

book ; and, if you had no other mean of probation, you should have referred the debt to their oaths, and constituted them one way or other ; which I could not do, having denuded in your favours, and given up my books. DUPLIED,—The back-bond shows the assignation to the debts is not taken in satisfaction, or as *donatio in solutum*, but only in farther security and corroboration ; and, if it be a *mandatum*, it is only *in rem propriam*, and noways a trust for the other creditors and debtor,—all the obligation being on payment ; so that you should either have paid me, or required me to do diligence in order to my own payment.

The Lords thought the case deserved a hearing in their own presence, how far the nature of the thing could oblige James Scot to do diligence.

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1694. December 7. MR RORY M'KENZIE OF PRESTONHALL *against* The MARQUIS OF ATHOLE.

THIS was a charge on a bond for £3,170 Scots. The reason of suspension was,—He offered to prove, by the charger's oath, the true cause of the bond was only the clerks' fees for extracting a decret of locality given to the Marquis on Argyle's estate in 1684, when it was under forfeiture ; which being now rescinded, it was *causa data causa non secuta* ; and he was content it should be modified and restricted to an ordinary fee, payable in such cases. ANSWERED,—The King, to whom the right of Argyle's estate devolved *jure coronæ*, might burden it with what he pleased ; and accordingly, by a letter, had ordained Mr Rory, as clerk, to get for each such decret half a year's rent of the lands contained in that locality. REPLIED,—There was a *jus quæsitum* to the creditors before that letter, in regard the King had, by his letter under his Great Seal, vested the estate in several trustees, to be distributed and given out among the creditors. DUPLIED,—This did not divest the King, they not being the creditors' trustees, but his Majesty's. *2do.* My Lord Athole was not then a creditor, but, *ex post facto*, acquired in some old debts upon the estate ; which cost him little or nothing. *3tio.* He homologated the King's letter by granting bond : Though it was urged that it was granted in obedience ; and so could be no homologation, the letter being impetrated *per subreptionem et obreptionem* ;—as was found in the cases of the *Earl of Morton* and *Lord Yester*, and lately in the concussion pursued by the *Earl of Lauderdale* against the *Earl of Aberdeen*.

The Lords repelled the reasons, and also that founded on the *condictio ob causam non secutam* ; though some of the Lords inclined that Prestonhall should at least instruct that Athole made benefit by that locality, and possessed it several years. But the plurality thought that unnecessary ; in respect he had given bond, and which was a favour, rather than to have put him to lay down ready money. Others proposed, whether Argyle would not, by his act rescisory, get repetition from Athole of the bygones of that locality he had intromitted with ; for, in such a case, it were hard to make the Marquis pay for what he made no benefit, at least what can be evicted from him. But it was ANSWERED, *1mo.* Argyle was not in this process ; and so it was *super jure tertii*. Next, he was not donatar, but got it as a creditor.

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