

to give their oaths upon the claims referred to their oath; and that there used no writ to be made upon their officers warnings, and no execution in writ was usually produced by the officers, but only they compeared in judgment, and made relation to the Bailie, that they had warned the party, either personally, or at his dwelling-place, and upon his report decret was given; so that for not production of their officers' execution the sentence could not be reduced. This allegiance was repelled, and this custom was found not to be allowable, for thereby the ordinary means, to try the verity of the officers' warning of parties, and the way to improve the same, was taken away, which ought not to be permitted, and to give therein more trust to the relation of a messenger or officer, than is due to him, and which ought not to be: So the LORDS found, that in such citations and warnings made by town-officers, the least that could be done in any lawful process, proceeding judicially thereupon, by the magistrate of burgh was, that when the officer made his report in judgment, that thereupon a note should be made by the town-clerk in writ, bearing, 'That such an officer made such a report in judgment, viz. That he upon such a special day warned the party, either personally or otherways according as he happened to do, to compear in such a cause, and before such special witnesses named and designed;' which report in writ the LORDS found ought to be extant, and made furthcoming to all parties, when the process should be called in question, or the saids executions called to be produced by the parties having interest; and which being so extant and exhibit, the LORDS found might supply the production of any precept, or executions of officers called for to be produced.

Act. *Belshe.*

Alt. ———.

Clerk, *Gibson.**Fol. Dic. v. 1. p. 204. Durie, p. 227.*

1633. July 20.

BROWN against MAXWELLS.

MR ROBERT BROWN charges Mr William and Patrick Maxwells, for payment of the mail of a chamber set to them, conform to a contract made betwixt them; who suspending that they cannot pay the duty, as that contract obliges them; because by that contract the charger is obliged to enter them precisely at Whitsunday to that chamber; and it is true, that ten days after Whitsunday, by instruments they required him to enter them thereto, which was not done, but the possession still retained by him, who possest it about 20 days thereafter; so that it being a month after the term ere the house was made void, they were forced to take another chamber; being in the time when the King was in Scotland, where they had a necessity of a chamber to ease their friends who came home with him; and therefore they ought to be free of this tack. And the pursuer opposing the contract, and that it is not the custom of the town, to remove so precisely at the term; and it is no reason that for so usual delay in removing, this tack should be made void, and he so heavily pre-

No 27.

No 28.

Where access to a house or chamber, set in tack, is required ten days after the agreed term of entry, but not given for 20 days, so that the tacksmen comes to be obliged to take another lodging, he is free from the tack, and cannot be obliged to pay the rent, tho' it be proved, that by the custom of the place, entry to the possession of

No 28.
such lodgings
is not com-
monly given
sooner than 20
days after the
term.

judge;—the LORDS nevertheless sustained the reason, and suspended the charges upon the contract against them *simpliciter*.

Act. *Hart.*

Alt. ———.

Clerk, *Hay.*

Fol. Dic. v. 1. p. 204. Durie, p. 687.

No 29.

Altho', by the
general cus-
tom of Scot-
land, sen-
tence-money
belonged to
the judge, yet
the Lords
found, that
the parti-
cular custom
of a particu-
lar place
derogated
from the ge-
neral; and
that being
proven, they
preferred the
clerk.

1684. December 17. CATHCART *against* IRVINE.

JAMES CATHCART of Carbiston, clerk of the Canongate, pursues Irvine his depute for the sentence-silver. *Alleged*, That by our law, and the custom of all courts, the sentence-money belongs to the judge, and not to the clerk. *Answered*, By a special custom in Edinburgh and the Canongate, it was a perquisite and a pendicle of the clerk's office; and it is but within these twelve months that the Magistrates of Edinburgh have, by their act, taken it away from the clerks, and annexed it to the bailie's office. 'THE LORDS found the particular custom derogated from the general; and that being proven, they preferred the clerk.'

Fol. Dic. v. 1. p. 204. Fountainball, v. 1. p. 322.

1782. March 10.

MARGESTON *against* The PROCURATOR FISCAL and CLERK of the High Court of Admiralty.

MARGESTON having captured an American vessel, obtained sentence condemning the same as lawful prize, in the High Court of Admiralty; and demanded an extract of this sentence, upon payment of the usual dues.

No 30.
A practice of
giving the of-
ficers of the
admiral court
more than the
ordinary dues
of court, in
cases of prize,
discounte-
nanced.

The Judge-Admiral found, 'That as the prize was of considerable value, the captors were liable to the deputy clerk of court, for behoof of all concerned, in the sum of L. 40 Sterling; and that over and above the the sums paid as the dues of extract.'

In an advocation of this judgment, the LORDS

Found, 'That the officers in the Court of Admiralty, in questions of prize, were entitled to no more than the ordinary dues of court.'

Reporter, *Lord Kennet.*

Act. *Henry Erskine.*

Alt. *Monro.*

Fol. Dic. v. 3. p. 165. Fac. Col. No 43. p. 70.

See APPENDIX.