

far it does not go. He who uses it must be sure that there are smuggled goods in the house: if not, he must show his informer, or act at his peril.

JUSTICE-CLERK. If this action were a reduction or a suspension, I might listen to it; but it is an action of oppression, and nothing is said to prove any oppression on the part of the justices, or any intention to oppress. The conduct of the officer of excise, and of the constable, seems blameworthy, and fit to be inquired into.

HAILES. Of the same opinion. The proceedings of the justices may have been inaccurate, but there was no harm either intended or done by them. I have not the same opinion of the officer and constable. I see what they have aimed at,—an imitation of a practice among messengers. If a messenger had a warrant to poind, and was possessed of a caption, upon finding the doors shut, he used his caption; by virtue of it broke open the doors, and then, without thinking more of the caption, proceeded to the poinding. Thus he made the letters of caption supply the place of letters of open doors. The author of the treatise on the office of a messenger mentions this practice, and cautions his brethren against it as illegal. It is the same sort of irregularity which the officer of excise and the constable are accused of: they have made an irregular and illegal use of a foreign writ.

PRESIDENT. I would rectify a decree of this kind, but not find oppression where no *animus injuriandi*. I wish that the officer, who has acted so illegally, were deprived of his office. This would quiet the minds of the people more than any judgment of this court can do. The distress was altogether irregular. There is an end of liberty, if officers of the revenue may, in this manner, under false pretences, break into every man's house.

On the 17th January 1769, “the Lords assoilyied the justices, but sustained action against the officer of excise and the constables, and remitted to Lord Barjarg, Ordinary, to proceed accordingly.”

*Act.* A. Crosbie. *Alt.* H. Dundas. *Reporter,* Barjarg.

1769. *January 24.* JOHN and ANN YOUNG *against* FRANCIS ROBERTSON.

#### HUSBAND AND WIFE—MINOR.

The Wife's Minority no ground for reducing a Postnuptial Contract of Marriage.

By a postnuptial contract of marriage, between Francis Robertson and Elizabeth Young, the wife conveyed to her husband a sum of L.500 which had been left to her by her father; and he, on the other hand, made suitable provisions for her and the issue of the marriage. At this time they were both in minority. The wife having predeceased her husband, her representatives

brought a reduction of the above contract on the head of minority and lesion. But the Court repelled the reasons of reduction. The following opinions were delivered :—

PITFOUR. I doubt as to the validity of the marriage-contract. It is a post-nuptial contract, whereby a husband, as curator to his minor wife, authorises her to make a bargain with him. The law would have taken little care indeed of minors, if it had not taken this care of them. Wives under age would be injured in their family interests by such deeds ; as, for example, if the wife died before majority, her heirs would be cut off without redress.

KAIMES. Although the husband and the wife enter into a contract, like the present, yet the husband does not act as curator. The only question is, Whether there is any lesion ? I see none : every thing was fair and rational.

PRESIDENT. It is not only expedient but necessary that contracts like that in question be executed. For, how are settlements to be made in the case of minors marrying without a previous marriage-contract. This often happens from accident, and may from necessity. According to the argument here maintained, a minor marrying without a contract can execute none till she is of age, which is an event distant and uncertain. When a contract is executed in such circumstances, it cannot be otherwise executed than as in the present case. I deny that a wife is so far *sub cura mariti* as that every deed done by her and her husband must be held void and null. It would require more arguments than I have heard to convince me that a woman between 14 and 21 is incapable of making a settlement with her husband. There is no decision as to this, for the thing was never doubted. I know, by experience, that President Dundas and President advised a postnuptial contract of the same kind where a minor lady was concerned. They thought so little of the objection, that they saw no occasion to postpone the marriage for a day till a quorum of the lady's curators should be got to consent to an antenuptial contract.

On the 24th January 1769, “ the Lords repelled the reasons of reduction,” and adhered to the interlocutor of Lord Stonefield.

*Act.* R. M'Queen. *All.* J. M'Laurin.

*Diss.* Pitfour. *Non liquet*,—Strichen and Monboddo.

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