

of 6000 merks intromitted with by the said Andrew's father, which fell to him by Carmichael, his uncle by the mother, and was alleged to have been lost in the burning of Howat's house ; and, all defences being now discussed, they recurred at last to deny the passive titles. ALLEGED,—This was not receivable after proposing peremptors, and leading probation thereon, and after advising them. ANSWERED,—By the act of litiscontestation the defenders had not only proponed the defences, denying the passive titles, which would have saved them ; but also the pursuer consented to reserve them till the debt was constituted, and the conclusion of the cause ; seeing paction and consent may take away law in some cases. Which the Lords found here. *Vol. I. Page 628.*

1694. *July 10.* SIR JOHN CLERK of PENNYCUIK, and ARCHIBALD PRIMROSE of DALMENY, Petitioners.

SIR John Clerk of Pennykuik, and Archibald Primrose of Dalmeny, gave in petitions, representing that they had made the greatest offers at the roups of the baronies of Nicolson and Laswade, and had the price ready to pay ; but the creditors not being ranked according to their preference, they knew not whom to pay it to ; and therefore craved liberty to consign the principal, that they might be free of the annualrents in time coming : seeing, the rent of the lands they had bought at so dear a rate, the one at 24 years' and the other at 22 years' purchase, will not pay them four of the hundred ; whereas, if they be at the creditors' reverence, who may delay long enough in ranking, they must, during all that time, pay six per cent. : which is a most unequal damage to the buyers, and will discourage all bidding at roups. Yet, on the other hand, the Lords considered it would be an intolerable prejudice to creditors, to have their money lying consigned, without interest : and that the buyers at the roup knew their hazard, and yet offered ; for, it is not only an article of the roup, that the price was to be paid to those who shall be found to have the best right, but the bond and caution they give for the price bears the same quality and condition ; upon which the Lords found that consignment would neither exoner them for principal nor interest. But the true way to prevent this loss to the buyers is, to ordain, that no sale shall proceed by roup till the creditors be first ranked.

The *second* point that occurred between these buyers and the creditors, was, There were 3000 merks of liferent annuities, payable out of these lands, and the creditors only allowed him to retain 50,000 merks of the price, as the principal sum corresponding to the said annualrent of 3000 merks ; whereas he has bought the said 3000 merks at 22 years' purchase, the stock whereof is 66,000 merks ; and, therefore, he ought to retain that sum, free of paying any annualrent for the same, during the liferenter's lifetime, else he will clearly lose the annualrent of 16,000 merks. But the Lords considered, that no such thing was proposed at the time of the roup, but great emulation who should be preferred ; therefore they repelled this calculation, and found, that no more could be free of bearing annualrents but a stock answering to the liferent-annualrents, and not in relation to the years' purchase by which he bought it.

The *third* controversy between them was, The buyer craved some deduction of the price, because some of the lands held ward ; which he did not know the

time of the roup, else he would not have bid so great a price. Yet the Lords thought, where a party does not know the holding of lands, they ought to presume they are ward. But this was reserved to further consideration.

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1694. *July 11.* WALTER BUCHANAN and JOHN ANDERSON, Tacksmen of the Milns of GLASGOW, *against* The MAGISTRATES thereof.

THE reason of suspension was, They craved abatement, because there was a committee named by the town-council, to consider on their losses, and they had made a report that they deserved some ease.

The Lords found, that the report of a committee, not approven, was not probative; though some urged it might be produced before answer.

The next point put to the vote was, Whether it was a relevant exception against paying the whole tack-duty, that a contest arising between the magistrates and the maltmen, anent their obligation to go to the milns with malt bought within the thirlage, there was a great abstraction during that time, whereby they were losers.

The Lords considered, that setters of tacks were not bound to warrant against these eventual chances in fact, but they took them with their hazard. If the maltmen had prevailed, it would have afforded a ground, as being *in jure*: but they having succumbed, they had a clear remedy against them, by pursuing them for abstracted multures. And, therefore, the Lords also repelled this allegiance; though some thought there might be oppression to exact the whole in such a case.

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1694. *February 16 and July 11.* MARY GRAY, LADY EDINGLASSIE, *against* SIR JOHN GORDON of PARK, &c. her Curators.

*February 16.*—MARY Gray, Lady Edinglassie, against Sir John Gordon of Park, and her other curators, for making up her damage, in not securing her in her jointure upon her contract of marriage. The Lords thought it would be hard, and dangerous, to overtake curators on such nice omissions; seeing they are bound to act, in their minor's affairs, as rational provident men do in their own. And, seeing they had consented to dispoise her tocher of 25,000 merks to her goodfather, Sir George Gordon of Edinglassie, and had nominated no friends, at whose instance execution should pass, for implementing the contract to herself and her children; and, though they had inserted a procuratory of resignation, yet there was no precept of seasine on which she might have been summarily infett, and afterwards confirmed that base seasine: therefore, they ordained the curators, subscribers of her contract, to expedite her infettment presently, on the procuratory of resignation foresaid, conform to the new Act of Parliament 1693, on their own charges and expenses; reserving to themselves to consider, how far they may be made liable for her damages, in the