

No 53. his client M'Lamerick to a land estate. The defence was, That the titles were erroneously made up, as the defender had been served heir in general to his grandfather, in place of heir of provision under a contract of marriage. The Court repelled the defence. See APPENDIX.

Fol. Dic. v. 4. p. 233.

1770. November 19.

ANGUS SINCLAIR in Hunthill, *against* JOHN M'FARLANE, Officer of Excise, and JAMES CARGILL, Constable.

No 54.
Officers of excise not authorised, in virtue of a writ of assistance, to make a forcible entry, for the purpose of executing a poiding, in implement of a decree of the Justices, in an excise matter.

SINCLAIR having been fined for retailing foreign spirits without a licence by the Justices of the Peace for the shire of Lanark, and his effects having, in virtue of their decret, been poided, he brought an action of oppression and damages against the Justice, the Collector, and Supervisor, and against M'Farlane the Officer, and Cargill the Constable, who had executed the distress.

THE COURT, 17th January 1769, pronounced the following judgment: "Sustain the defence proposed for the Justice of Peace, the Collector, and Supervisor; assoilzie them, and decern; but sustain action against John M'Farlane, officer of Excise, and James Cargill constable; and remit to the Lord Ordinary to allow a proof with respect to the execution of the poiding, entering the house, and maltreatment of the pursuer."

A proof having been led, the cause was taken to report upon informations—when it was

Pleaded for the pursuer,

1mo, That the poiding was illegal, and directly in contravention of the statute 1669, c. 4. which requires, that before proceeding to poid, a charge be given; and farther, that the days of said charge be expired. But neither of these requisites had been observed; no charge had been given; and, instead of 15 days, two had not elapsed. The decret was dated 2d July, was endorsed on the back of the same date, to be forthwith put in execution; and was actually executed the next day, viz. the 3d of July.

2do, Though an officer executing a poiding could not break open doors without letters for that purpose, yet the defenders, after having repeatedly attempted to force the doors, had at last broke in at a window. These facts were proved; as also that the defenders' conduct had been harsh and violent; and, in particular, at the time they broke into the house, that the pursuer's wife was in bed, and either in actual labour, or very near the time of her delivery. The writ of assistance authorised no such procedure. The writ authorised a forcible entry only when a search was made for smuggled goods upon due information given; no such pretence was alleged in this case: and hence, perverting the use of it on this occasion, was illegal, and, in fact, converting it into a general search-warrant, for the purpose of breaking into any person's house the officers possessed of that writ might think proper.

The defenders denied the maltreatment, and maintained, that the prompt execution of the Justice's decret was authorised by the 12th Car. II. referred to in the 16th and 27th Geo. II. which regulated the mode of diligence and execution in excise matters. By the writ of assistance introduced by the 14th Car. II. c. 5. they were authorised to enter any house whatever as to which they had suspicion; and being legally within the house, in virtue of that writ, they were then entitled to proceed with and execute the pouding. Though they were not therefore possessed of letters of open doors, which would have been granted of course, they were, by means of this writ, possessed of a sufficient legal authority for the same purpose.

The following judgment was given: "Find, That the defenders, John M'Farlane and James Cargill, acted in an illegal, riotous, and irregular manner; and therefore find them liable in damages and expenses."

Lord Ordinary, *Barjarg.*

For Sinclair, *Crosbie.*

Clerk, *Gibson.*

For M'Farlane and Cargill, *Sol. H. Dundas.*

R. H.

Fac. Col. No 47. p. 135.

1787. February 14.

MASON *against* THOM.

No 55.

WILLIAM THOM was entrusted with a bill of exchange accepted in favour of Mason, 'for the purpose of doing such diligence as to put the drawer on an equal footing with the other creditors.' He used inhibition on the ground of debt, but as he neglected to adjudge, no part of the money was recovered. THE LORDS found him liable in a sum equal to what the pursuer would have received had an adjudication been led.

Fol. Dic. v. 4. p. 233.

*** This case is No 68. p. 3535., *voce* DILIGENCE.

1798. February 6. INNES *against* MAGISTRATES of Edinburgh.

No 56.

A PERSON receiving a material injury from falling, during the night, into a temporary pit made in one of the lanes of a burgh, found entitled to damages from the Magistrates, although a considerable degree of precaution had been used by those who dug the pit, to prevent such accidents.

Fac. Col.

*** This case is No 31. p. 13189, *voce* PUBLIC POLICE.