

Thereafter there was a condescence given in of omissions, bearing, That he had executed letters of horning against Sir William and Sir Andrew, upon the contract, but had never registered the same, nor used inhibition or comprising against Sir Andrew or Sir William, to affect their estates, before they were denuded in favours of their creditors.

It was ANSWERED for Sir John, That the condescence could not be respected to make him liable ; because the contract of marriage being by his deceased father and him, it was only declared that diligence might be done in his name ; but he was not particularly obliged to do the same ; and, for the back-bond, he had never contravened the same ; seeing Sir Andrew, albeit he had granted an assignation and disposition, yet he did still retain the whole grounds and evidents whereupon he could pursue ; and having most fraudulently kept up the same, until he heard his father had disposed his estate, it were against all law and conscience to make him liable to more than his own estate would amount to : and, for the not registration of the horning used in his name, it could not militate against him as any omission, seeing they were raised and executed by Sir Andrew himself without his knowledge ; and the omission of registration can only be imputed unto him.

The Lords did consider the contract of marriage ; and found, That Sir John being only a party-contractor with his father, who was then an old man, and that it did only bear, that it should be leisome to do diligence in his name against Sir William and Sir Andrew Dick ; that these words were no particular obligation for doing diligence, unless he had been required, and he refused the same ; for, if it were otherwise interpreted or extended, it might bar the door to all friends and relations to be party-contractors, and to lend their name to be made use of, the fulfilling of the contract being particularly upon Sir Andrew, the husband, and who was obliged to see the same performed by the father, and whose condition he did only know as being the only person intrusted therewith, and did transact with his whole creditors. As to the back-bond and letters of horning, they found, That Sir John, never being required, nor instructions offered or delivered to him, nor the horning executed or raised by his warrant or knowledge, that it did not oblige him for contravention ; and, therefore, decerned that he should subscribe a blank factory and commission to such a fit person as Sir Andrew should name for doing diligence upon his charges, Sir John himself being *in lecto ægritudinis*, and by all appearance irrecoverable.

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1677. January 19. The LAIRD of KINNEIR against JOHN and WILLIAM PATIES, his Shepherds.

IN an action at Kinneir's instance, against his shepherds, for the price of 100 lambs, upon this ground, That he desired the shepherds to separate the lambs from the rest of the sheep and ewes, who were all bleating and crying, which was a clear presumption that they were not the natural lambs of his ewes ; but, instead of doing thereof, he drove in the lambs to a house, where he did cut

many of them ; and then did bring and made offer of them, which he was not bound to accept of:—

It was ALLEGED for the shepherds, That they did refer to the pursuer's oath that they did make offer of his own lambs, and so were no farther liable.

It was REPLIED, That he could not be obliged to depone, it being a matter which did not consist in his knowledge ; and it being an ordinary trick in shepherds to change their master's good lambs for worse, the presumption in law did militate against them, who refused a natural trial.

The Lords did sustain the libel to find the shepherds liable for the true price of the lambs, which his neighbours got for that same gang and quality ; and found, That the presumption against the shepherds, in refusing to separate, did prove against them, and did free the master to give his oath upon what he could not know.

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1677. *January 23.* JOHN HAY of MOUNTCASTLE *against* LADY LUCIA HAMILTON and the CREDITORS of MOUNTCASTLE.

IN a reduction of a bond of 4500 merks, granted by George Hay of Mountcastle, and John his son, as cautioner to the Earl of Abercorn, and assigned to the Lady Lucia, and of a decret of suspension following thereupon, *in anno* 1658, by the English Judges ; whereby, they finding that the bond was conditional, upon the procuring an infestment from the King, as superior of the lands bought from Mountcastle, which were held formerly of Duke Hamilton ; which being *factum imprestable*, they did deduce 2000 merks of the sums due, and decerned for the superplus. The reason of the reduction was, that the decret was most unjustly given ; because, albeit there was a charter offered by the Protector during the late usurpation, yet, before the decret, the Duke and Duchess of Hamilton being restored, who refused to resign the superiority, and as yet doth refuse, the bond was null, as being *causa data causa non secuta* ; and therefore the decret, finding the letters orderly proceeded, was most unjust, and the Lady Lucia ought to count for the whole rents intromitted with, by virtue of the comprising following upon that decret.

In this process compearance was made for the creditors of Mountcastle, whose rights she had reduced upon an inhibition served against him, or any other who had given her bond or security, and so were forced to agree with her, and pay her what was contained in her decret ; for which she, having assigned her comprising to Mr Archibald Fleeming, who did dispone the same to the creditors, and which disposition Mountcastle had ratified ; and so it was ALLEGED for the Lady and the Creditors, That the reason of the reduction was noways relevant ; *1st.* Because the decret of the English Judges was not only never recovered *debito tempore* ; but likewise was in itself most just, and could never be reduced ; because the bond granted by Mountcastle, being for a part of the price of the lands sold, albeit it did bear that condition to obtain a resignation from Duke Hamilton, to be holden of the King, and that the Duke, during the usurpation, and since the King's restoration, doth altogether refuse