

1707. *July 5.* WILLIAM TURNER, Notary in Birse, *against* ALEXANDER ROSS of Tillisnaught.

ALEXANDER ROSS of Tillisnaught having pursued reduction of one Middleton's testament against William Turner; and the cause coming to be advised *in præsentia* upon the 19th January, 1695; and the votes happening to be equal, the Lord Rankeillor, then President, superseded to give his casting vote till he should attempt an accommodation; and that proving abortive, he reported the same to the bench, the 9th February, 1695, and in presence signed the interlocutor of the former date. Thereafter his Lordship having given in a representation upon the 26th of the said month of February, when another President sat in the chair, bearing that the decret had been put in the minute-book of the date when it was signed, and not when it was voted: The Lords allowed the same to be put up of new again of that present day's date, and it was extracted accordingly. William Turner raised reduction of this decret upon this ground of nullity, that the interlocutor which is the warrant thereof was not signed in presence immediately after voting, in the terms of the Act 18th Sess. 4th Parl. W. M. and the Lord Rankeillor could not, three weeks after, when he was not President, have his decisive vote, without the question had been put to the whole Lords, and voted *de novo*.

The Lords repelled the reason of reduction.

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1707. *July 23.* JOHN CUNINGHAME of Enterkin *against* his CURATORS.

IN the action of count and reckoning at the instance of John Cuninghame of Enterkin against his curators: The Lords found, That the pursuer's immixing himself in his own affairs, and intromitting during his minority, doth only exoner the curators for so much as they can instruct he intromitted with; and did not free them from diligence, so as to make them liable only for their actual intromissions.

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1707. *July 25.* JAMES CORBET, Merchant in Glasgow, *against* WILLIAM COCHRAN of Kilmarnock.

KILMARONNOCK and James Corbet, and other ten, being equal sharers in a ship called the Hopewell, and its cargo, to and from Guinea, Kilmarnock granted bond the 29th of October, 1701, to James Corbet, in these terms: "That where

James Corbet has disposed to me his twelfth part, I oblige myself to pay to him therefore, the sum of three hundred pounds Sterling, at Candlemas next, with annual-rent from the term of payment; with this express provision, that the ship arrive safe in Scotland or England, and otherwise he should be free." And because James Corbet did at the same time insure to Kilmaronnock the said share bought by him, at ten per cent., he gave a separate obligation to Mr. Corbet of the same date, for thirty pound Sterling, as the premium of insurance. The ship and cargo came safe to Guinea, where negroes were bought and taken in; and sailed thence to America, where ship and all was sold by the super-cargo: the produce whereof being returned to London, Kilmaronnock received his own twelfth share. James Corbet pursued Kilmaronnock for the three hundred and thirty pounds Sterling contained in his bond; who alleged absolvement as to the three hundred pound, because the same was conditional, and conceived with an irritancy, which is incurred by the ship's never returning to Scotland or England.

ALLEGED for the pursuer,—The irritancy could not be understood incurred, because the ship and goods were sold in America by the super-cargo, for whose actions the pursuer was not answerable, after he had disposed his share to the defender. Besides, the price and produce of the ship and cargo returned to England, which was equivalent. And the defender having homologated the sale as to one twelfth part, he could not reprobate the same as to the share purchased from the pursuer. For had the price answered his expectation, he had uplifted that part also; and *quem sequitur commodum*, &c. 2. The pursuer was no otherwise liable for the return of the ship than as an insurer; and insurers are not liable for the deeds of super-cargos, but only for the accidents of hostility or piracy, or stress of weather, or fire, or the like.

ANSWERED for the defender,—The plain words of his conditional obligation, whereby he secured himself, cannot be supplied by pretended equivalents. The loss by the under-valued sale in the West Indies, did not happen through any fault of the super-cargo, but through the insufficiency of the ship. The defender's receiving his own twelfth proportion of the price was most reasonable and warrantable, seeing he had no recourse for it in case of his refusal: for a creditor, to whom a debt is partly due *proprio nomine*, partly as assignee, having absolute warrantice, may take what he can get of his own proper debt, without being excluded from recourse upon his author's warrantice. Nor doth it follow, that because the defender would have had right to the product of the share bought, had the same been ever so profitable, that, therefore, he must be satisfied with it when disadvantageous. For, by his agreement he had right to the whole profit, whereas, the pursuer's right to the price was limited to the event of the ship and cargo's arrival to Scotland or England. 2. If there had been any insurance in this case, as there is none, it must have comprehended all imaginable events or damage arising by the insufficiency of the ship, or the infidelity of the masters, or arrestments, &c. which are usually comprehended in policies of insurance. Again, albeit the writ had carried the form of an insurance, and that were less comprehensive as it is, yet what hindered Kilmaronnock to add thereto (as he hath done for his security) a special provision beyond the common form? 3. As no action can be sustained on the first bond; the second must fall in consequence, as being *pars con-*

*tractus*, and given in contemplation of the ship's returning, and cargo's being delivered at the respective ports, which hath failed.

REPLIED for the pursuer,—That he knew nothing of the ship's insufficiency, and he sold her *talis qualis*. Again, if through insufficiency she had perished in the voyage, the bond had not then indeed been purified: but insufficiency in a harbour, is capable of refitment.

The Lords found, That the ship and cargo being sold in America, and the price thereof returned, the condition of the bond is not purified: and, therefore, assoilvied from the three hundred pounds Sterling, but decerned for the thirty pounds.

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1707. December 23. JOHN CRAWFORD, JOHN GAY, and JOHN FIFE, indwellers in Newark, *contra* Robert Cunninghame, Writer in Edinburgh.

ROBERT CUNNINGHAME being accused at the instance of John Crawford, John Gay, and John Fife, for giving out an extract of a bond granted by them to his father, bearing the two witnesses inserted in the body to be subscribing, whereas only one of them subscribed; industriously to validate the null bond: he alleged for his exculpation, that he could have no evil design in so doing, seeing, 1. The bond was valid without any witnesses, the subscribing parties being in effect witnesses to one another; as was decided betwixt Sir Thomas Kennedy and Sir Alexander Brand: and if Robert Cunninghame had had any fraudulent design to supply a defect, he would have made the principal writ conform to the extract. 2. Many have fallen in the like, and greater mistakes, by raising hornings against persons inserted in the body of a bond, and not subscribing, and adjudication against such: registrating the copy of a paper for a principal, and raising diligence thereon against the designed granter; as in the case of Sanderson *contra* Dougalstoun, for which no punishment was inflicted.

ANSWERED for the accusers,—The worst actions are not accompanied with the greatest prudence; and 'tis but weak reasoning, to infer either innocence or fraud from effects and consequences; the nature of actions being distinguished by the presumed intention of the actors. But that Robert Cunninghame's giving out an extract disconform to the principal, was not an innocent mistake, appears from his ingiring himself to write that extract in favours of his father, albeit he was not an ordinary writer of extracts. Fifty several debtors subscribing a bond granted by them, would not support the writ without witnesses; though it be otherwise in mutual contracts, which was Sir Thomas Kennedy's case with Sir Alexander Brand; because there, every contractor is a debtor for his own performance.

The Lords discharged the said Robert Cunninghame for ever to meddle in any business in the Clerks Chambers, or about the Parliament House; and ordered him to prison during their pleasure.