

burgh, against the said Hector, for payment of a sum indebted to him for certain merchandise, conform to his merchant-count, with the annualrent thereof, since the sum was due to be paid, which decret was given against him in absence; the said John Ritchie pursues the said cautioner, for payment of the said sum and annualrents, wherein the cautioner compear'd, and *alleged*, That this action, betwixt merchant and factor, should be pursued before the conservator, conform to the act of Parliament, Ja. IV. Parl. 6. cap. 81. This allegiance was repelled; and the LORDS found, that this, and the like pursuits may be pursued before the Lords of Session; for by that act it was only statuted, that such pursuits should be pursued before no other Judges out of the realm, but the conservator; and also the LORDS found, that the cautioner was not subject to pay annualrent for the money indebted by the factor, albeit the factor himself was decerned therein, as said is, he being absent and bankrupt.

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Act. Miller.

Alt. Trotter.

Clerk, Gibson.

1630. *March 4.*—It being alleged by the cautioner for the factor, that the pursuer was *in mala fide* to send any wares out of Scotland to Flanders to the factor, and thereby to make the cautioner liable therefor; for the pursuit was for the price of the wares sent to the factor by the pursuer, and for which decret was given against the factor before, because the said factor was a notour bankrupt before the sending away of the said wares, and was so known to the pursuer himself; so that this being known to him, the cautioner ought not to be answerable to him therefor; this allegiance of the pursuer's knowledge was found only probable by writ, or the pursuer's oath, and not by those who were alleged to have intimated and signified it to the pursuer, before the sending away of the wares, that he was bankrupt.

Fol. Dic. v. 2. p. 233. Durie, p. 494. & 499.

1631. *January 18.* JEAN HOME against The LAIRD of RENTON.

JEAN HOME charged the Laird of Renton, then Sheriff of Berwick, to take and apprehend the Laird of Wedderburn; and because he had disobeyed the charge, pursued him for the debt owing by the rebel to the pursuer. *Alleged*, He having been charged, while he was sitting in judgment in Eymouth upon some witches, he was not obliged to leave the Court and obey the charge. *Replied*, Ought to be repelled, because it was offered to be proved that the rebel was sitting beside him the time of the charge, and discoursing with him, which the pursuer offered to verify by the officer's executions, which bore, that when the charge was given, the officer designed the rebel to the Sheriff sitting hard by him; in fortification whereof, he offered to prove the verity of the executions by the witnesses inserted therein. *Duplied*, Ought to be repelled, because he offered to prove, by famous barons and ministes present in the Court, that

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What proof
of disobeying
a charge to
apprehend
a rebel?

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the rebel was removed out of the Court before the charge given unto him; and as for the witnesses in the executions, they could not be received for proving the reply, one of them being the pursuer's father-in-law, and the other her brother-in-law' *Triplied*, They were *testes instrumentarii*, and so receivable. THE LORDS ordained the pursuer to condescend upon as famous witnesses to prove his reply by, as the defender had condescended on, otherwise they would prefer the defender in probation of his duply; for they respected not the executions which bore that the officer designed the rebel, as being done besides the officer's duty, which was only to give a charge, and not to put that narrative in his executions, whereas, if the question had been anent the truth of the executions of the charge simply, none had been receivable but only the witnesses inserted.

Spottiswood, (CAPTION.) p. 32.

1671. December 14. DUFF and BROWN against FORBES of Culloden.

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Collusion being objected against a preferable creditor, in that he desired the bailie and clerk to keep his infestment secret; the Lords would not admit witnesses to prove the emission of words, but admitted them to prove the other circumstances of fact.

THOMAS MONCRIEF and James Brown, having apprised a part of a salmon fishing, upon the water of Ness, from Duncan Forbes, brother to Culloden; and Thomas Moncrief having disposed to William Duff, his right upon the apprising, one of the Bailies of Inverness gives sasine, which bears the apprising, and the ordinary tenor of a charter with a *tenendas* and *reddendo*; and the Bailie being charged, gave sasine in obedience, and in the sasine there is also inserted a ratification of the Provost, Bailies, and Council, and the sasine is subscribed by the notary, and the first Bailie that gave sasine, and by the Provost, Bailies, and Council; and in the competition of the right, Culloden produces a disposition by the said Duncan his brother to him, of the same fishing, containing a procuratory of resignation, together with a sasine, bearing the resignation to be in the hands of one of the Bailies of Inverness, and sasine given to him thereupon, which sasine is prior to the appriser's sasine, and thereupon craved preference. The appriser *alleged*, That Culloden's prior sasine cannot give preference, because it is null, not being done *habili modo*; for though in burgage lands which are holden immediately of the King, all infestments may be given by any Bailie of the burgh, who as to that, is the King's bailie; yet where burghs acquires lands or rights not in burgage, but as any other superior, and give out the same to be holden of them, they are in the same condition as any other superior, and no infestment can be given but by themselves, and cannot be done by one Bailie who is not superior. It was *answered*, That albeit by the common law and custom of the kingdom, infestments can only be given by the superior, or persons empowered by him, yet all feudal rights have their original by custom, and as to the solemnities thereof, there is no law, but custom introducing the same; for at first, the superior's introducing the vassal, and possessing him in presence of the peers of Court, did suffice.