

Commissaries' decret had no foundation, for there was not the least conclusion in the libel for damages or reimbursement of expenses. He acknowledges, he being then an unexperienced apprentice lad, by her seduction, had to do with her; and she gave him up as the father of the child, though there were many about it beside him, as appears by the scandals delated against her in the West-kirk books: and, he being now lawfully married to another woman, whores are not to be encouraged in such unjust claims, but ought to suffer for the damage arising from their own sins.

ANSWERED,—The Commissaries' decerniture for her expenses, though not expressly libelled, is no more but a native consequence of the process resulting from the probation; which, though it did not amount to a marriage, yet imported that she was exceedingly damnified both in her reputation and fortune; and it were *frustra* to put her to raise a new libel; but, without any violent detortion, her former process might be transformed into an action of damages; even as criminal judges, where death is libelled, turn it into an arbitrary punishment.

The Lords found the decret *ultra petita et libellata*; and therefore suspended the letters, and assoilyied from the Commissaries' modification on this process, whatever they might do in a new one. *Vol. II. Page 395.*

1707. December 2. JAMES CORBET *against* WILLIAM COCHRAN of KILMARONOCK.

[See the prior part of this Case, *supra*, page 634.]

JAMES Corbet, merchant in Glasgow, pursues Mr William Cochran of Kilmarnock, on this ground,—That, they being partners of a ship freighted outward to Guinea, there to take in slaves and carry them to their market in America, James sells his 12th part to Kilmarnock, and insures it for the premium of 10 per cent.; whereon James Corbet gets from Kilmarnock two bonds, one for £300 sterling, as the price of his 12th share, and the other for £30 sterling, as the premium of insuring. But Kilmarnock inserted this clause in his bond of £300,—That it should be payable if the ship returned to Scotland or England; but, if it returned not, the bond should be void and null, and Kilmarnock free of paying the sum. The ship went safe to Guinea, took in 70 slaves, carried them to the West Indies, and sold them there, but never returned to Britain; Pitisco the skipper, and Corse the supercargo, having sold the ship there, because it was insufficient to sail home, and was delated to the governor as an unfree ship. The price and effects were remitted to Scotland; and Kilmarnock took his own 12th share, but would not meddle with Corbet's, (though dispoed to him,) because he thought his bond null, the condition never existing; whereupon Corbet pursues him to pay the £300 sterling. His defence arose from the quality of his bond, that he was only to pay it when the ship returned; but, *ita est*, it never came back: and so, the obligation being conditional, and not purified, he cannot be liable.

ANSWERED for Corbet,—That the bargain being mercatorian, and of the nature of an insurance, if the ship had failed to return, on the usual events provided against by such policies of insurance, as tempests, shipwrecks, firing, rifling, reprisals, seizure by capers or buccaneers, embargos of foreign states, &c. then

Kilmaronock's condition had existed, and he been free. But this accident arising from the unfaithfulness and baratry of the skipper or supercargo, that was such a *casus incogitatus*, and was not provided against; and they being of Kilmaronock's in-putting, he must be answerable for their deeds; *nam qui per alium quid facit, per se facere videtur*.---And all the writers on maritime law, and all the forms of insurances do never extend to such hazards and events. *2do*, Though the condition of returning was not performed in the strict literal sense, and *in forma specifica*, yet it was virtually and *equipollenter* fulfilled, in so far as the price returned and Kilmaronock drew his share of it. And, if the price had been to the owner's advantage, Kilmaronock would never have proponed this defence; and therefore, though it proved to their loss, he cannot be heard to obtrude this strict and rigorous not return; for *majus et minus non variant speciem, et qui habet commodum debet et sentire incommodum*, otherwise it would be a *societas leonina*.

REPLIED for Kilmaronock,—That maritime contracts are *optimæ et uberrimæ fidei*; and, whatever be the style of insurances, what hinders a man to provide, by additional clauses, for his own security; as is here done. And, by the Act of Sederunt, 1613, the Lords are bound to decide precisely in the terms of clauses irritant, as the parties have agreed: and though, in some cases, equipollents are received for implements, yet, generally, equipollences are not allowed, as in the cases of premonitions, requisitions, consignations, &c.; and law is plain and precise on that head,—*l. 8, § 2. D. de Condit. Institut. adimplenda est conditio in modo et forma præscriptis, alias pro defecta habebitur; l. Unic. § 4, C. de Cad. Tol.; l. 44, 45, 55. Dig. de Condit. et Demonstrat.* And Kilmaronock denies any accession to the selling of the ship in the Indies, or that the skipper or supercargo were more of his in-putting than the rest of the partners, who were as much bound to answer for their deeds as he.

The Lords, by a plurality of six against five, found, the ship never having returned to Britain, the condition of Kilmaronock's bond was not purified nor fulfilled; and therefore assoilyied him from the £300 sterling bond; but found him liable in the £30 sterling of premium.

This will not hinder Corbet to get his share of the price returned; which was so inconsiderable that it will not be the tenth part of what they probably might have expected by the voyage, if it had been prosperous and successful.

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1707. February 19, July 3, and December 26. JEAN GUINE against JOHN DOUGAL.

February 19.—JEAN Guine, relict of George Muir, goldsmith in Edinburgh, charges John Dougal, starchmaker at Dalry, on his bond, either to marry her, or to pay £100 sterling in case of failiye. He suspends, and alleges the bond to be forged, and that two of the witnesses were imposed upon to sign it, upon her promise that Dougal should come and own his subscription to them; which he never did, but now, on the contrary, disowns the same: and accordingly he had raised improbation of the said bond.

The cause being called in presence, it was ALLEGED for Jean Guine, the