

No 15.

sententiam dicant when they had once accepted, and that there was not *locus penitentiae*; but that law could not compel Sir William to concur with the other three in their sentiment, but only to give out his determination as he was persuaded to be just in his own conscience; so the LORDS granted letters of horning against him to this effect, that he might give his opinion as to the claim and controverted points, but nowise to oblige him to join with the other three in their decision, unless he thought it just.

The Lords of Session, and all other judges, are bound *impertiri officium suum*, and to discern when required by the parties; and by the same rule arbiters accepting are tied to do the same.

Fountainball, v. 2. p. 163.

1708. *Janaary 31.*

HAMILTON of Bangour *against* LORD and LADY ORMISTON.

No 16.

THE LORDS sustaiued a bond, although the party did therein bind his heirs and successors, but not himself, that subtilty of the common law having been repudiated by the latter constitutions, as a mere nicety.

Fol. Dic. v. 2. p. 15. Fountainhall.

*** This case is No 118. p. 5909, *voce* HUSBAND AND WIFE.

1708. *July 6.* Mr GEORGE SKEEN *against* The LAIRD of SKEEN.

No 17.

In conformity
with No 15.
P. 9435.

Mr GEORGE SKEEN of Robslaw, by a petition, represents, that a difference having emerged betwixt the Laird of Skeen and him about the succession to Sir George Skeen of Fintray; and they having submitted to arbiters, who accepted and agreed on the tenor of their decreet-arbitral, but one of them was dissuaded to sign by Skeen's influence; therefore craved horning against them to give out their decreet in what terms they pleased, without prescribing or imposing on their judgment any manner of way. *Answered*, Where arbiters had not clearness, the Lords could not compel them; and they were willing, seeing both parties did not acquiesce, to let the submission expire. *Replied* That submissions were *ab initio* before acceptance *voluntatis*, but after it *necessitatis*; and as the Lords used to give compulsitors against witnesses to compare before them for clearing points in controversy, so, to make submissions effectual *ad sopiendas lites*, they have been in use likewise to force them to emit their decreet-arbitral, but so as to leave them to God and a good conscience in their determination; and so they did lately, *Jerviswood, No 15. p. 9435.*, in ordering Sir William Bruce, one of the arbiters, to give his opinion in what

terms he pleased. THE LORDS inclined to grant it, but had no occasion, in regard the parties agreed among themselves.

No 17.

Fountainhall, v. 2. p. 449.

1725. February 3.

WILLIAM HUTTON and the CREDITORS of THOMAS WHITE *against* JAMES GRAY
Writer to the Signet.

THOMAS WHITE elder disposed to his son in his contract of marriage certain lands and tenements, with the burden of his son's paying to Elizabeth White his eldest daughter of the first marriage 3000 merks; and this burden was repeated in the procuratory of resignation and precept of sasine upon which the son was infeft. The 3000 merks were assigned by the daughter; and the creditors of the assignee having adjudged, they craved preference to the creditors of the son, upon this ground, that the burden was real, not only by the conception of the clause, but from its being repeated in the procuratory and precept, upon which the son's infeftment was taken.

No 18.

It was *answered*, That the clause being only with the burden of payment, it could have no stronger effect, than if the son, by the quality of the right, had obliged himself to pay; and therefore though it was inserted in the procuratory and precept, yet it was no real burden.

THE LORDS found, that the obligation on Thomas White younger to pay 3000 merks to his sister Elizabeth was only personal.

Reporter, Lord Cullen. Act. H. Dalrymple. sen. Alt. Ch. Binning. Clerk, Mackenzie.
Edgar, p. 163.

1751. January 29. HENRY ALLAN *against* the KING'S ADVOCATE.

HENRY ALLAN writer in Edinburgh, was cautioner for James Lord Balmerino, in a considerable sum, which he was obliged to pay, together with the interest due thereon, and with L. 7 of expense of diligence used against him. This payment was made after the principal debtor's death, and after a forfeiture incurred by his brother and heir Arthur Lord Balmerino.

No 19.

Mr Allan claimed upon the Lord Balmerino's estate. for the sums paid by him.

Answered, His claim can only be sustained for the principal and interest; but with regard to the expenses recovered against him out of the penalty in which he was bound, it is enacted, 'that no decree shall be made for any sum