

ed to answer, as not being called. And since they are the only administrators and proper defenders of the town's commonty, being in office, they ought to be cited before any process can be insisted in against the town.

ANSWERED for the pursuer, That the Magistrates who were in office when the summons was raised, being duly cited, they who pursue corporations are not bound to renew their citations upon every change of the Magistrates or governors: for the citation is against the community, and only against the Magistrates for the time, as representing such communities.

The Lords reponed the Magistrates to their defences, and turned the decret to a libel.

*Act. M. Lumsden. Alt. W. Scot. Sir James Justice, Clerk. Vol. I. page 67.*

1715. *February 16.* MRS AGNES NICOLSON, *against* SIR JAMES SHARP of Stoniehill.

THE deceased Sir William Sharp of Stoniehill, grand-uncle to the said Sir James, having married a lady, with whom he got a considerable portion, and having no children, grants bond to her for L10,000 Scots, payable and bearing interest after his decease; and thereafter grants a disposition to several debts resting to him, constituted by bonds, tickets, accounts, &c. in favours of Sir William Sharp of Scotsraig his nephew, and father to Sir James: Which disposition bears this narrative, That his nephew stood bound for him in several considerable debts. After old Sir William's decease, his nephew did not represent him; but paid many of his debts, taking assignation thereto in name of George Howat his trustee, who thereupon leads an adjudication on old Sir William's estate. And Agnes Nicolson, the old lady's niece and assignee, did also within year and day, lead an adjudication upon the above-mentioned bond, and now insists in a process of mails and duties. Wherein compearance being made for Sir James Sharp, son to Sir William the younger, he produces for his title the said adjudication: and craves preference, because Howat's adjudication was led for true debts and bonds of borrowed money; whereas Agnes Nicolson's adjudication is a gratuity, which ought to be postponed to onerous debts.

ANSWERED for Mrs. Nicolson,—That she only craved to be admitted *pari passu* with Howat's adjudication; and that Sir James could not object against her debt, because old Sir William had left sufficient means to pay all his debts, and this bond also in favours of his lady. And further, that young Sir William had accepted the said disposition, to a vast sum more worth than all the heritage; so that it was presumeable he had bought in his uncle's debts with the effects of the disposition.

REPLIED for Sir James,—That the naked acceptance of the disposition could never import extinction of his adjudication, in regard it was only a right in further security, nowise innovating the constitution of the debt secured; and Sir James and his father were under no obligation to use diligence, either implicitly from the nature of the right, or expressly from the tenor thereof: and therefore Mrs. Nicol-

son ought to prove his intromissions ; in which case, he offered to prove the same was applied towards payment of other debts due by old Sir William than what was contained in Howat's adjudication, and therefore must be imputed in payment of these other debts.

DUPLIED for Mrs. Nicolson,—That the disposition being not only accepted, but effectually made use of, it is not relevant for Sir James to say, that he can be found liable to hold count for no more than for what shall be proven he did uplift, unless at the same time he produce the bonds, tickets, &c, which are disponded, and say they are yet unpaid and undischarged. *2do*, It was presumeable, that young Sir William, who was apparent heir to his uncle, but refused to represent him, and yet did accept and make use of this right, has recovered payment of all these debts, unless he produce the documents of such as are not recovered ; and this chiefly, because he accepted this right for his relief of engagements. And therefore seeing he refused to represent, he had no farther a just title to these evidents as his own, but for his relief only ; and *quoad ultra* he was but trustee for Sir William's other creditors.

The Lords found the defender must count for such of the debts in the disposition, whereof the instruction came to his father's or his own hands, to extinguish his adjudication. *Vide 17th June, 1715.*

*Act. Hay. Alt. Nasmyth. Mackenzie, Clerk. Vol. I. page 89.*

1715. *February 16.* JOHN WATSON of Saughton *against* THOMSON of Corsehill, and JOHN TOD, Merchant in Glasgow.

ROBERT HAMILTON, younger of Wishaw, having adjudged the lands of Monkland, he and Monkland at length entered into a minute, whereby Wishaw is obliged to dispone the adjudication to Monkland, and he to pay a certain sum therefore at diverse terms, declaring always that this is only a corroborative security, containing an irritancy in case of not punctual payment at the respective terms, viz. That the minute should be void. Monkland accordingly made some partial payments, but did not keep his days : and in the mean time Gabriel Thomson and John Tod, Wishaw's creditors, laid an arrestment in Monkland's hands, and obtained decreets of furthcoming, which Monkland suspended upon double poinding : and thereafter Watson of Saughton, another creditor of Wishaw, adjudges Monkland's estate, as belonging to his debtor by virtue of the foresaid adjudication, and now insists in a process of mails and duties against Monkland and his tenants. In which process Thomson and Tod compearing, and craving preference, because of the priority of their diligence ;

It was ALLEGED for the adjudger,—*Imo*, That an adjudication being an heritable subject, is only transmissible by such diligence as is capable to affect heritage, and so not by an arrestment. *2do*, No man can have right to the money due by Monkland, except he who is capable to dispone Wishaw's adjudication ;—seeing Monkland is bound to pay upon Wishaw's disponing. Now, an arrester