

clause, that he had the value in his own hands, *ergo* he was debtor in the sum; which Mr Forbes, in his Tractate on Bills, page 53, thinks sufficient to afford the payer recourse against the drawer. And as for the direction, it must be presumed to have been *ab initio* as it now stands, unless you improve it; the subscription to the bill serving for both, and it not being customary to sign the direction. Next, the bill being designed as a fund for credit to Deuchar, whatever he did to make it effectual, by procuring Sands to concur with him in the acceptance, must bind the drawer who trusted him with negotiating of the bill. And you, the drawer, have no imaginable prejudice; for what if Deuchar had got the money at the first presenting, before Wilson or Sands accepted, you would have been liable to refund: or if Campbell had indorsed it to Wilson, and he had paid it, would not that have made Mackenzie the drawer effectually liable to repay it? What if he had accepted for the honour of the drawer? would that have evited the recourse, seeing I have voluntarily paid for you, *et utiliter negotium tuum gessi*, and so cannot, without ingratitude, be refused repetition? And his taking a bond of relief from Deuchar no more weakens his recourse against the drawer than a co-cautioner's taking a separate security from his conjunct cautioner can be construed a passing from the relief competent to him against the principal debtor; and on Mackenzie's paying him he is willing to assign him to Deuchar's security.

The Lords repelled Mackenzie's defence, in respect of the answer, and found him liable in repetition to Sands of the sum in the bill he has paid out for him to the bank.

Vol. II. Page 651.

1711. June 30. SIR ROBERT SINCLAIR and SIR ARCHIBALD SINCLAIR'S CREDITORS
against SIR ROBERT FORBES.

FORBES against Sinclair. King Charles II, by a patent in 1682, constituted the Duke of Lennox, his natural son, to be his Admiral of Scotland; reserving the liferent of the Duke of York, afterwards King James VII, who had a gift of it before. After King James's abdication, and the Revolution, King William named commissioners to manage the Scots Admiralty; and Sir Archibald Sinclair, advocate, was made Judge-Admiral during pleasure. In 1699 his affairs obliging him to retire for a while, he demits the office in favours of Sir Robert Forbes; who procures a new commission from King William, and grants a back-bond to Sir Robert Sinclair of Longformacus, for Sir Archibald's creditors' behoof, assigning to him the £100 sterling of salary annexed to that office, during the said Sir Archibald's lifetime and the said Sir Robert's enjoying the office jointly; by which Sir Robert Forbes restricted himself to the perquisites and emoluments of the place. King James having deceased in 1701, and so the commission of Admiralty ceasing, the Duke of Lennox's right began; and so both Sir Archibald's right and Sir Robert Forbes's came to a period; and Lennox having qualified himself by taking the oaths to Queen Anne, he is installed in the office, and names Mr James Graham as judge-admiral; but he, after a year or two, consents that Sir Robert Forbes get a joint commission with him: whereupon Sir Robert is re-admitted by a new gift, and possesses it for several years, till the circumstances of his affairs forced him to quit it. Upon this, Sir Robert Sin-

clair and Sir Archibald's creditors raise a process against Sir Robert Forbes, for payment of the salary during the time he possessed the office, by virtue of the second gift : at least to declare they had the only right thereto ; for the fees, during the standing of the first gift to him, were all satisfied and paid.

