

No 45.

Leckie, No 48. p. 2118., marked by President Gilmour. *Replied*, That the contrary has been found in a co-cautioner taking assignation, and recurring against the other cautioner, that he could reclaim no more from him than what he had paid out, 27th July 1672, Brodie *contra* Keith, No 44. p. 3393.; and therefore *a paritate rationis* the same ought to hold in a cautioner taking assignation against the principal. THE LORDS found he ought to declare and elect his title, and if he insisted under the reduplication as assignee, he behoved first to use requisition; and that the raising this process was not equipollent thereto, as was contended by Fodderance; and if he pursued as cautioner distressed, though they inclined to think he ought to communicate the eases he got, yet they allowed him to be further heard thereupon.

*Fol. Dic. v. 1. p. 227. Fountainball, v. 2. p. 143.*

No 46.

A procurator fiscal, by the judge's written warrant, pointed goods without a previous charge. He was found liable in damages. The person to whom the damages were found due accepted of a lesser sum, and granted an assignation of the decree; on which the procurator fiscal pursued the judge by whose warrant he acted. The Lords found he could not recur in warrant for more than he himself paid.

1712. January 23. GORDON against AGNEW.

SIR James Agnew of Lochnew, sheriff of Wigton, being informed that one Douglas of Garrary had cut and carried away some trees, he caused William Gordon of Balmeg, his procurator fiscal, indict him for theft and cutting of green wood; and by his decret fined him in 200 merks; and of the same date he gives Balmeg an order to this purpose, 'Fail not on sight to go and secure so much of Douglas's goods as will pay the 200 merks of fine, and dispose of them according to my order given you this day; and thir presents shall be your warrant.' In obedience to this order, the procurator fiscal, without getting any precept on the decret, or bidding till the days of the charge were run, pointed twelve or thirteen nolt of Douglas's, and brought them to the sheriff, who disposed on them. This execution being so summary and contrary to law, Douglas pursues Balmeg for a spuilzie before the Lords; and referring the fact to his oath, which he could not deny, he is decerned in the value, and the violent profits, amounting to a vast sum; and being distressed is forced to transact; and taking an assignation, he raises a process against Sir James Agnew the sheriff, for refunding his damages, in respect that what he did was by his warrant. *Alleged, imo*, The warrant is null, as wanting the writer's name and witnesses. *Answered*, Custom, the best interpreter of laws, has sufficiently explained this, that warrants and sentences of judges require no such solemnities, the character and authority of the judge and clerk supporting these deeds without any other formality. *2do, Alleged*, The warrant relates to another order given him of the same date, and so cannot oblige till that be produced; for it might regulate and qualify his procedure. *Answered*, This is a chimerical objection; for he is ready to give his oath that there was no separate order but the decret, and a verbal commission to bring the point to the sheriff. *3tio, Alleged*, Words are to be taken in a legal sense; so that the warrant to secure

and apprise must be always understood after the days of the charge are elapsed ; for *in ambigua voce ea potius accipienda est interpretatio quæ vitio caret* : l. 19. *D. de legibus* ; and it is founded both in humanity and charity to put the most favourable construction the words will allow, *rapienda est occasio quæ benignius præbet responsum*. Answered, There is no room left for such charitable conjectures here ; for it commands him on sight to go and poind, though he knew there was neither precept nor charge given ; so Balmeg obeyed the very letter of the warrant by present poinding, to prevent Douglas's abstracting his beasts. 4to, Alleged, Esto the warrant were taken in the worst sense, yet you ought not to have obeyed it, for wrong has no warrant ; where a warrant is given to commit a delict, the mandatar has no relief nor recourse against the mandant, for the damages he has incurred by performing the same, as is clear *per l. 6. § 3. D. mandati*,—§ 7. *Instit. eod. tit. Rei turpis nullum est mandatum, non est obligatorium quod contra bonos mores fit* : and Voet *ad d. tit.* goes a greater length, though the *mandans promississet indemnitate rei turpis executori in casu quo criminis illius perageretur, non tamen habebit actionem contra mandantem* : And Craig, *L. 2. Dieg. 4. § 11.* is positive *spoliationem nullum habere warrantum ut homines a malificiando deterreantur* : and Stair *lib. 1. tit. 12.* says, a mandate in a thing unlawful, though accepted, yet does not oblige the acceptor to perform it ; and if he executes it, yet it does not bind the mandant to make up his damage. Answered, Mandates given by private parties *et in materia privata*, afford no recourse to the mandatar, but it is otherways in judges' and magistrates' warrants, which their apparitors or servants of court are not to examine if legal or not, oppressive or not ; we know mandates of sovereigns or supreme judicatories excuse the obeyers, and why not of inferior judges ? And here the recourse is founded on express paction ; for it bears 'and this shall be your warrant.' It is true, mandates to commit crimes against the light of nature, as murder, theft, &c. will not defend ; but in dubious cases, whether the poinding be lawful or not, the authority of the judge is sufficient. THE LORDS, without giving a distinct categorical answer to these defences, fixed on a different point, insinuated by Sir James, in his informations, that Balmeg had transacted this plea with Douglas for 10 or 12 guineas, and that he could never recur in warrandice for more than what he actually paid himself ; as has been several times decided ; or at least he could only claim that with the expense of the process ; therefore they remitted it to the Ordinary to hear them on that precise point, which if true would determine the whole cause. Some of the Lords thought this was shunning a clear opportunity put into their hands, to let inferior judges know they would severely punish them for oppressing and concussing the poor lieges, under the shadow of law, and abusing their authority to covetous gripping extortion. That warrandice, in these cases, goes no farther than the sum paid, see Stair *Instit. l. 2. tit. 3.* and the decisions there cited.

*Fol. Dic. v. 1. p. 227. Fountainball, v. 2. p. 710.*