

1675. February 11. DOUGLAS *against* JACKSON and GRAHAME.

No 75.

THE LORDS found, that a pointing is not lawful, unless it be begun before the setting of the sun ; and what is to be done at that time, be all done and complete before the day light be gone.

*Fol. Dic. v. 1. p. 263. Dirleton, No 250. p. 121.*

\* \* \* Stair reports the same case :

ROBERT DOUGLAS having pursued Jackson for spuizie, or restitution of goods pointed from him, insists, upon this reason, that the pointing was not done in due time of day, but in night, at least after sunset. It was *answered*, That it was sufficient that it was done with day light.

THE LORDS found, that the pointing was not valid, unless it were begun before sun-set, and ended during the day light.

*Stair, v. 2. p. 321.*

1703. November 10.

MR WILLIAM GORDON, and ELISABETH WOOD, his Spouse, *against* SIR WILLIAM HOPE.

No 76.

SIR William Hope having obtained a decret of removing from the house of Balcomie, against Mr William Gordon, and thereupon having charged and denounced him, he obtained letters of ejection, which he did execute upon the 9th of October 1702.

An ejection, begun to be executed about break of day, illegal.

Mr William and his wife did raise a complaint before the Lords of Session, that the said ejection was not only executed with the utmost rigour, dragging his wife violently out of the house, when he was in prison, and using the children no better ; but likewise that the same was illegal, being done in the night-time, at least before the rising of the sun. Whereupon THE LORDS, before answer, ' allowed a mutual probation to either party, for proving the precise time of the day at which the ejection was executed, and whether before or after sun rising ; and likewise to prove the custom in burgh and landwart in the like cases.'

It did appear by the probation, that the ejection was executed with great rigour ; and Sir William's instrument of ejection bore to have begun betwixt six and seven in the morning, upon the 9th of October ; and the current of Mr William's witnesses proved, that the same did begin at the break or point of day ; and there was no condescence or probation of any custom or practice of executing ejections in the night-time, or after sun-setting, or before the rising thereof.

No 76.

It was *alleged* for Sir William ; That whatever might be the rigour of the execution, he could not be charged with that ; because he was neither present, nor would have allowed any hardship to have been done to the lady or children ; but the nature of that diligence is rigorous against such as are disobedient, and continue their possession in contempt of the law ; so it may be executed at any time of the night or day, for the same reasons that captions are allowed to be executed in the night time, and much more in the case of ejections ; because indigent debtors have not wherewith to pay their debts ; but it is always in parties power to remove from a possession, to which they are found to have no right. *2do*, By the probation it appears, that it was day-light before the ejection was begun, and that the sun was up long before the same was finished.

It was *answered* ; That the common rule is, that all legal executions should be used in the day-time ; and therefore poindings in the night are found to be illegal. And as to the instance of captions, there is no parity ; because debtors disobeying the law are in use to lurk, and appear not in the day time, and it is necessary to apprehend them where, and whensoever, they can be had, and therefore there is a known and uniform practice of executing captions in the night-time ; but the effect of an ejection being to make a house void and redd, if the party to be ejected be not found there, there is so much less to be done ; and, it being necessary that goods, plenishing, papers, and every thing that is found in the house, be taken out, the same must be done in day-light, that there may be no embezzlement, and that the goods may be carried safely to convenient places.

And as to what is alleged, that it was day light before the execution was begun, and full light and up-sun before it was finished ;

It is *answered*, The beginning of the execution is to be considered, which being unlawful, renders the whole proceeding illegal ; as has been often found in the parallel case of poindings.

*2do*, The proper time for such executions is betwixt sun and sun ; and, if the probation were any ways dubious, whether the sun was up or not, when the execution began, then it might be favourably constructed, that the act was legal ; but, seeing it appears that the execution began about the break of day, it is to be reckoned as done in the night, and illegal ; for the known, clear, and certain periods of the law, are betwixt sun and sun ; otherwise such executions might proceed for two months, at least, before and after mid-summer, at any time in the night ; and there cannot be any fixed period, or certainty of the break of day.

*3tio*, As this is clear in law and reason, so there is no condescence or probation, that the like was practised before or after the sun.

THE LORDS found the ejection illegal ; and ordained Mr William Gordon to be repossessed. No 76.

*Fol. Dic. v. 1. p. 263. Dalrymple, No 37. p. 46.*

\* \* \* See this case by Fountainhall, *voce* LEGAL DILIGENCE.

1745. February 12.

GRANT against JONES.

THE said parties being both creditors to the corporation of taylors in Canongate, did severally arrest on the 16th day of May, in the hands of tenants, in order to affect the current term ; and the execution of Grant's arrestment bearing to be between five and six of the morning of said day, and the execution of Jones's arrestment bearing to have been at the several dwelling-houses between 12 o'clock and 1 in the morning of said day, it was *objected* to Jones's arrestment, that being at midnight, it was irregular, and ought therefore not to be sustained, otherways all diligence whatever might be executed at such improper hours, which might be of bad consequence, and attended with much inconvenience : That further when the law allows execution at the dwelling-house, in the nature of the thing, it supposes it to be done at a time when the executor may lawfully demand access, which a messenger cannot lawfully do at midnight. And some able judges were of that opinion.

Nevertheless, as it was said, there was no law against executing arrestments at any time of the night, though the question put was only, whether the arresters should be admitted *pari passu* ? Jones was preferred on his arrestment by the narrow majority of seven to six.

*Fol. Dic. v. 3. p. 189. Kilkerran, (ARRESTMENT) No 15. p. 43.*

\* \* \* D. Falconer reports the same case.

WILLIAM JONES head collector of the stamp-duties in Scotland, being a creditor of the incorporation of taylors in the Canongate, arrested in the hands of their tenants, betwixt the hours of twelve and one in the morning, the 16th day of May, and Thomas Grant merchant in Edinburgh, arrested between five and six that same morning.

A competition arose between them, in which it was *pleaded* for Mr Jones, that the first arrestment ought to be preferred, there being no law to forbid arrestments at any hour ; that it was as probable people would be in bed betwixt five and six, as betwixt twelve and one ; and here it was not pretended the debtor had paid the money for want of being certiorate, but it was still *in medio*.

*Pleaded* for Mr Grant ; That the middle of the night was an improper hour

No 77.

An arrestment executed betwixt 12 and 1 o'clock in the morning, was preferred to one executed betwixt 5 and 6 of the same morning.