ALLEGED by Sir Robert Forbes's creditors,—That there could be nothing worse founded than this claim ; for *res ipsa loquitur* that the sole onerous cause of Sir Robert's assigning the £100 sterling pension, was Sir Archibald's demitting the office, that by the vacation Sir Robert might succeed ; so the assignation being the mutual and correlative cause of the demission, and depending on Sir Archibald's right to the place, how soon that ceased by King James's death and Lennox's instalment, the other fell in consequence : So that both Sir Archibald's right and Sir Robert's determining, with what face can he claim the salary ? The law being clear, that *si causa promittendi sit finita, tunc dicendum est conditioni indebiti esse locum* ; which is precisely the case ; for King James's right ceasing by his death, Sir Archibald's must dissolve and fall in consequence with his author. And as every body will be convinced this was the meaning of parties, so it is as evident, from the conception of the words, assigning the fee and pension during Sir Archibald's life, and Sir Robert's enjoying the office jointly. And how is it possible, that Sir Robert's procuring a new gift, after he was out for a good while, can ever make a resurrection of the former gift, and cause that revive which was quite extinct ? Law has fictions, but no such miracles as this. So it is undeniable, both from the letter and sense of the agreement, that it was only to subsist so long as Sir Archibald's right stood, and no longer. And this quadrates likewise with the Lords' decisions in parallel cases ; as 8th January 1668, *Forbes* against *Innes* : and particularly 19th July 1664, *Elisabeth Douglas* against *Wedderburn* ; where *Wedderburn* having got a right to his teinds from the Earl of Home, and the Earl's right being reduced by *Stewart of Coldingham*, *Wedderburn's* sub-right fell in consequence. Home afterwards acquires a new and better right to these teinds, and disposes it to the said *Elisabeth* ; and she pursuing *Wedderburn*, he contends, that he had purchased his teinds from the Earl of Home for onerous causes and a valuable consideration paid ; so that he could acquire no new right to his prejudice ; but it must accresce as *jus superveniens auctori*. But the Lords found, the first right failing, there was no obligation on the Earl of Home to renew or communicate his second right to *Wedderburn*. And just so here, Sir Archibald's and Sir Robert's first right ends. Sir Robert purchases a new right to the place, absolutely independent on Sir Archibald's right, which was resolved and gone, what law or reason can make him pay the salary to Sir Archibald after his claim is determined, and what topic can plead its accrescing ? Besides, by the 18th Act 1698, this salary was laid on the tonnage of ships, which expired in five years. So not only the right failed here, but the very fund out of which it was payable.

ANSWERED for Sir Archibald and his creditors,—That these flourishes in which they expatiate can have no weight with the Lords. For Sir Robert Forbes, when he made the bargain with him in 1699, knew very well that Sir Archibald's right was *ad bene placitum*, and precarious, depending on King James's life ; and that *Lennox* had the right of survivance and reversion. So all he craved of Sir Archibald was, to make the place vacant by his demission, that he might, by his own interest, be let into the office ; which being done, he was satisfied to take

his hazard of all future emergents. And if he had intended to assign the pension only during the existence of Sir Archibald's right, would he not have said it? But he is so far from that, he explains his meaning by these additional words,—“As long as Sir Archibald lives, and Sir Robert enjoys the office, Sir Archibald Sinclair shall have right to the yearly fee and pension assigned.” Which imports, that, by whatsoever title Sir Robert should have the office, Sir Archibald, during all that time, should have the salary; and he was no loser; for Sir Robert gave no price for it, but only renounced the salary, which was none of his, and took himself to the perquisites, which were considerable. And, *esto* there was a dubiety, *verba sunt interpretanda contra proferentem*. And the like was found betwixt the *Earl of Winton* and the *Lord Pitmedden*; who, having a bond of pension when he was an advocate, Winton alleged it ceased when he changed his station, and was advanced to be a Lord of Session: but the Lords found it still due. And, as to the fund of the tunnage, he is not assigned to any such fund; but allenarly to L.100 sterling of salary indefinitely, and in the general.

The Lords, on the first report, found the meaning of parties was, That Sir Archibald should only have right to the salary so long as Sir Robert bruiked the office by his right and demission. But, on a reclaiming bill, they altered, and found the salary due for all the years the said Sir Robert possessed, by whatsoever title. But, towards their farther clearing, they ordained inquiry to be made, if, upon Sir Robert's second reëntry into the office, precepts or payment of the salary was made by the Barons of the Exchequer to Sir Robert or Sir Archibald; or if Sir Robert opposed the paying of the salary to Sir Archibald; or if there was any acquiescence or homologation on his part: Which would tend exceedingly to explain what was the parties' meaning in that agreement; for it seemed to be a case of divination; and a conflict betwixt the letter of the words upon the one part, and the sense and meaning on the other.

Vol. II. Page 653.

1711. *July 7.* SIR ROBERT DICKSON *against* SIR JOHN HOUSTON and his BROTHER.

AN appeal was given in by Sir Robert Dickson of Inveresk against an interlocutor, decerning him in £2900 sterling, as Sir John Houston and his brother's proportion and share of the profits of the tack of the customs, wherein they were partners, from 1691 to 1696.

Sir Robert craved allowance for his pains and trouble in managing; as also, that Sir John should pay annualrent for the money he retained in his hand, as Collector at Port-Glasgow, conform to the Acts of Sederunt made in their society; both which the Lords had refused.

Vol. II. Page 657.

1711. *July 18.* FOTHRINGHAM of POURY *against* HUNTER of BURNSIDE.

FOTHRINGHAM of Poury feus off a part of his lands near the castle of Brughly,