

of Guild court, they can always discover every debt of this kind. It may be true, that the jedge and warrant in this case was irregular in some minute particulars of form ; but as to every thing essential, it was unexceptionable.

No 46.

THE LORDS found, ' That the whole tenement, whereof the shop in question is a part, being built by the pursuer's father in consequence of a jedge and warrant from the Dean of Guild, the pursuer is a preferable creditor upon the said shop, for the whole expense laid out, to all the creditors of Reid, whether prior or posterior.'

For the Creditors, *Ferguson.*Reporter, *Lord Woodhall.**W. J.**Fol. Dic. v. 3. p. 296. Fac. Col. No 86. p. 150.*

 S E C T. VI.
Hypothec on *invecta et illota.*

1630. December 7.

DICK against LANDS.

No 47.

If a messenger come to poind the gear of one that dwells within burgh, the landlord may stop the poinding, if the tenant be owing to him a year's mail of the said tenement, until he be satisfied thereof, but may not stop for any more terras than one year's.

Fol. Dic. v. 1. p. 419. Auchinleck, MS. p. 160.

*** Durie reports the same case :

LANDS pursuing Dick for deforcement, in staying an officer to poind upon a bond registrate in the books of the Canongate, and conform to the act and warrant directed by the magistrates thereon to the officer, to make open doors; the defender *alleged*, that this bond registrate in the books of the Canongate, and the foresaid act to make open doors, could not be a warrant to bring the party under so dangerous an action of deforcement, except that, before that act to make open doors, there had been first a precept of poinding directed upon the sentence, and that precept had been executed by the officer, and reported again to the Magistrates, shewing, that he could find no goods strenziable, that thereafter that precept to make open doors, might have been directed ; which not being done, that decret of registration, and the act thereon, to make open doors, could not be a warrant, whereon the officer

No 47.

might point. And this defender finding that he wanted a warrant, might stay that unorderedly pointing, and for doing whereof cannot be convened as a deforcer. THE LORDS found, no pointing could be executed, while the officer had recovered a warrant to make open doors; *item*, the LORDS found, the landlord of the house might stay the pointing, while he were satisfied of a year's mail, owing for the house, in doing whereof he committed no deforcement; but that he could not stay the pointing upon pretence that any more terms were owing to him; and albeit he at the pointing stayed the same, upon allegiance, that three terms mail were owing to him, yet the Lords found no deforcement thereby, albeit he might not stay the pointing in law, for any more terms mail but a year only, seeing the party pointer offered not security to him, for that year's mail, for which he might have stayed the same; and the offer to pay a term's mail by the pointer was not found enough. See LETTERS OF OPEN DOORS.

Clerk, *Gibson*.*Durie, p. 545.*

No 48.

Omnia invecata et illata stand hypothecated to the landlord for his rent in urban tenements, nor can the tenant remove his furniture, unless he find caution for a year's rent.

1702. June 12. COUNTESS of CALLANDER against CAMPBELL.

THE Countess of Callander having set a lodging in Edinburgh to Sir George Campbell of Cesnock, and he dying within the year, his lady possessed the house till the Whitsunday thereafter, with her family, and offering then to remove her plenishing, the Countess obtained a warrant from the bailies to arrest and sequestrate the same till the year's rent were paid; but on application made by the Lady Cesnock, the bailies took off the sequestration, and ordained the household furniture to be delivered up to her, she finding caution to pay the year's rent, in case she should be found liable to do the same in law. Of this ordinance the Countess gave in a bill of suspension as iniquous, seeing it tended to loose the security of all masters and landlords, and to enervate their tacit hypothec upon the *invecata et illata*; and whatever might be said if caution had been simply offered for the house-mail, yet this conditional and qualified offer to pay, if she were liable in law, was wholly elusory, and would engage the Countess in a tedious and expensive plea to prove the passive titles, &c. *Answered* for the Lady Cesnock, she was neither the taker of the house, nor liable for the rent; that being a debt upon her husband, and his representatives, who were solvent, and that the plenishing was her own in property by a disposition; *2do*, The defunct had given his ticket for the rent, which was a sort of novation, and passing from the legal hypothec, and a relying on his personal security; *3tio*, Some of the goods arrested are a part of her daughter Captain Gordon's Lady's wearing-clothes, who coming only for a visit to her mother, *et non animo remanendi*, her clothes could not be a subject affectable by the hypothec. *Replied*; It is an uncon-