Macjarrow having broke and absconded, neither himself, nor any from him were to receive the goods, and pay the custom and other dues; wherefore, the collectors and surveyors there put them in cellars, and detain them till payment. Of which the said Gilbert being informed, he now craves the Lords' warrant to intromit with the goods, on his paying the customs due to the public; and he is willing to find caution for their value to be made forthcoming to Macjarrow, or his creditors, if they shall afterwards lay claim thereto.

The Lords ordained the bill to be intimated, that any concerned might compear to answer the same. But none appearing, the Lords thought the desire reasonable for the preservation of the goods; especially seeing factors abroad cannot know the condition of their employers, who may alter and fail in the interval of a few posts, betwixt the commissioning the goods and the receiving of them. And though we have not that hypothec introduced by the Roman law, whereby the ware and goods stood affected and impignorated for the price, (*June* 14, 1676, *Cushnie* against *Christie*;) yet here there was no reason to let the goods perish; and therefore allowed him to intromit, on his finding caution to make them forthcoming, and paying the freight, the customs, cellar-maills, and other dues; and gave him letters to charge the collectors to deliver them up to him on these terms. Which, though not consonant to the strict principles of law, by which the dominion of the goods was Macjarrow's, to whom they were consigned, and whose faith Montier followed in sending them; yet, in this circumstantiate case, his desire seemed to be founded on justice and equity.

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1706. *June* 27. MULLIKINS *against* SHARP of HODDAM and COUPLAND of COLLASTON.

LORD Prestonhall reported Mullikins against Sharp of Hoddam and Coupland of Collaston. Thir two gentlemen, as having a right to the lands of Crookmuir, warn John and Andrew Mullikins, the tenants thereof, put in by the heritor, to remove at Whitsunday 1705; and a process of removing either being intented, or feared, before Mr Macnaught, bailie of the regality of Terreigles, within which jurisdiction the lands lay, there is an advocation obtained, and produced to Thomas Martin, clerk to the said regality-court, on the 19th May 1705, and marked as judicially admitted by him in January 1706. There is a decreet of removing pronounced against the foresaid two persons; and, a suspension being given in, the Lords did pass the same without either caution or consignation, in respect of the preceding advocation produced. But the question arose, If there was any contempt of the Lords' authority in proceeding to sentence after advocation marked and admitted?

ALLEGED for Hoddam and Collaston,—There could be no contempt; 1*mo*, Because the advocation was raised several months before the process of removing was intented, and so a *non ens* could not be advocated; 2*do*, Though its production be marked by the clerk, yet that was but collusive, and can infer nothing against thir defenders, who knew nothing of it; and so their procedure can never be interpreted to have been *spreto mandato judicis superioris*.

ANSWERED,—This is but a mere contrivance to palliate their guilt; for they have

abstracted and withdrawn the former process depending at the time the advocation was produced, to frustrate the poor tenants of their legal remedy, and then intent a new process of removing posterior to the advocation; and hurried it through to a sentence, before the advocation could be got produced again: and that the clerk would collude with thir poor men against the judge and these considerable gentlemen, contrary to his own interest, to carry away causes from himself, passes all understanding, and will never be believed.

Replied,--This is but founded on a slender presumption, and at most is but *fictio fictionis*, and can never burden them so as to presume their knowledge of that advocation.

The Lords thought such judicial deeds were probative; and so found there was a contempt, and fined them in 100 merks to the parties for their damage.

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1706. *June* 29. Sir John Swinton *against* The Lady Craigmiller.

Sir Alexander Cockburn of Lanton being debtor to Sir John Swinton, he prevails with the Lady Craigmiller, his sister, to draw a bill on Sir Alexander Gilmor of Craigmiller, her son, for 1000 pounds Scots, payable to Swinton. This bill Sir Alexander refuses to pay, alleging he had no effects in his hand; whereupon it is protested in 1698 for not acceptance, and lies over till 1705; and then he raises a process against the Lady as drawer, to warrant her bill, and pay the sum therein contained.

Alleged,---The Lady could not be liable, the bill not being duly negotiated, nor the refusal of it timeously intimated to her, but suffered to lie over five or six years; by which neglect she was lesed, and prejudged of her relief and recourse against Lanton; for, he being now dead, she was precluded of all relief. And that she received no value for that bill, but was a mere gratuitous compliment to her brother. And, by the mercatorian laws and customs of foreign parts, if the creditor of a bill refused to be accepted or paid, do not do diligence against the drawer within the space of six or seven months after his protest, he is by his own negligence excluded from recurring against the drawer; because, by not certiorating the drawer, he may lawfully presume it is paid; and, if he knew the contrary, he could affect the goods of him on whom he drew, and so make his own relief effectual; whereas, by your taciturnity, he may break in the mean time, and so the drawer loses his relief.

Answered,—Whatever prescription the municipal customs of other nations have introduced, as to foreign bills of exchange for expedition of commerce, yet this cannot extend to inland precepts as this: For the Act 1696 provides the same execution to pass on them that is appointed for foreign bills by the Act of Parliament 1681; yet that relates only to summary diligence, but not as to any prefixed time for negotiating such bills, as to which there is no rule yet fixed by our law, or a strict negotiating of them prescribed; therefore, the Lady, as drawer, must still be liable.

The Lords thought it very reasonable that even inland precepts should be limited to a time for recourse against the drawer, else it might be very prejudicial and ensnaring: Yet, our law having prescribed no time, the Lords repelled the Lady's defence, and found her liable in the sum. *Vol. II. Page* 339.