

1710. July 27.

JOHN LAMB, Dyer in Edinburgh, Supplicant, *against* JAMES CLELAND, Messenger, and THOMAS GIBSON, Apothecary there.

No 16.

A person was in the messenger's hands before a sifit was procured or intimated. The messenger proceeded after intimation to put him in prison. Freed as well as his employer from expences, *propter probabilem ignorantiam juris.*

JOHN LAMB having complained upon James Cleland and Thomas Gibfon, for contempt of the Lords' authority, by incarcerating the complainer, upon a caption against him at the instance of Thomas Gibfon, after intimation of a sifit upon a bill of suspension :—THE LORDS found the incarceration unwarrantable ; and therefore affoizied the complainer from expences to Gibfon the creditor. Notwithstanding that he, the complainer, was in the messenger's hands before the sifit was either procured or intimated : And it was *alleged* in answer to the complaint, That a messenger's touching one, and keeping him prisoner in his hands, has all the legal effects of actual imprisonment ; in so far as such a prisoner could not be effectually released upon a suspension, without a charge to set at liberty ; more than one could be set out of prison without such a charge. Whence it is, that sifits upon bills of suspension run ordinarily thus, Sifits Execution, &c. unless the party be in the messenger's hands. But though the commitment of John Lamb to prison, after intimation of the sifit of execution, was not warrantable—THE LORDS found the Messenger, or his employer, not liable to pay any expences to him, upon the account of his incarceration, in respect they had a probable ground for their mistake.

Fol. Dic. v. 1. p. 106. Forbes, p. 436.

1766. February 12.

SIR JOHN GORDON of Invergordon, Bart. *against* CAPTAIN JOHN FORBES of New, Factor upon the annexed estate of the late Earl of Cromarty.

No 17.

Bona fides found not to protect against statutory penalties.

The estate of Cromarty, lying mostly in the shire of Cromarty, became forfeited to his Majesty, by the attainder of George Earl of Cromarty, and was, by statute 25th Geo. II. annexed to the Crown. Captain Forbes was named factor for the public on the estate of Cromarty, and acted as such for many years ; he was neither proprietor nor superior of any lands in the county of Cromarty ; but, in several acts of Parliament appointing commissioners of supply for that county, Captain Forbes was named as a commissioner, and designed ' Captain John Forbes of New, factor upon the annexed estate of Cromarty ;' and, in consequence of being so named, he acted with the other commissioners, when occasion required.

Sir John Gordon exhibited a complaint to the Court of Session against Captain Forbes, for recovering penalties incurred by Captain Forbes acting as a commissioner of supply, without being possessed of the qualification of L. 100 valued rent, required by law ; and the Court, 7th August 1765, found he had no title

to act, and was liable in the penalty ; but, upon advising a petition for Captain Forbes, with answers for Sir John, the Court, 18th December 1765, 'sustained ' the defence of *bona fides* pleaded for Captain Forbes, and assolizied him.'

Pleaded, in a reclaiming petition for Sir John Gordon, No person can pretend to be *in bona fide*, when transgressing a public law ; such *bona fides* can only be deduced from a supposed ignorance of the law : But it is an established maxim, *ignorantia juris neminem excusat* ; and this maxim, applied in the strongest manner to the present case, as the very acts of Parliament, which contained Captain Forbes's name, and under the authority of which alone he could pretend to act, would have satisfied him, if he had but looked at them, that he had no title to act, not being possessed of a legal qualification ; which amounts to this, that the very commission, under which he presumed to act, contains a prohibition against his acting, notwithstanding of which, he acted as if legally qualified ; and, in these circumstances, there is no room for the defence of *bona fides*.

But, even supposing that Captain Forbes had acted *bona fide*, that defence cannot, in this case, be listened to. In questions of this nature, the jurisdiction of the Court is purely ministerial ; the statute has created the offence, and defined with precision wherein it consists, and, with equal accuracy, fixed the punishment that must be inflicted ; and, therefore, if the offence is actually committed, the Court cannot liberate the offender from the penalties. The act 1701 inflicts certain penalties for wrongous imprisonment ; a person, ignorant of law, may counteract that statute, without intending so to do ; but, it is believed, the Court would not, on that account, think that the person transgressing could be liberated from the statutory penalties ; and, therefore, Captain Forbes's supposed *bona fides* cannot, in this case, be listened to, as a defence sufficient to relieve him from the penalties he has incurred, by acting contrary to law.

Answered for Captain Forbes, In our Scots acts before the Union, and for many years after the Union, no particular qualification in land was required ; and numbers of persons were named commissioners *ratione officii*, as factors, bailies, tutors, &c. and sometimes an alternative nomination of the heritor himself, or another for him in his absence ; and, in this very county of Cromarty, in the late supply-acts, it has been the practice to appoint factors to act in absence of their constituents ; yet the legislature never could mean, that factors, thus conditionally appointed, should be heritors, and as such have qualifications. Captain Forbes's case is more favourable than any private person's factor ; the estate of Cromarty is forfeited ; there is no proprietor who can possibly attend the meetings of the commissioners ; the factor is therefore the only person who can attend to the interest of the estate in that particular ; and, being named *virtute officii*, it cannot be thought that the law meant to require his being possessed of the qualification of an heritor.

But even if it could be maintained that the law did require his having a legal qualification in valued rent, still the *bona fides*, in this case, must afford sufficient

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.

S E C T. 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.