

1680 and 1681. GEORGE HOME *against* SIR ALEXANDER and PATRICK HOME.

1680. *December 14.*—GEORGE HOME, as donatar to the forfeiture of HOME of Kello, his brother, pursuing Sir Alexander and Mr Patrick HOMES, as representing Renton, their father, for a sum owing by him to the forfeited person :

ALLEGED,—Compensation against the King, (from whom the gift of forfeiture flowed,) upon a bond due by the King to their father. ANSWERED,—This did not meet the donatar. REPLIED,—It extinguished *pro tanto in ipso momento* that the forfeiture devolved to the King, he thereby becoming both debtor and creditor.

Newton took this to the Lords' answer. See 6th of Jan. 1681.

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1681. *January 6.*—The compensation proponed (14th Dec. 1680,) by Mr Patrick HOME against the King, being reported, the Lords inclined to sustain the compensation, but evaded it upon another point, as not being proven by the King's letter produced, which acknowledged indeed the debt, but recommended to the Parliament to fall upon a way to pay it: and so, being limited by that special destination and method laid out by the King for payment of it, it could not compensate.

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1681. *January 6.*

IN an action for payment against a cautioner in a suspension, he alleged absolutor; because, the principal not having subscribed the Act for his relief, he being only an accessory, (*qui sublato principali tollitur,*) he could not be tied.

The Lords found him obliged, seeing it was on his own peril that he did not look to his relief. Yet, *negotiorum gestorum actione*, he may seek it.

This, being a judicial enacting, differs from the case of a cautioner in a bond, anent whom it may be questioned, if he be obliged where the principal does not subscribe; for, though they be *correi debendi*, and each of them bound for the whole conjunctly and severally, yet it may be said to be only a renunciation of the *beneficium ordinis et discussionis* in order to ready access and execution against either, but not to be a renunciation of the pendency of the obligation itself, *in suspenso*, till the principal sign it. See 27th July 1671, and Haddington's Index, *voce* Caution, *n.* 10, where the cautioner is freed, the principal not subscribing; and Stair is of the same mind, *tit.* 3, *in fine*.

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1681. *January 8.* GRANT of KIRKDALES *against* GORDON of BIRKENBURN.

A REDUCTION of a disposition by a father to a son, on the Act 1621, was this day advised. The Lords had, by the Act of Litiscontestation, sustained thir two defences against the reduction; *Imo*, That the father was not a bankrupt, but had an estate *aliunde* in moveables, sufficient to pay the debt acclaimed,

beside the lands disposed to his son. *2do*, That the son had paid an adequate onerous price to his father's creditors; and, probation being led, both on the worth of the lands and the price paid, the Lords found the moveable estate proven was not equivalent, so as they might have satisfied the sums pursued for; and that the mains, never being set in tenantry, the rent of them was not clearly proven. Therefore ordained the defender to depone anent the true yearly sowing and holding of the mains, and either of them to adduce probation what a roun of that sowing might be set for in that part of the country, and that betwixt and the 16th of January next. And, *ex officio*, ordained the creditors to depone what sums the defender paid to them when he acquired their rights.

Against this he gave in a bill, ALLEGING, He ought to have allowance, in the computation of the whole sums which might have been exacted from his father; and that the clause in the 62d Act, Parl. 1661, making it redeemable from apparent heirs for the sums they gave, meets not here, especially seeing the said Acts, 1621 and 1661, are correctory; and he offers to depone the favours and eases he got were merely on his own account, and he never pactioned to give any benefit of it to his father.

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1681. *January 11.* JANET JACK *against* The MARQUIS of DOUGLAS.

JANET Jack having charged the Marquis of Douglas on his bond for 50,000 merks; he suspends, that it was granted *ob turpem adulterii causam*, and without all onerous causes.

The Lords ordained her to depone on the onerosity of the cause for which it was granted. Law says, *ubi utriusque versatur turpitude potior est conditio possidentis*. But, upon a representation by the Marquis, who was unwilling that her oath should be taken on it, the Lords inclined to examine the witnesses in the bond what were the onerous causes thereof.

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1681. *January 13.* DOCTOR ROBERT TROTTER *against* THOMAS GARVIE.

Doctor Robert Trotter's action against Thomas Garvie being reported; the Lords, before answer, ordained Patrick Telfer, the pronouncer of the decreet-arbitral, to be examined, upon oath, what evidences were given to him that the discharges produced were different, or that Thomas Garvy did consent or acquiesce thereto.

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1681. *January 13.* SYME *against* BLACK.

In a suspension, Syme against Black, the Lords reponed Syme against a decreet of spuilie pronounced by the bailie of the regality of Lanerk, upon probation in absence; because, though he had *focum et larem* there, *viz.* his wife