

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.

*Vol. II. Page 276.*

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

against them, unless he had adjudged this 6000 merks for his relief in case of distress, which he has neglected to do. *2do, Esto* it had been a part of the price (which is denied,) yet the said cause is now quite innovated and passed from, by his granting a bond of borrowed money without relating to the price.

REPLIED for Edward,—That Mr Thomas Skene's creditors can be in no better case than he would have been in ; and, if he had been pursuing for this 6000 merks, it would have been a good defence, "I cannot pay you, till you, in the terms of your bond, purge the incumbrances ;" for, *in personalibus*, the assignee is in no better condition than the cedent, except *quoad modum probandi*. And that this bond was a part of the price is instructed by a holograph missive letter of Mr Thomas's, acknowledging the same. And therefore he may lawfully retain till they be purged ; even as a debtor, being charged on a liquid bond, may justly allege, "I am cautioner for you in the equivalent sum, and must have retention till I be relieved."

DUPLIED,—This allegiance behoved to be either compensation or retention *ob causam datam causa non secuta*. Compensation it could not be, for that is *de liquido in liquidum*, and must be commensurable ; but here the one is for a liquid sum, and the other for a fact, to purge incumbrances. And it can as little be resolved into retention ; for, *esto* it had been originally a part of the price, yet the same is plainly innovated by turning it into a bond of borrowed money, without the least relation to the price : whereby Edward has followed Mr Skene's faith that he would fulfil his obligation ; otherwise he would have made the one obligation the mutual correlative cause of the other. And the missive letter is not probative though it were holograph, as it is not ; for *nunquam probat suam datam*, and so is presumed to be on death-bed, when he could not prejudge creditors. See 26th November 1674, *Panton* against *Stirling*.

The Lords were tender in deciding this point, both the parties being *in damno vitando* : and, wherever the preference fell, there would be an evident loss to the other party ; seeing Mr Skene's creditors must either want their money or Edward Marjoribanks must pay a part of the lands of Halyards twice. Therefore, before determining, they named some of their number to try a settlement betwixt the parties.

*Vol. II. Page 277.*

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1705. June 22. ALEXANDER HIGGENS, Fiscal of the Admiralty, against JOHN MATTHIE, ROBERT HOG, DAVIDSON, &c.

MR Alexander Higgens, Procurator-fiscal to the High Court of Admiralty, against John Matthie, Robert Hog, Davidson, and others, skippers in Prestons. The fiscal having pursued them for exportation of wool, linen yarn, and money, out of the kingdom, contrary to law, and having taken out a decret against Matthie for £300 sterling, and the rest for lesser quantities, they present a bill of suspension, on thir reasons: 1<sup>mo</sup>, That they were harassed and convened upon stretches of old and obsolete laws, contrary to the claim of right : And it was a very questionable problem, whether the exporting money was truly prejudicial to the republic (for Sparta thought not so ; ) and what was the nation benefited by taking it from poor men and giving it to Mr Higgens? *2do*, Denying all export of money, but only of our native product of goods, to barter