

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.

No 218. creet null, because inferior courts *regulariter* must have a dispensation to sit in the vacation time ; and the act of sederunt, July 21, 1696, doth not import a general dispensation to all inferior courts to sit till the 20th March inclusive, but only that by a dispensation, they may sit till then, and no longer.

Fol. Dic. v. 1. p. 502. Forbes, p. 707.

1714. November 19.

FULLERTON of that Ilk, and two of his Tenants, *against* JOHN HAMILTON, Factor to the Earl of Dundonald, and two of the Justices of the Peace of the Shire of Ayr.

No 219.
Justices of
Peace cannot hold a
court in time
of Christmas
vacation, unless
for riots.

THERE being a decret of the Justices of Peace against two of Fullerton's tenants, on a complaint at John Hamilton's instance, whereby each of them were fined in ten pounds Scots to the party, and ten pounds to the Fiscal, whereupon they were immediately imprisoned till they should pay their fines ; there is now a process at the instance of Fullerton and the said tenants, libelling damages against the Justices of Peace, *alleging* that the decret was enormous and oppressive, and insisted on the qualifications following ; *imo*, The decret was pronounced by two Justices of the Peace, whereas three were a quorum. It was *answered* ; By an act of parliament of the 6th of Queen Anne, intituled, ' An act for making the Union more complete,' it is provided, That the Justices of Peace are to have the same powers in Scotland as they have in England ; and two Justices of Peace make a quorum in England. It was *replied*, That by the same act it is provided, that the method of trial and judgments shall be according to the law and custom of Scotland ; and by the 38th act, Parl. 1. Sess. 1. Ch. II. three Justices of Peace are a quorum ; as also, by the law of England, one of the two must be a Justice quorum *unus*.

" THE LORDS found, That three Justices of Peace were a quorum in Scotland."

The pursuer further insisted, that the decret was pronounced in time of Christmas vacance, contrary to law.

It was *answered*, That the Justices of Peace being for preserving the public peace, may sit at any time.

It was *replied*, That all that was here libelled, was, that two of the pursuers had taken certain rabbits off the island called Lady Island, not by any violence, there being no interruption, nor clandestinely, but openly, by the warrant of their master, who was infest in the island, and looked upon it to be his property.

" THE LORDS found, that there being no violence libelled, the Justices of Peace could not have judged in the Christmas vacance ; but found that this and