

same are apprised ; in which case, it were most unjust to exact the hail rent for the sums contained in the apprising : as also if there were a tie upon the compriser, to offer and pay *ut supra*, it were of most dangerous consequence, because the debtor might prefer one appriser to another, by showing his writs to one for drawing of a charter, and concealing the same to another, who might have been prior in diligence. And therefore the pursuer having done all that in law or reason he was obliged to do, and being yet willing to pay such a composition as the Lords shall find equitable, he ought to be preferred.

The which reason of preference, answer, reply, duply and triply, being considered by the said Lords, they repelled the foresaid reason of preference proponed for the pursuer, and his reply and triply, in respect of the foresaid answer and duply ; and found that the Duke and Dutchess of Hamilton, as superiors of the lands above written, and the donatar, had right to the ward thereof by the decease of the said Robert Hamilton, notwithstanding of the pursuer's apprising and charge proceeding thereupon before the death of the vassal ; and found that it is the duty of the compriser to offer a charter, and an year's duty of the lands to the superior, and if the duty offered be less than an year's duty of the lands, that the compriser is to find caution for the overplus ; and found by the instrument produced upon the back of the charge, that the superior was not *in mora*. And therefore the said Lords preferred the said Duke and Dutchess of Hamilton, and their said donatar, to the pursuer, since the decease of the vassal, and in time coming during the ward ; reserving to him his right after the expiring of the ward, as is above mentioned, and ordain letters in form as effeirs.

This was thought a very hard decision, and the like of it cannot be shown before. See farther my thoughts, in the summary of this same decision, *supra* [page 450,] 20th January 1669, *Duke Hamilton and French*. *Vide* 23d March 1622, *Mr. Simeon Ramsay*, and the cases there. *Vide infra* No. 652, 13th November 1677, *Sir William Purves* against *Strauchan of Kinaldy*.

Advocates' MS. No. 1, folio 65.

1669. *February.*

MURRAY against LYLLE.

THE suspension, *Lylle contra Murray*, being called before my Lord Stair, in December, 1668, Mr. Alexander Oswald, procurator for the suspender, repeated the first reason of suspension : also offered him to prove that the ship was broken *vi majore*, and that no *mora vel culpa* on his side proceeded the *vis major* ; and so was made incapable to ply the said voyage. (See P. Peckius *ad Leges Nauticas*, pagin. 285, *et seq.*)

To the which it was ANSWERED for the charger, by Mr. John Colvill and myself,—That albeit the ship had been broken *vi majore*, which he denied ; yet the foresaid reason ought to be repelled, in respect of the contract charged upon ; whereby the suspender did input the charger, master of the said ship, and took him obliged to attend the same, and to cause repair the same in all the defects thereof upon the said suspender his charges, also to hire a company of skilful mariners for plying the said voyage. And it is offered to be proven that the charg-

er did attend the said vessel for the space of eight weeks, and did hire sailors, and was ready to fulfil all the other parts of the said contract; likeas by the instrument produced, he made offer to do the same.

Which reason and answer the said Lord having considered, he ordained before answer the suspender to prove the ship was broken *vi majore*, and at what time; and also ordained the charger to prove his attendance and hiring of mariners; *item*, assigned the day of January. Whereupon an act being made, letters of diligence by both parties are raised thereon: who compearing and deponing, the Lords at the advising of the cause and of the deposition of the witnesses, found the letters orderly proceeded for the sum of L.13 Sterling, and suspended them for the remanent sums charged for.—28th February, 1669.

Lauder, Clerk.

Advocates' MS. No. 3, folio 69.

1669. July. JAMES CLEILLAND and JAMES SCOT *against* MR. JOHN BONAR.

THIS action being called in July, 1669, it was ALLEGED for Bonar, defender, by Cunyghame, Harper, Stewart, and myself, his procurators, that no process can be sustained against him, because one of the assignees, viz. Edward Clelland, is deceased, and his testament is not yet confirmed; and so, no active title to pursue the defender on. *Vide infra*, 12th January, 1678, *Dundas* against *Holborn*.

ANSWER, Maxwell and Mr. Archibald Campbell, procurators for the pursuers,—That the allegiance above written ought to be repelled, in respect there are two others of the assignees living, at whose instance, as well as of this Edward Clelland, this action is intented and pursued, viz. James Scot and Ja. Clelland, son to the said Edward; and craved process at their instance, as assignees yet on life.

Which allegiance above written, and answer thereto, the Lords having considered, they declared before answer thereto, that they would hear both parties farther. And their foresaid action being again called, the pursuer's procurators declared they would restrict their pursuit *pro loco*, and insist *primo* for the two parts of the debt above written, due and payable to the two pursuers living.

Whereto it was ANSWERED for the defender, that no respect can be had to the pretended ticket produced for them, because the same is only a declaration, and noways obligatory, and so can furnish no action in law against him.*

Whereunto it was REPLIED for the pursuer, that in fortification of the ticket above written, produced by them, they offered them to prove that either the defender got money to pay the quarters contained in the said ticket, and did not pay the same; or otherwise was quartered upon some other person, and not on Margaret Wardrop the pursuer's cedent; and so the defender must be liable in payment of the quarterings above written.

Which reply the Lords, having considered, in regard of the long time that has intervened since the said quartering, by their interlocutor, found the said reply relevant to be proven by the said Mr. John Bonar defender, his oath of verity

* *Nota*, the act of indemnity in 1662, seems also to include and take away this debt.