

1675. June 30. WARDLAW *against* WARDLAW.

MARGARET WARDLAW having obtained a decret against her brother, and thereupon denounced him, pursues reduction of an assignation made by him upon the act of parliament 1592, c. 128. The defender *alleged* absolvitor, because the pursuer's decret, whereupon her horning proceeded, is null, as being pronounced by the Sheriff of Fife in vacance time, without dispensation. It was answered, That the decret was after Michaelmas, which albeit in the vacance is the Head Courts of all the Sheriffs, and nothing done at that Court can be null, and consequently at none thereafter, in respect of the general custom of all inferior Courts, to keep Courts after Michaelmas without dispensation.

Which the LORDS found relevant.

*Fol. Dic. v. 1. p. 502. Stair, v. 2. p. 337.*

\* \* \* Gosford reports this case :

IN a suspension raised by Wardlaw of a decret pronounced against him in the Sheriff Court of Fife, upon this reason, That the decret was null, being given in the time of vacation, without a dispensation ; it was *answered*, That the decret was given in October, after the Head Court at Michaelmas, and so needed no dispensation, it being the custom of Sheriff Courts to proceed in all actions depending before them after the Head Court. It was *replied*, That the vacation being from the rising of the Session until the sitting down thereof, the suspender was *in tuto* not to compear. THE LORDS did consider this as a general case, and found that if the charger could prove that it was the custom of that Court to proceed legally in actions after the Michaelmas term, that the decret should not be null, yet they reponed the defender, if he had any just defence, to propone the same before the Ordinary.

*Gosford, MS. No 765. p. 476.*

1711. January 9.

JOHN RUSSEL of Braidshaw, Writer in Edinburgh, *against* JAMES MILLER, Coppersmith in the Canongate.

JAMES MILLER being charged at the instance of John Russell, to make payment of L. 149: 19s. Scots, contained in a decret obtained at the charger's instance against him, before the Commissaries of Edinburgh, dated the 21st of March last, he suspended and raised reduction of the decret, upon this ground, that it was *ipso jure* null, for being pronounced in close time of vacation, when no inferior Court could sit ; seeing, by act of sederunt July 21. 1696, the LORDS discharged the clerks of the bills to write upon any bills for dispensations to in-

No 216.

All inferior judges hold courts after Michaelmas, without dispensation.

No 217.

A party suspended a decret, because it was obtained before a sheriff on 21st March, by virtue of a

No 217.  
dispensation,  
although by a  
prior act of  
sederunt, all  
dispensations  
were limited  
to the 20th of  
that month.  
The decree  
was sustained,  
but the Lords  
declared they  
would find  
such decrees  
null in future;  
and they re-  
primanded  
the clerk of  
the bills for  
allowing such  
dispensation  
to pass.

ferior Courts beyond the 20th of March, in all time coming; and acts of sederunt have the force of acts of parliament in regulating the administration of justice, and are directories to the whole lieges to walk by.

*Replied* for the Charger; The reason ought to be repelled, because the decret bears a dispensation granted by the Lords' licensing, and dispensing with the Commissaries to sit, hold courts, and administer justice to the lieges, to the 22d of March inclusive, as the licence produced bears, and the decret was pronounced on the 21st.

*Duplied* for the Suspender; No deed of the clerks of the bills can be more prevalent than the act of sederunt; especially considering, that dispensations are granted and passed of course upon a common bill without reading.

*Triplied* for the Charger; The Lords frequently grant dispensations to the 22d of March, and such a dispensation must be held a sufficient warrant to the inferior judge to sit, who is to presume that the Lords' deliverance was orderly given; and if their decreets should be annulled or reduced on this pretence, decreets of the greatest importance might be laid open to the great prejudice of the lieges, who might have contracted *bona fide* thereupon. *2do*, Though the act dischargeth clerks to write upon such bills, it doth not declare such dispensations null; and if the clerks of the bills have malversed, the suspender might seek redress against them. *3tio*, The Lords being able to alter their acts of sederunt at pleasure, a warrant of dispensation signed by a Lord, gives full security, notwithstanding it be not precisely in the terms of the act of sederunt.

