and declared in their favours. And, as to the accidental inconvenience of noise, a public good was not to be stopped on that account; though the French lawyers tell, that a professor having complained that a smith dwelling next him disturbed his own and his scholars' studies, the judge ordained him to flit and remove to another part of the town. And yet a smith is as necessary a member of society and republic as any professor of law: Both are useful in their own kind. And, as to expenses, the Lords ordained the pursuers to give in a condescendence and account of the same, that they might consider thereupon.

It was OBJECTED against some of the witnesses, That, being burgesses, they were parties; and so might tine and win *in re civitatis.*

The Lords thought, If it were in a common pasturage belonging to the city, where all the witnesses had a liberty to put in their goods, there might be suspicion; but there was no ground for it here: and so repelled the objection.

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1706. *June* 12. LORD LINDORES *against* WILLIAM FOULIS and SIR JOHN FOULIS.

DAVID Lesly, now Lord Lindores, gives in a petition, representing, That he was infeft by his father, *in anno* 1694, in the fee of the lordship of Lindores; and the seasine duly registrate by Sir John Foulis: But that, the principal seasine being amissing, he had applied to John Macfarlane, who was notary to it, and got another principal from his protocol-book; and, by good providence, two of the witnesses being still in life, he had got their subscriptions and attestations likewise: but when he brings it to Mr William Foulis, now keeper of the register of seasines, and to Sir John, his father, who had marked the former, they both declined to do it:—Sir John, because he was *functus* and exauctorate, having demitted in favours of his son, who is now *in officio*; and Mr William refused, because it would be a sort of falsehood in him to mark a seasine of a date long prior to his entry, and when he was not keeper.

The Lords thought such a defect ought not to want a remedy; but some proposed a proving of the tenor. Others said it might be granted *periculo petentis;* but the plurality thought they might warrantably ordain Mr William, the present keeper, to mark it: and that there neither might be alteration, nor vitiation of the registers, which were dangerous, they appointed their act and warrant to be marked and inserted on the margin of the register where it was first recorded; which would bear the *res gesta*: and this was no new thing, for they had granted the like to Sir Andrew Ramsay on his supplication, as is observed by Stair, *January* 2, 1678. *Vol. II. Page* 333.

1706. *June* 21. GILBERT MONTIER *against* JAMES MACJARROW.

GILBERT Montier, factor at Rotterdam, gave in a petition, representing, That, on a commission from James Macjarrow, merchant in Air, he had sent him a parcel of indigo and other goods to the value of 187 guilders, in George Walker, skipper in Borrowstonness, his ship; but, before arriving of the ship, the said

Macjarrow having broke and absconded, neither himself, nor any from him were to receive the goods, and pay the custom and other dues; wherefore, the collectors and surveyors there put them in cellars, and detain them till payment. Of which the said Gilbert being informed, he now craves the Lords' warrant to intromit with the goods, on his paying the customs due to the public; and he is willing to find caution for their value to be made forthcoming to Macjarrow, or his creditors, if they shall afterwards lay claim thereto.

The Lords ordained the bill to be intimated, that any concerned might compear to answer the same. But none appearing, the Lords thought the desire reasonable for the preservation of the goods; especially seeing factors abroad cannot know the condition of their employers, who may alter and fail in the interval of a few posts, betwixt the commissioning the goods and the receiving of them. And though we have not that hypothec introduced by the Roman law, whereby the ware and goods stood affected and impignorated for the price, (*June* 14, 1676, *Cushnie* against *Christie*;) yet here there was no reason to let the goods perish; and therefore allowed him to intromit, on his finding caution to make them forthcoming, and paying the freight, the customs, cellar-maills, and other dues; and gave him letters to charge the collectors to deliver them up to him on these terms. Which, though not consonant to the strict principles of law, by which the dominion of the goods was Macjarrow's, to whom they were consigned, and whose faith Montier followed in sending them; yet, in this circumstantiate case, his desire seemed to be founded on justice and equity.

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1706. *June 27.* MULLIKINS *against* SHARP of HODDAM and COUPLAND of COLLASTON.

LORD Prestonhall reported Mullikins against Sharp of Hoddam and Coupland of Collaston. Thir two gentlemen, as having a right to the lands of Crookmuir, warn John and Andrew Mullikins, the tenants thereof, put in by the heritor, to remove at Whitsunday 1705; and a process of removing either being intented, or feared, before Mr Macnaught, bailie of the regality of Terreigles, within which jurisdiction the lands lay, there is an advocation obtained, and produced to Thomas Martin, clerk to the said regality-court, on the 19th May 1705, and marked as judicially admitted by him in January 1706. There is a decreet of removing pronounced against the foresaid two persons; and, a suspension being given in, the Lords did pass the same without either caution or consignation, in respect of the preceding advocation produced. But the question arose, If there was any contempt of the Lords' authority in proceeding to sentence after advocation marked and admitted?

ALLEGED for Hoddam and Collaston,—There could be no contempt; 1*mo*, Because the advocation was raised several months before the process of removing was intented, and so a *non ens* could not be advocated; 2*do*, Though its production be marked by the clerk, yet that was but collusive, and can infer nothing against thir defenders, who knew nothing of it; and so their procedure can never be interpreted to have been *spreto mandato judicis superioris.*

ANSWERED,—This is but a mere contrivance to palliate their guilt; for they have