

No 34.

former situation. But such case is widely different from the present; and no argument can, with propriety, be drawn from the one to the other.

THE LORDS gave contrary judgments; but at last found, 'That the children of the marriage between the deceased Bryce Blair and Jean Scott, have right, during the life of their mother, to the excrescence of rents, after paying to her the liferent annuity of L. 30 Sterling, and that the same are not affectable by the creditors of the father.'

Lord Ordinary, *Kennet.*

For the Creditors, *Ilay Campbell, Elphinston.*

For the Children, *Rae, Wight.*

Clerk, *Home.*

Fol. Dic. v. 3. p. 128. Fac. Col. No 62. p. 98.

S E C T. V.

Dubious Clauses.—Revocation of a Tailzie.—Liberty to contract Debts.—Conjunctly and Severally.—Just and Lawful Debts.—Liferent and Fee.—Back-Bond.—Importing Property or only Servitude.

1638. July 28.

FARQUHAR *against* M'KAIN.

No 35.

Parties were bound 'conjunctly and severally, ilk one for his own part.' This was interpreted to mean, that each was liable only for a half.

ONE Patrick Farquhar having charged James M'Kain for L. 700, conform to his bond, of this tenor, viz. bearing, 'That the said James M'Kain and John Gordon bind and oblige them, conjunctly and severally, to pay the said sum at the term contained in the bond, ilk one of them for their own part;' these were the very words, in respect of the which clause, terminating the prior words of 'conjunctly and severally,' and resolving in payment, ilk one of them of their own parts;—THE LORDS suspended the charges against M'Kain for the half of the sum, and found him only debtor of the one half thereof, and not of the whole.

Durie, p. 861.

1665. December 20.

SIR RORIE M'LAUD *against* WALTER YOUNG and JOHN GOVAN.

No 36.

A clause, dubious, interpreted against the writer.

WALTER YOUNG, JOHN GOVAN, and HENRY HOPE, by a letter written to any that they should buy cows from in the Highlands, desired that they might use the bearer of the letter kindly, and, for whatever quantity of cows they bought,

they should answer such bills as he should draw upon them therefor. Henry Hope being broken, James Gray, as assignee, pursues the other two for the whole, who *alleged*, they were only liable for their own parts. It was *answered*, That they were obliged to answer such bills as the person intrusted by them should draw; and they produce a bill drawn by him upon them, or either of them. It was *answered*, That such bills can only relate to the quantity, and not to the quality, and manner of obliging; seeing, if they had so intended, they would have obliged them, and either of them, or it would have borne, what he should draw upon them, or either of them, should be answered.

No 36.

THE LORDS found every one of them liable *in solidum*; for they thought, that the clause being dubious, was to be interpreted against the writers, and the sellers of the cows were *bona fide* to rest upon the interpretation of the persons intrusted.

Fol. Dic. v. 1. p. 147. Stair, v. 1. p. 329.

1673. July 22.

LORD ROSS *against* MAXWELL.

THE Laird of Newark having made his application to the Commissioners of the thesaury, for changing of the barony of Newark from ward to tax-ward, wherein the Lord Ross at his desire concurred; at which time Newark, by bond, obliged himself to receive the Lord Ross in the five-pound land of Stainlie, which he hath in property, for a proportional part of the expences, together with what further it should please the Lord Ross to determine and appoint for his entry, to whose determination he referred and submitted himself. The Lord Ross having charged Newark to enter him on this bond, Newark suspends, on this reason, that he ought to have a year's rent of the land for the Lord Ross's entry; for albeit, he did submit the entry to the Lord Ross himself, yet the Lord Ross is only thereby arbiter, and ought to determine according to law and equity; by which it is clear a year's rent is due for the entry of a singular successor. It was *answered*, That this clause was not conferred as in *arbitrium boni viri*, but simply to his arbitrimt, bearing, *what he pleases to determine*; and it cannot be thought that this reference was to no effect, for a year's duty was the most could be demanded by the strictest law, without any reference.

THE LORDS found, that the clause did import an absolute arbitrimt at the charger's pleasure, but that he behoved to determine somewhat for the entry, and appointed one of their number to speak with him as to the quota.

Stair, v. 2. p. 217.

No 37.

A clause, submitting to a party, what should be given for an entry to lands, and bearing, 'what he pleases to determine,' was found to entitle the arbiter, to decide entirely at pleasure, without regard to any rule or practice.