

1670. *June 21.* HALIBURTON *against* SCOT.

IN this cause, my Lord Stair found that a man's not solvency, who had granted a disposition of before, was not to be estimated or considered as he was at the time of his decease, but as he was at the time when he made the disposition quarrelled on that head.

*Advocates' MS. No. 26, folio 75.*

1670. *June 21.* The MARQUIS of DOUGLAS *against* SINCLAIR.

THE Marquis of Douglas, in his minority, and his tutors and curators, assigns and disposes to the defender the gift of the ward of his own lands: the defender gives backbond to the Marquis, that in case he do not ratify his said deed done in his minority when he comes to be major, that then he shall be countable to the Marquis, as superior, of his intromission with the rents and profits of these ward lands. On this back-bond the Marquis charging the said Sinclair, he suspends on two reasons: *Imo*, The Marquis can never be heard to take the benefit of the backbond, because he offers to prove by the Marquis his own oath, that since his majority he has ratified the same; in so far as he faithfully promised never to make use of the back-bond against him, but to give it him back, and so to ratify his gift: which must be equivalent to a ratification; for an obligation to grant a disposition or discharge is as good and the same thing with a disposition or discharge.

To which it was REPLIED, *Imo, Non relevat* to say he promised, because the back-bond expressly requires a written ratification, which cannot be shown. *2do, esto*, he had promised, he may resile.

The Lords FOUND his promising to ratify, sufficient to elide the back-bond.

Then *2do, et separatim, esto*, the Marquis on oath deny the promise, yet *frustra petit quod mox est res restiturus*: the Marquis his father, to whom the Marquis is heir by his bond, bound him and his heirs to this defender, that whensoever his lands fell in ward he should take no benefit thereby, but he assigned the same in favours of the defender; in warrandice of which deed of his father's, the Marquis will be liable, according to the rule in law, *quem de evictione tenet actio eundem agentem repellat exceptio*. (Which failyies though, in some cases in law, as in *spolio, ubi spoliatus ante omnia est restituendus*.)

To this it was REPLIED,—That the defender's back-bond being posterior, and contrary to that alleged gift of the Marquis his father, he must be reputed and interpreted to have thereby tacitly past from the father's bond introduced in his favours; however, when he pursues on the said bond, he shall get an answer.

My Lord Stair inclined much to sustain this reply.

*Act.* for the Marquis, Lockhart and Colt. *Alt.* Cheap and Sinclair.

*Advocates' MS. No. 27, folio 75.*