

1708. February 5.

ALEXANDER SCOT, Writer in Edinburgh, *against* Mr GEORGE SETON of Gardinrose.

No 47.  
The condition of 'being decerned,' found to include decerniture by decree-arbitral; unless, where the conditional creditor could allege a defence, upon which the debtor might have been assolizied from the depending plea.

MR GEORGE SETON having, for love and favour to Janet, Margaret, and Mary Setons, his sisters, obliged himself, by bond, to pay them L. 1000 at the term therein mentioned, with this provision, That in case he were decerned to pay 3000 merks to Jean Kennedy for which there was a process depending against him, the bond in favours of his sisters should be void and null; the said process came not to a decision *in jure*, but being submitted, Mr George was decerned to pay the 3000 merks to Janet Kennedy by a decret-arbitral. The sisters assigned their bond to Alexander Scot, who pursued Mr George for payment.

*Alleged* for the defender, That the bond was null, in so far as he was not assolizied from Janet Kennedy's process, but forced to pay her the 3000 merks.

*Answered* for the pursuer, The bond stands good; seeing the defender was not decerned to pay the said sum by a decret in the then depending process, in the terms of the bond. Payment by virtue of the decret-arbitral, is not relevant to irritate the bond; because, the submission entered into without the pursuer's consent was unwarrantable, and cannot prejudice them whose bond was to take effect according to the judicial event of the process before the Lords.

THE LORDS found, That payment, by virtue of the decret-arbitral, did irritate the bond, as if Mr George Seton had been decerned to pay by their Lordships decret; and, that he was under no restriction by the clause in the bond, from submitting his process, to evite the expense of a plea.

November 12.—IN the pursuit at the instance of Alexander Scot against Gardinrose, for payment of L. 1000, contained in a bond granted by him for love and favour to Janet, Margaret, and Mary Setons his sisters, with this quality, That it should be null, if he were decerned to pay to Jean Kennedy, and Captain Monro her husband, any part of the sum of L. 3000 that they were pursuing him for; which bond was assigned to Alexander Scot; (the LORDS found, That payment made to the said Jean Kennedy and her husband, by virtue of a decret-arbitral, was equivalent to payment upon a judicial decret, and did irritate the bond; unless the pursuer could allege a defence whereupon Gardinrose might have been assolizied from Jean Kennedy's process.

*Fol. Dic. v. 1. p. 191. Forbes, p. 235. & 279.*