

1705. November 30. SIR WILLIAM HOPE *against* MR WILLIAM GORDON.

IN the process of roup and sale of the lands of Balcomy, betwixt Sir William Hope and Mr William Gordon, mentioned 3d July 1705, *voce* RANKING and SALE, Mr William, clothing himself with Morton's apprising, to carry the right of superiority and the teinds, as being long ago expired; it was *alleged*, That the said apprising was null, in so far as it being led for an heritable sum secured by infestment, the requisition was wrong, being made on the 20th of May 1655, to pay the wadset sum of 10,000 merks at the Whitsunday thereafter, which, by the clause of requisition, was to be made forty days before; whereas this was scarce eight days, and so was null, not being used upon the legal and conventional number of days, either required by law or paction. *Answered*, This was but a mistake in the writer of the apprising, calling it May instead of March, seeing it was evident, from the letters of apprising and other documents, that it was truly done in March, though the instrument of requisition itself, which would have cleared all, be now amissing. *2do*, A requisition made on the 20th of May 1655, though it be not applicable to that year, yet it may serve as a requisition to pay at Whitsunday 1656. *Replied*, The adminicles are not sufficient, without the instrument itself; and being a plain nullity in a decret, the same can neither be supported nor supplied. As to the *second*, If the comprising had not been led till after Whitsunday 1656, this excuse might hold, though it is unusual to require a year before the term; but so it is, the apprising was led in 1655, and so cannot admit of this interpretation.—THE LORDS thought it but *error scriptoris* in writing May for March, and refused to annul the apprising on this ground; whereupon Sir William Hope recurred to another nullity, viz. That this requisition was contrary to a standing law at the time, being the 17th act of the Parliament held in 1641, changing the terms, and ordaining all requisitions of sums to be at Candlemas and Lammas, and no more at Whitsunday and Martinmas; and therefore, this being used at the Whitsunday, is null. *Answered*, Not only this act of Parliament, but the very authority by which it was made, is *funditus* taken away and reversed by the general rescissory act 15. 1661, and therefore ought not to be founded on; and Voet, *de statutis*, says, he who cites abrogated and rescinded laws, is guilty of falsehood; likeas, the practice in Scotland after the year 1641, was in the contrary, and many used their requisitions still at the Whitsunday, notwithstanding that act, and so it was in desuetude; likeas, the act bears no certification of nullity in case of contravention. *Replied*, The act rescissory bears an express reservation of deeds done by virtue of these acts; and what can be the rule and standard of our obedience but acts unrepealed at the time? neither do transgressions of a law abrogate and annul it; and the very being habit and repute is sufficient to support a deed, as in the case of Barbarius Philippus, l. 3. *D. De offic. prator.* and has been so sustained in the case of deprived notaries and mes-

No 13.

By act 17th  
 Parl. 1641,  
 requisition of  
 a sum cannot  
 be made at  
 Whitsunday,  
 but only at  
 Lammas or  
 Candlemas.  
 Requisition  
 having been  
 made at Whit-  
 sunday, an  
 apprising was  
 on that ac-  
 count redu-  
 ced to a secu-  
 rity.

- No 13. sengers. And it is enough to annul it, that it is *lege prohibente*, though it want the express certification of nullity, as Vinnius proves in his *Select Questions*, *lib. 1. cap. 1.*; and the acts made in the year 1641, having been questioned as no rule to judge by, after their abrogation, in the case of the 67th act of that Parliament anent intromission with rents of lands appraised from minors, the LORDS, 18th Feb. 1663, Mackenzie *contra* Ross, No-8. p. 298. found these laws in 1641 were to be the rule of judging and regulating all cases that intervened betwixt their enacting in 1641, and the rescinding in 1661. THE LORDS, considering this nullity was not pleaded to annul the apprising *in toto*, but only to cut off the expiry of its legal, and that it was allowed to subsist as a security for principal, annualrents, and accumulations; therefore they found this defect in the requisition sufficient to take off the legal, and keep it open, and redeemable on payment of the sums therein contained.

*Fol. Dic. v. 1. p. 537. Fountainball, v. 2. p. 295.*

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1707. July 3. DUNCAN *against* SCRIMGEOUR.

- No 14. AN adjudication having proceeded on decrees of constitution against an apparent heir, as lawfully charged to enter heir to his predecessors, for payment of principal sums, annualrents, and penalties contained in his predecessor's heritable bonds, without using previous requisition, in terms of the said bonds, the LORDS restricted the adjudication to a security for principal and annualrents, and refused to sustain it as a security for a fifth part more, or for the termly failzies, although requisition was made after the decree of constitution, and the days thereof expired before executing the summons of adjudication, which narrated the requisition.

*Fol. Dic. v. 1. p. 536. Forbes.*

\*.\* This case is No 4. p. 171. *voce* ADJUDICATION.