

to the analogy from the case of forgery,—forgery was tried, of old, in the form of an action of improbation, and then no list was necessary. It might still be tried in the same form ; but the practice is for the advocate, out of humanity, to insist, *per modum simplicis querelæ*, and to give out a list.

GARDENSTON. I am against a list ; for I am against all innovations : Specious reasons may be assigned for innovations ; but we cannot foresee their consequences. We are allowed to try, by summary complaint : why not try it like other summary complaints ? If forgery trial is to be the rule, we ought to examine the witnesses in presence, and we ought to oblige the parties to attend.

On the 6th July, 1768, the Lords repelled the defence, and ordained both dilatory and peremptory defences to be given in, this day seven-night.

Act. D. Rae. Alt. A. Crosbie.

Diss. Barjarg, Coalston.

1769. *January 17.* ANGUS SINCLAIR *against* JAMES HAMILTON, JOHN MACFARLANE, and OTHERS.

PUBLIC OFFICER—REPARATION.

Malversation of Justices—Poinding by an officer of excise, in virtue of their decret.

[*Faculty Collection, IV. p. 194 ; Dictionary, 13,130.*]

PITFOUR. If the decret is in terms of law, it is not liable to reduction : but then the question is, Whether the justices acted in terms of law ? We ought not to catch at every irregularity committed by justices of the peace, if, however, they act within some bounds of law. They are judges appointed, *ex vicineto*, for the benefit of the subject, who would otherwise have been judged by the Court of Exchequer. They ought to be favoured whenever they can be favoured : but here their whole conduct is irregular. I will state some of the most striking particulars : There was no proof in writing, which is always necessary when a judgment is subject to review. If custom can sanctify this, still the party must be allowed to prove that the evidence was other than what the justices suppose it was. *2d*, There is a difference in the manner of stating the fact ; from whence it cannot with certainty be known whether the offence was prescribed or not.

GARDENSTON. I am not much moved with objections in point of form. When there are hundreds of little causes before the justices of peace, it is impossible to take down, in writing, the evidence, and every thing that passes. I see nothing against the justices ; but I see great irregularity charged against the officers,—that they beat Sinclair, and that they made irregular distress. It is said that the officers had a writ of assistance, and thereby got into the house. I do not know how far a writ of assistance does go ; but I know how

far it does not go. He who uses it must be sure that there are smuggled goods in the house: if not, he must show his informer, or act at his peril.

JUSTICE-CLERK. If this action were a reduction or a suspension, I might listen to it; but it is an action of oppression, and nothing is said to prove any oppression on the part of the justices, or any intention to oppress. The conduct of the officer of excise, and of the constable, seems blameworthy, and fit to be inquired into.

HAILES. Of the same opinion. The proceedings of the justices may have been inaccurate, but there was no harm either intended or done by them. I have not the same opinion of the officer and constable. I see what they have aimed at,—an imitation of a practice among messengers. If a messenger had a warrant to poind, and was possessed of a caption, upon finding the doors shut, he used his caption; by virtue of it broke open the doors, and then, without thinking more of the caption, proceeded to the poinding. Thus he made the letters of caption supply the place of letters of open doors. The author of the treatise on the office of a messenger mentions this practice, and cautions his brethren against it as illegal. It is the same sort of irregularity which the officer of excise and the constable are accused of: they have made an irregular and illegal use of a foreign writ.

PRESIDENT. I would rectify a decree of this kind, but not find oppression where no *animus injuriandi*. I wish that the officer, who has acted so illegally, were deprived of his office. This would quiet the minds of the people more than any judgment of this court can do. The distress was altogether irregular. There is an end of liberty, if officers of the revenue may, in this manner, under false pretences, break into every man's house.

On the 17th January 1769, “the Lords assoilyied the justices, but sustained action against the officer of excise and the constables, and remitted to Lord Barjarg, Ordinary, to proceed accordingly.”

Act. A. Crosbie. *Alt.* H. Dundas. *Reporter,* Barjarg.

1769. *January 24.* JOHN and ANN YOUNG *against* FRANCIS ROBERTSON.

HUSBAND AND WIFE—MINOR.

The Wife's Minority no ground for reducing a Postnuptial Contract of Marriage.

By a postnuptial contract of marriage, between Francis Robertson and Elizabeth Young, the wife conveyed to her husband a sum of L.500 which had been left to her by her father; and he, on the other hand, made suitable provisions for her and the issue of the marriage. At this time they were both in minority. The wife having predeceased her husband, her representatives