*Quadruplied* for the Suspender; The act of sederunt doth not only regulate the clerks, but the administration of justice; and what is done contrary to regulations is void and null. *2do*, Albeit the Lords may alter their acts of sederunt, yet this act stands unaltered. And it were absurd to allow more force to a single Lord's deliverance upon a bill of dispensation of course, than to express acts of sederunt made by the whole Lords *in præsentia*, after mature deliberation.

THE LORDS having found, upon trial, That it hath been the constant custom, since the act of sederunt, for the Commissaries of Edinburgh to sit and judge by virtue of dispensations to the 22d of March; they refused to repon the suspender against the decret charged upon, in respect of the dispensation produced, and bygone custom, and therefore found the letters orderly proceeded. But the LORDS called the clerks of the bills before them, and required them to beware of such a practice in time coming.

*Fol. Dic. v. 1. p. 502. Forbes, p. 473.*

\* \* \* Fountainhall reports this case :

1711. January 10.—JOHN RUSSELL of Braidshaw, as donatar to Alexander Baird's escheat, pursues John Miller, coppersmith in the Canongate, one of his

debtors, for L. 160 Scots, and obtains a decret against him before the Sheriffs, dated the 21st of August. Miller having suspended, he insisted on this reason, That the decret was null, as being pronounced contrary to an express act of sederunt, 21st July 1696, discharging any dispensation to be given for any inferior courts to sit after the 20th of August, the *feriæ autumnales* then beginning, whereas this decret is pronounced on the 21st. *Answered*, That there is a dispensation produced, allowing the Sheriff to sit till the 22d of August. It is true, this is contrary to the act of sederunt, but it was warrant enough to the inferior judges, being under one of the Lords hands; and the constant practice has been, that they have always sat till the 22d, inclusive; and if this should be found a nullity, then it would not singly endanger this process, which is but of small moment, but many hang on the same string; and which is worse, adjudications and other diligences have followed thereon, by which, if this nullity were sustained, they would all fall to the ground; besides, the act only discharges any such dispensations to be granted, but does not declare the deed null; and the most that can be made of it is, to call the clerks of the bills to be more careful and circumspect in time coming. THE LORDS having taken some trial of the practice, found a great many concerned in this point as well as Miller, and that the dispensation had been surreptitiously impetrated to the 22d, in express contradiction to the act; and thought any law, act, or order conceived in prohibitory terms did likewise imply a nullity of the deed. And Hope says, in his lesser practics, cap. 13. anent actions of removings, that *lex prohibitoria* is good, though it do not proceed *irritando, annullando actum*, and the deed is null and invalid, though it want that clause. See 9th Nov. 1624, Hope against Minister of Craighall, *voce* KIRK PATRIMONY. THE LORDS were equally divided in the vote, and the President sustained the decret, and repelled the nullity, in respect of the preparative and consequence; but were clear to declare all such deeds null in time coming; and called for the clerks to the bills and their deputes, and gave them a sharp rebuke; and declared that the principal clerks were liable for the escapes of their servants. And some were of opinion, that, in this case, they were liable to make up James Miller's damage, by their procuring a dispensation downright contrary to the act of sederunt; but this was not decided, as not directly falling under the present state of the process.

*Fountainball, v. 2. p. 623.*

1713. July 23.

Mr GEORGE HONYMAN, Minister of the Gospel, *against* ANNA OLIPHANT and  
JOHN WILSON, Writer in St Andrews.

IN the suspension of a decret obtained by Mr George Honyman, March 20. 1712, before the Stewart-depute of the Regality of St Andrews, against Anna Oliphant and her Husband, without a dispensation, the LORDS found the de-

No 217.

No 218.