

1724. February 27.

SIR THOMAS CALDER *against* COLIN MACKENZIE, Bailie of Dingwall.

SIR THOMAS pursued Colin Mackenzie for payment of certain sums due to him by one John Dingwall; and the ground of his action was, That Mackenzie, as one of the Magistrates of Dingwall, being required by a messenger to give his concurrence in the execution of letters of caption against Sir Thomas's debtor, he not only refused to search the town, but likewise denied the messenger access to a particular room in his house where the rebel was alleged to be.

It was *pleaded* in defence for the Bailie; *1mo*, That in a process against him for malversation in his office, the other Magistrates should have been called; because any sentence passed against a Magistrate of a burgh, in a question that concerned his office, might establish a precedent in prejudice of the burgh; *2do*, As to searching the town, the Bailie was not obliged to have any regard to such a vague requisition, for it was incumbent on the messenger to point out a particular house in which he suspected the debtor was; and *3tio*, The room in the Bailie's house, to which the messenger demanded access, was set to a gentleman who at that time was in the country, and had the key with him, and therefore, without letters of open-doors, the Bailie did not think he could lawfully break it open.

In *answer* to the *first*, The pursuer cited a decision, Artobus against Anderson, Provost of Glasgow, 13th June 1667, No 40. p. 11712. where a libel was sustained against the Provost without calling the other Magistrates. And to the other *two* defences, it was *answered*, That wherever the debtor was, whether in the defender's house or not, he could not, without contempt of his Majesty's authority, refuse his concurrence, by searching the whole town if required, and breaking up every lock-fast door, particularly in his own house, where he was informed by the messenger that the rebel lurked, as was found 2d July 1669, Farquhar against the Magistrates of Elgin, No 44. p. 11716.

THE LORDS found, That the process being founded on the Bailie's proper delict, there was no necessity to call the other Magistrates; and found he was not bound to search the whole houses of the town for the rebel: But found it relevant to make him liable for the debt in the caption, that he was required by the messenger to open a particular room and give the messenger access thereto, which he refused, and that whether the room belonged himself, or was set by him to another who might have had the key thereof.

Act. Pat. Grant.

Alt. Ja. Boswell & Col. Mackenzie.

Clerk, Mackenzie.

Edgar, p. 42.

No 64.

When the process is founded on the proper delict of one of the magistrates, there is no necessity to call the other magistrates.