

by an article of the regulations 1695, decreets-arbitral are declared unquarrel-
lable upon any head whatsoever, except that of corruption and bribery, which is
not pretended here. *2do.* The decret may be maintained against the injustice
founded on; for what hinders a man from binding himself up from bidding at
such a roup? If that obligation be lawful, why may it not be the subject of
a submission; and that case of Bargenie's and Kennedy's came to no decision,
but was transacted. And as to the perpetual reversion, it was only to make the
prohibition effectual, that he might not evacuate it by the interposition of a
third party; *et quod directo fieri non debet, nec per obliquos cunniculos licere de-
bet*; and in a late case of a decret-arbitral, pronounced by one Forrester, be-
tween *Henderson of Meggetland* and *John Luke*, merchant in Glasgow, though
it was carried on by tricks and fraud, yet the Lords would not reduce it,
unless they proved bribery or corruption.

The Lords sustained the decret-arbitral, and repelled the reasons of suspen-
sion.

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1698. *June 29.* EUPHAME SETON *against* BERNARD M'KENZIE.

I REPORTED Euphame Seton, relict of John Robertson, and now spouse to
Bailie Gilbert Fife, against Mr Bernard M'Kenzie, for repetition of two years'
stipend paid by the said Robertson, her first husband, when factor for the estate
of St Germain's, in respect they have been forced to pay the same stipend over
again to Mr Mungo Watson, minister at the new erected church at Gladsmuir.

ALLEGED,---There could be no repetition, *1mo.* Because *qui suum recipit con-
ditione non tenetur*; and he had right, because he had preached these two years
at the church of Tranent on the call and invitation of some of the parishioners,
(but not the Presbyterians,) as also had a right to the stipend 1691, from Doc-
tor Gartshore, the incumbent; and to the former year 1692, he had right, by a
gift from the Lords of the Treasury. *2do.* *Esto* the minister of Gladsmuir's
right were better, in respect of the dismembration of the lands of Greendykes
from Tranent kirk, and the union and annexation of them to Gladsmuir kirk;
yet John Robertson's heirs or assignees cannot repeat, because you knew of Mr
Mungo's right before you paid me, and yet took your hazard; for his decret
of locality is long prior to the discharge, and wherein you were called as a de-
fender; and it cannot be called *indebite solutum et per errorem*, seeing it was
done *scienter, et cujus per errorem dati est repetitio ejus consulto dati est dona-
tio*; *et qui sciens indebitum solvit, is donare præsimitur.*

ANSWERED,---However this might take place where a proprietor pays, yet the
brocard cannot hold in a factor or *negotiorum gestor* for another.

The Lords repelled the defences, and found him liable to restore.

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1698. *February 12 and July 1.* LADY DALRY *against* ARCHIBALD HOME.

February 12.—The Lady Dalry, as donatar to her husband's escheat, pur-

sues Archibald Home, the late tenant there, for the price of the stocking he received at his entry in 1686, viz. horses, corn, straw, &c. to a great value.

ALLEGED, 1mo. Prescribed by the Act of Parliament 1669, not being pursued within five years. ANSWERED,—This being vitious intromission, it falls not under the Act. 2do. It was interrupted within the years by the gift, &c. Whereupon the Lords repelled the allegiance.

3tio. He offered to prove payment, and produced John Cheisly's discharge. ALLEGED,—It was null, being both destitute of the writer's name and the witnesses'. ANSWERED, 1mo. A receipt from a master to a tenant needs not these solemnities. 2do. He had a ratification of it signed before witnesses. REPLIED,—This was not a discharge of rents, and had many other marks of suspicion; and the ratification could never supply the defects, it being signed by him after he was imprisoned and condemned to die for murdering President Lockhart: and if the discharges or declarations of criminals were then to be regarded, they would soon evacuate all their escheat falling to the King and the fisk; and, besides the rule, *quod ab initio vitiosum est tractu temporis nequit reconvalescere*, it is farther clear, that *damnatus ad mortem habetur pro nullo et civiliter mortuo*, and can then do no valid deed; as Faber shows, *lib. 9. Codic. tit. 28. definit. 4.*

The Lords found this discharge, joined with the other circumstances, not probative of the payment.

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July 1.---IN the action pursued by the Lady Dalry against Archibald Home, mentioned 12th February 1698; his discharge being rejected as not probative, it was now ALLEGED for him,---The subject acclaimed being moveables, and he being in possession of them several years unquarrelled, before raising this pursuit, the said delivery and possession presumes property, there being no other title required for the transmission of moveables, unless the former *dominus* instruct *quomodo desiit possidere*; and that it was *clam, vi, vel præcario*, or by such a title as does not admit dominion.

ANSWERED,---It is very true, a person buying goods in a public market, the seller is presumed proprietor, and I, the buyer, am secure by my possession, else the commerce of moveables would be too much restrained; but that is not the case, for here is a vast intromission with moveables, above 7000 merks, without any title; and every vitious intromitter might pretend this.

The Lords sustained the title founded on the presumptive dominion arising from his possession. This being conjoined with the discharge, whereof it was proven the Lady had a double among her husband's papers, and on which Archibald had written an obligation to deliver some straw to Dalry, and she had counted with him several years without excepting this claim; and Dalry had, by letters, desired him to borrow money for him, which he would not have done had Archibald been his debtor in that sum; upon all which conjoined together, the Lords assoilyed.

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