

REPLIED,—This can never be called a transaction ; which is ever *super re dubia*, and where there is a *lis pendens* ; but here there could be neither doubt nor question, the Captain's debt being clearly cut off by the forfeiture, and the donatar gave him law, and concussed him into whatever offer he pleased to make.

The Lords considered this was the first case where such a repetition was demanded by creditors of forfeited persons, and might be a leading preparative to many others ; therefore resolved for making a rule to hear it in their own presence.

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1707. July 24. THOMAS FLEMING *against* STEWART of BLACKHALL'S TENANTS.

SIR John Shaw of Greenock being nominated by the Privy-Council, with Colonel Ogilvie and others, to execute the laws against importing Irish victual, butter, cheese, horses, and other goods, and to prevent and punish the same ; he constitutes one Mr Thomas Fleming his depute, for pursuing the transgressors ; whereupon he pursues, before Semple of Fulwood, sheriff-depute of Renfrew, above 200 persons dwelling in the lands of Inverkip, and others belonging to Stewart of Blackhall, libelling, That there are sundry creeks in that bounds lying towards the coast of Ireland, where boats land privately in the night-time ; and that thir defenders resetted these Irish goods, and dispersed them through the country, to the prejudice of the native product of Scotland ; and so are liable in the penalties contained in our Acts of Parliament ; and thereon takes a decret against a whole country-side, holding them as confessed, for not compearing to depone as to their guilt and accession in harbouring these prohibited goods. This decret being suspended, the reasons were :—*1mo*, The decret is in absence, pronounced in seed-time, without a dispensation, without any lawful citation : a copy not being given to every one ; but a single one to serve for a whole family, summoning the man and his wife, children and servants : and under no less certification than all the men under 50 to be sentenced to deportation, and being delivered up to Flanders officers to serve in the wars abroad ; and all above that age, with the women and bairns, to pay pecunial mulcts, the value of the goods extending to many thousand pounds sterling ; besides corporal punishment, with the confiscation of all their boats : which is no less than forfeiture to these poor people, and beggaring that part of the country, and turning it to a hunting field. *2do*, They have not the legal *inducia*, but are sentenced within 48 hours after the citation. *3tio*, It is not holden at the ordinary place, but upon the pursuer's lands of Greenock. *4to*, The decret is not subscribed by the clerk, but by the judge himself ; whereas, these officers being distinct in every court, they cannot be confounded, nor be both exercised by one person.

ANSWERED,—In such commissions as holding out of Irish victual, all the special formalities of law required in other judicatories need not be precisely observed ; for this is more a point of government than private interest ; and these laws are most useful, and cannot be executed in the common way of solemnities : And yet here they were all personally apprehended, and both the time and place was contrived for their ease ; Greenock being sundry miles nearer to the defenders than Renfrew, the sheriff's ordinary place for holding his court : and

the clerk being lately dead, and none put in his place, he only supplied that defect; the design of a clerk being only to see if the decreet be extracted conform to the minutes which he had attested; and he was not to take advantage of them, but was willing to repon them yet to their oaths, and to insist only against those that were most notoriously guilty.

The Lords thought this decreet had not so much as the visage and scelet of a decreet; and that it was given without Sir John Shaw's knowledge, he being then out of the country, and who would have no accession to what looked like oppression: Therefore they turned the decreet to a libel, and reponed such of the defenders as he now insisted against, not only to their oaths, but to all their other defences *in causa*. *Vol. II. Page 386.*

1707. July 25. PRINGLE *against* THOMAS REID.

A COMPLAINT being given in by Pringle againt Thomas Reid, sheriff-clerk of Haddington, That, after he had received payment of a house-maill, he had assigned it to one Mackaulay, and charged in his name, though he disowned it; and put Pringle to suspend on this reason, That he had paid it to Reid, the cedent, and produced his discharge:—This appearing by the papers in process, though he exculpated himself by sundry rigorous proceedings of Pringle's against him, and so *ars deluditur arte*; the Lords thought the fault greater in him, who was bred about the house. And some moving to deprive him of his office of sheriff-clerk, it was at last carried, That he should be fined in 200 merks, and go to prison till he paid it, and longer, during the Lords' pleasure, that it might terrify others from attempting such tricks again.

There was nothing modified to Pringle, because Reid had privately transacted with him, and taken off his interest; so what was done was for the vindication of public justice, or the *vindicta publica* only. *Vol. II. Page 387.*

1707. July 26. ROBERT PATERSON, Commissary of Aberdeen, *against* SIR SAMUEL FORBES of FOVERAN.

I REPORTED the complaint Mr Robert Paterson, commissary of Aberdeen, against Sir Samuel Forbes of Foveran; who having unfortunately broke his leg, and employed Andrew Skeen, chirurgeon in Aberdeen, to cure it; and he craving his wages and salary, and they not agreeing on the quota; Skeen pursues him, before the Commissary of Aberdeen, for payment, and obtains a decreet against him for 450 merks; which Foveran attempted twice to suspend, but the bills were refused; whereupon he was forced to make payment, and procured Skeen the chirurgeon's discharge.

Some of the reasons in the bill of suspension carried reflections against Commissary Paterson, viz.:—That Skeen, the pursuer, had capitulated with him as judge, to decern for an exorbitant sum, that he might get a part of it to himself: and that the Commissary said to Skeen, You may kill *impune*, by applying corrosive plasters to his leg; for we see physicians kill *cum privilegio*, and