but only to redress that nullity, and all the rest of the interlocutors to stand : It was thought they had not ; ---but this point was not decided.

*Vol. I. Page 758.*

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1697. *January 26.* ROBERT CAIRNS *against* PATRICK THOMSON.

MERSINGTON reported Robert Cairns, wright, against Patrick Thomson, late deacon of that trade : it being a suspension of a decret of the Commissaries of Edinburgh, decerning Patrick to crave Robert Cairns's pardon in a public meeting of the trades in the Magdalen Chapel, in regard he had there publicly called him a rabler and a robber ; and likewise decerned him, beside the *palinodia* and recantation, to pay £100 of expenses. The reasons were,