

The Lords preferred the executors-creditors to the children's intimated assignations; but ordained them to assign after their own payment, with this express quality, That the same should not compete with the other extraneous onerous creditors. Which brings in the children in the last place, after all the creditors, if the estate be sufficiently able to satisfy them all; and no otherways.

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1707. July 18. CAPTAIN MACDOWAL *against* MACDOWAL of FREUCH and GEORGE FULLERTON of DREGHORN.

CAPTAIN Macdowal, against Freuch and Fullarton. Macdowal of Freuch being forfeited, for joining with the rising in arms at Bothwel Bridge; and Colonel Graham of Claverhouse, afterwards Viscount of Dundee, being made donatar to his forfeiture; George Fullarton of Dreghorn, Freuch's uncle, composes with the donatar, and for a great sum acquires a right to the forfeiture. Captain Macdowal, being a creditor on Freuch's estate for 30,000 merks, but unconfirmed, applies to Dreghorn, what he would give him for his debt: and though, in the circumstances as they then stood, he needed not have owned him in a sixpence, yet they agreed on 7000 merks; which the Captain accepted in that desperate case in full of his whole claim, and gave an assignation to Dreghorn, blank in the name, to his portion foresaid; which was afterwards filled up in the name of James Edmonston of Dreghorn and Freuch's behoof, in 1682. After the Revolution, Freuch being restored amongst the rest, by the rescissory act 1690; and likewise having recovered the composition paid to the Viscount of Dundee, by affecting his lands of Dudhope, and from the Duke of Douglass, donatar to Dundee's forfeiture; Captain Macdowal intents a process against Freuch and Dreghorn, craving to be reponed and restored to his own place, against the transaction so disadvantageously made, quitting 30,000 merks for 7000, plainly arising from the terror incussed by the forfeiture; and so it was either *sine justa causa* or *ob causam nunc finitam*, per l. 1, sec. 2, *D. de Conduct. sine causa*; and since you Freuch are fully restored, and have the benefit of your estate, it is against natural equity that, *ex meo damno*, you should be enriched; l. 14, *D. de Conduct. Indeb.* and l. 206, *de Reg. Jur.* and much more when I am damnified by a voluntary deed of yours, by running to Bothwel-bridge: And as there was a fault on your side, so there was evident *vis et metus* on mine; and it is unjust to obtrude your restitution to cut me off from my right on your estate: But it should be equally to us both, as the Emperor Dioclesian determines in l. 12, *C. de Sententiam Passis et Restitutis*. Where a criminal is restored against a sentence of deportation, if he would protect himself thereby *contra creditores suos*, it is *improbis conatus*, a dishonest attempt.

ANSWERED for Freuch,—That it is a most extraordinary action to reverse a transaction so deliberately entered into, and accepted with much thankfulness, as a singular favour, when he could not have expected a farthing: And the rescissory act 1690 annuls no transactions but those made by the rebels' wives or widows; which, being the only exception in the act, *confirmat regulam in casibus non exceptis*. And the 16th Act of Parliament 1695 declares, That the person restored shall have the benefit of the eases of all the debts purchased during the forfeiture.

REPLIED,—This can never be called a transaction ; which is ever *super re dubia*, and where there is a *lis pendens* ; but here there could be neither doubt nor question, the Captain's debt being clearly cut off by the forfeiture, and the donatar gave him law, and concussed him into whatever offer he pleased to make.

The Lords considered this was the first case where such a repetition was demanded by creditors of forfeited persons, and might be a leading preparative to many others ; therefore resolved for making a rule to hear it in their own presence.

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1707. July 24. THOMAS FLEMING *against* STEWART of BLACKHALL'S TENANTS.

SIR John Shaw of Greenock being nominated by the Privy-Council, with Colonel Ogilvie and others, to execute the laws against importing Irish victual, butter, cheese, horses, and other goods, and to prevent and punish the same ; he constitutes one Mr Thomas Fleming his depute, for pursuing the transgressors ; whereupon he pursues, before Semple of Fulwood, sheriff-depute of Renfrew, above 200 persons dwelling in the lands of Inverkip, and others belonging to Stewart of Blackhall, libelling, That there are sundry creeks in that bounds lying towards the coast of Ireland, where boats land privately in the night-time ; and that thir defenders resetted these Irish goods, and dispersed them through the country, to the prejudice of the native product of Scotland ; and so are liable in the penalties contained in our Acts of Parliament ; and thereon takes a decret against a whole country-side, holding them as confessed, for not compearing to depone as to their guilt and accession in harbouring these prohibited goods. This decret being suspended, the reasons were :—*1mo*, The decret is in absence, pronounced in seed-time, without a dispensation, without any lawful citation : a copy not being given to every one ; but a single one to serve for a whole family, summoning the man and his wife, children and servants : and under no less certification than all the men under 50 to be sentenced to deportation, and being delivered up to Flanders officers to serve in the wars abroad ; and all above that age, with the women and bairns, to pay pecunial mulcts, the value of the goods extending to many thousand pounds sterling ; besides corporal punishment, with the confiscation of all their boats : which is no less than forfeiture to these poor people, and beggaring that part of the country, and turning it to a hunting field. *2do*, They have not the legal *inducia*, but are sentenced within 48 hours after the citation. *3tio*, It is not holden at the ordinary place, but upon the pursuer's lands of Greenock. *4to*, The decret is not subscribed by the clerk, but by the judge himself ; whereas, these officers being distinct in every court, they cannot be confounded, nor be both exercised by one person.

ANSWERED,—In such commissions as holding out of Irish victual, all the special formalities of law required in other judicatories need not be precisely observed ; for this is more a point of government than private interest ; and these laws are most useful, and cannot be executed in the common way of solemnities : And yet here they were all personally apprehended, and both the time and place was contrived for their ease ; Greenock being sundry miles nearer to the defenders than Renfrew, the sheriff's ordinary place for holding his court : and