

1780. *December 22.* WILLIAM INNES *against* JOHN CLARK.

REMOVING.

[*Faculty Collection, VIII. 21 ; Dict. 13,871.*]

BRAXFIELD. In the case of the *Duke of Gordon* against *M'Vicar*, the same point was determined in favour of the tenant.

GARDENSTON. Had the substance of the Act of Sederunt been in the libel, *that* might have been sufficient, although the very words of the Act of Sederunt had not been recited.

COVINGTON. It is not necessary to libel the finding caution for five years ; that clause is in favour of the tenant, and he may plead on it in defence, if he will.

On the 22d December 1780, " The Lords sustained the defence, and suspended the letters ;" adhering to Lord Braxfield's interlocutor.

Act. Fr. Russel. Alt. Ld. Maitland.

1780. *December 22.* JOHN M'ADAM *against* JOHN FOGO.

HYPOTHEC—PRESCRIPTION.

Found, that although a writer hold possession of his client's papers, this does not interrupt the triennial prescription of his account.

[*Fac. Coll. VIII. 22 ; Dict. 6252.*]

BRAXFIELD. That I have a counter-claim is no reason for my not constituting ; for prescription may run in the interim. When a pledge is once constituted, the negative prescription will not run, because then there is possession : but, as to the case of a writer having retention, that does not necessarily suppose that anything is due to him. It is not an impignoration on a ground of debt : the account must be constituted.

JUSTICE-CLERK. It would have bad consequences were this privilege allowed to writers. The Ordinary appears to have gone, not on his own opinion, but on the authority of the only decision produced before him.

GARDENSTON. One decision is nothing. This puts me in mind of what Gulliver reports to be the law of England, that, if judges once go wrong, they make it a rule never to come right.

HAILES. I did not consider myself at liberty, in the Outer-house, to con-

trovert a judgment of the whole Court. If the Court should consider itself no more at liberty, then Gulliver's report might apply.

COVINGTON. I know not the origin of the privilege claimed by writers: I would not deprive them of it; but it ought not to be extended, so as to make their accounts real incumbrances on the estate. To maintain the rule of prescription will be beneficial to writers: it will both excite them to demand payment and furnish an excuse for demanding it.

PRESIDENT. The origin of the practice is good, that a writer may have a security for payment in a cause on which he has bestowed pains and expense.

On the 23d December 1780, "The Lords found that the holding of the client's papers does not stop the currency of the triennial prescription;" altering Lord Hailes's interlocutor.

Act. — Boswell. *Alt.* G. Ferguson.

1781. —. WILLIAM WELSH *against* MARGARET LUMISDEN.

MESSENGER.

Cautioner of a Messenger only liable for his actings *qua* Messenger.

[*Dictionary*, 8893.]

BRAXFIELD. It is no part of the duty of a messenger to receive money. Money levied in the course of diligence ought to be consigned. The caution is for the faithfulness and attention of the messenger in executing his office, but for no more.

HAILES. It does not appear that there was any pointing, or that the messenger discharged any part of his office at all.

COVINGTON. Messengers are frequently trusted with the receiving of small sums of money when they execute diligence; but this will not have the effect of making their cautioners liable.

PRESIDENT. It would be dangerous to make the cautioner liable. The words of the act of Parliament singly respect diligence and fidelity, the agent approved of all.

KAIMES. Were another judgment to be given, there would be no cautioners, consequently no messengers.

On the 18th January 1781, "The Lords found the cautioners only liable for the messenger's faithful execution of his office, but not for any money allowed to come into his hands;" altering Lord Stonefield's interlocutor.

Act. J. Boswell. *Alt.* Alex. Miller.