

for the composition; and that it could only be proven by Knockleith's oath. And he being craved to be holden as confessed, it was found, by looking into the execution, that he had absconded of purpose, that he might not be personally apprehended; whereon the Lords granted a diligence to cite him edictally at the market-cross of the head burgh of the shire, and at the church-door of the parish, on dissolving the congregation. On which warrant, the messengers, searching narrowly for him, at last, by accident, found him, and gave him a copy, personally apprehended. And the pursuers now craving he might be holden as confessed, it was ANSWERED he could not; because there was no warrant for a personal citation, but only an edictal.

REPLIED,—Though the warrant proceeded on a supposition of his latitation, yet the pursuer had done more, in apprehending him personally.

The Lords held him as confessed; but declared, If he came in and deponed, the 3d of June, he should be received. And he having given in a bill, craving a commission, the same was refused: but the Lords superseded extract for eight days, that, if he came and deponed within that space, he should be reponed to his oath. And on this the Lords were divided, six against six; and it carried, "Supersede extract for eight days," by my Lord Chancellor's vote: for the generality of the Lords thought Knockleith had used much shifting and tergiversation in this cause, and had made the poor man expend near the whole sum in seeking.

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1705. June 15. SIR GEORGE HAMILTON *against* LIEUTENANT-COLONEL ERSKINE of CARNOCK.

SIR George gives in a complaint to the Lords, bearing, That though he be in possession of the lands of Tulliallan, and thereby has right to the maills and duties thereof, yet the said Colonel Erskine interrupts him therein. And when his servants, in March and April last, were carrying the corns to Clackmannan, where he had sold them, the Colonel's servants fell upon them, seized the farms, beat the men, and wounded some of them to the effusion of their blood; and therefore craved the said Colonel might be fined and punished for his contempt of the Lords' authority; who had, upon a former riot of this kind, committed in 1703, decerned him to restore the corns so unwarrantably intromitted with.

ANSWERED for the Colonel,—That the lands of Tulliallan did truly belong to the Earl of Kincardine; and he having, at a roup of that estate in 1700, bought these lands, he was the only proprietor. It is true, Sir George, and Sir Robert Miln his author, had a right in these lands for £30,000 Scots; and, *quoad* the annualrent of that sum, he was content to prefer him, till, on his declarator of extinction, he instructed he was paid of the whole; but that Sir George, under that pretence, had intromitted with the haill rents, and so he, as heritor, might lawfully interrupt him. And though he was formerly decerned to restore, yet that must be understood *habili modo et in terminis juris*, in so far as concerns Sir George's annualrent of the foresaid sum; but not to give him a total possession of the whole lands of Tulliallan, seeing his own decreets bear only a preference *quoad* his annualrents.

REPLIED,—That, by a contract in 1678, betwixt Sir Robert Miln and the late Earl of Kincardine, Sir Robert did restrict his rights by Lindsay's and Wood's apprisings on the lands of Tulliallan, to £30,000, *ex gratia*,—with this irritancy, That, if it were not paid him betwixt and Martinmas 1685, he should have the irredeemable property, on paying in £10,000 Scots more. But the Earl's affairs going into disorder, they were so far from redeeming him within that time, that they have never offered it now, by the space of twenty years since; so that Sir George is the uncontroverted, heritable, and irredeemable proprietor; and is willing to instruct that he has paid more than the £10,000 of reversion, in purchasing other rights on the said estate. And there was no necessity of a declarator of the expiration and commission of the irritancy, because the reversion being granted by way of favour, it needed no declarator, but was, *ipso jure*, incurred. And the Colonel was *in pessimo dolo* to stop Sir George's possession, seeing, by the Lords' decret of restitution, on a former complaint made the last winter, the Lords discharged him to invert Sir George's possession.

The Lords found the interruption made by the Colonel to Sir George's total possession, unwarrantable; and discharged the same to be done *via facta* in time coming, till the point of right betwixt them were determined; and ordained Sir George to give in a condescendence of the damage he had sustained by this riotous opposition; reserving to themselves to consider what the Colonel's contempt of their authority deserves, at advising of the cause.

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1705. *June 20.* BEATRIX HEPBURN and THOMAS SKENE'S CREDITORS *against* EDWARD MARJORIBANKS of HALYARDS.

BEATRIX Hepburn, relict of Mr Thomas Skene, advocate, and his Creditors, against Edward Marjoribanks of Halyards. Mr Thomas Skene having been a joint disponer, with his brother John, of the lands of Halyards to the said Edward; besides the absolute warrandice, he grants a bond apart, obliging him to purge and disburden the lands of any infeftments yet affecting them and unpurged. After this obligation, Edward gives a bond for 6000 merks to the said Mr Thomas, as if it had been borrowed money, bearing no relation neither to the price, nor to Mr Thomas's obligation to purge. After his death, his executors confirm the bygone annualrents of this 6000 merks, and his creditors adjudge the principal sum, and thereon pursue Edward for payment; who raises a declarator, to hear and see it found and declared, that the said sum contained in his bond is a remainder of the price of the lands of Halyards, and so must stand affected with Mr Thomas's obligation to purge the incumbrances whereupon he condescended; and, until they were purged, the said Edward could not be obliged to pay.

ANSWERED for Mr Thomas Skene's Relict and Creditors,—That the bond was simply for borrowed money, without any mention or relation to the bargain or sale; and, being now, *habili modo*, affected by his creditors, and conveyed and transmitted in their persons, they were not concerned to purge any incumbrances; but Edward might pursue Mr Thomas's representatives for implement of his obligation to purge, as accords. And this declarator could have no effect