

## TRANSACTION.

1598. *November.* LAIRD OF MAYNE *against* LAIRD OF INNES.

The Laird of Mayne and the King's Advocate caused summons of contravention against the Laird of Innes, and others, for coming to his barn-yard and casting his stacks, and taking away his corns. It was alleged, that there could be no process, because Mayne had submitted that action with Mr. Alexander Innes, to friends, who had pronounced their decret-arbitral thereanent. The Advocate answered, that it could not prejudice the King's Majesty, *cui acquisitum fuerat jus ipso facto*, by the violent deed committed against the act of law-burrows, which the parties by the proved transactions could not invert. It was answered, that the King had no interest without concurrence of the party whose discharge or transaction might free the defender. The Lords found, that the allegiance of transaction *ante litem intentatam*, and before the raising of the summons might relieve the defender, but the summons being once raised and executed, that the parties could not transact in prejudice of the King.

*Haddington MS. No. 627.*

1664. *December 22.* BROWN *against* WATSON.

George Brown, merchant, by his ticket, obliged himself to pay to John Watson £.18 Sterling, and in case of failure, £.50 Sterling; and upon another ticket, to pay to Thomas Main £.10 Sterling. James Kirk being factor to both the said creditors, in November 1662 obtains a decret in absence before the Bailies of Edinburgh against the said George for the said failure of £.50 Sterling, and for the other £.10 Sterling, upon which he takes out an act of warding; wherewith he apprehends the debtor; and in the meantime while they are under trust, and the debtor being so taken, to save his credit and for fear of prison, he gives a new bond relative to the decret for payment of the whole sum; which bond he suspends, and intents reduction thereof; and of the said decret, whereunto it is relative, upon this ground, That the decret was for not compearance, whereas if he had compeared, he would have alleged, that he could not have been decerned for the £.50

No. 1.

Found that a party may transact a contravention of law-burrows before, but not after raising the summons, that being to the King's prejudice.

No. 2.

Effect of transaction of a debt, by granting a new bond for a larger sum, under dread of diligence.

No. 2. Sterling, being but a penalty for not payment of £.18, which exorbitant penalty in all justice and reason should have been restricted; and as to the new bond, it was granted under trysting, and for fear of prison, and loss of his credit and reputation. It was answered, That the new bond was granted by way of transaction, whereas he might have suspended the decret; and for fear of prison not relevant, where it is not a private force or prison he feared, but *Autore Pratore*, upon a legal sentence, and in execution thereof; transactions in such cases being most lawful, and not to be reduced. Replied, That the suspender being surprised in this case by the act of warding under trysting, there was not only fear upon the part of the suspender, but *dolus malus* in the charger to cause apprehend him when he was under trysting.

The Lords found they would modify the exorbitant penalty, the suspender proving, that they were under trysting the time of the caption or act of warding, or granting of the bond.

*Gilmour, No. 120. p. 87.*

1686. *March.*

CRICHTON *against* MURRAY.

No. 3. A decree at an assignee's instance for the whole debt against a cautioner, being quarrelled by him in a suspension as *ultra* the pursuer's title, in so far as two of the four cautioners were discharged and excepted from the assignation; answered, *Res est transacta*, the defender having got an abatement of the sum decerned, and the decree discharged; which the Lords found relevant.

*Fol. Dic. v. 2. p. 475.*

\* \* \* This case is No. 375. p. 12232. *voce* PROCESS.

See APPENDIX.