

pregnantly enough, yet the Lords refused altogether to grant any, but assoilyed Lammerton therefrom; notwithstanding that in our law the English double bonds are restricted to the single with interest, which is in place of *damnum*. But I think his profession, (*cui de jure canonico interdicitur mercantia illa usurarum*,) made this his claim unfavourable.

*Advocates' MS. No. 330, folio 131.*

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1672. *February.* MR. ROBERT MERCHINSTON, Minister, *against* THOMAS ROBERTSONE.

ABOUT the same time Mr. Robert Merchinston, minister, pursuing Thomas Robertstone, town-treasurer of Edinburgh, to make payment to him of the price of fifty-five bolls of bear, sold to him in 1656, by Mr. James Winrahame; which Mr. James being his debtor in a greater sum, he had arrested in the said Thomas his hands, the price of the foresaid bolls, and now craved to have the same made forthcoming; and produced, for instructing the debt, a precept drawn by Mr. James Winrahame on Mr. Cornelius Inglis of Eastbarns, bearing, that he had sold Thomas Robertstone fifty-five bolls of bear, and therefore desired him to deliver the same to the said Thomas, out of the increase of the lands of the Barnes, Newtonlies, and the acres about Dumbar; and at the foot of it Thomas Robertstone acknowledges the receipt of the said bolls contained in the precept.

ALLEGED,—He cannot make forthcoming, because the receipt produced, unless it had borne an obligation to pay the price, (which it does not,) can never bind a debt upon Mr. Robertstone.

ANSWERED,—A naked receipt of victual is a sufficient constitution of a debt against the receiver, and he must instruct either by writ or oath of party how he paid for it; yea, which is more, though there had been no receipt, if the pursuer should prove that the bolls were truly delivered, it would have undoubtedly bound him to pay the price, unless he could instruct where it was discharged.

The Lords found a naked or simple receipt of victual, imported an obligation to pay the price thereof.

Then ALLEGED,—That this was not a naked receipt, but depended upon a prior onerous cause, and related thereto; viz. to a precept, which in law presupposed payment of the price before Mr. Winrahame, a lawyer, and one exact in these things, would give the precept out of his hands; that the precept must be reputed of the same nature with a bill of exchange, which if protested, then the receiver has his regress to the drawer; even so here. I put the case, Mr. Cornelius Inglis had refused the precept, and to deliver the bolls, are there any doubt but Mr. Robertstone, *actione mandati contraria, ut eum præstet indemnem*, might recur against Mr. Winrahame to the value of the precept? and all that would be allowed him is to prove by Mr. Robertstone's oath, or otherways, that albeit he had given him such a precept, yet he was still unsatisfied therefore, and so *removendus erat exceptione doli mali*. Which point was farther pressed very elegantly by Sir Jo. Cunyghame in his information.

This being taken by my Lord Gosfoord to interlocutor, the Lords demurred exceedingly thereon, whether such a receipt was a sufficient qualification of a debt against the granter, yea or no. At last, before answer to the relevancy of the allegiance, they ordained Mr. James Winrahame to be examined thereupon; as also Mr. Robertstone to adduce such witnesses as were present at the numeration of the money (if any was,) with what other adminicles he could adduce for evidencing the payment.

Upon the pronouncing of which interlocutor the pursuer produced a decret wherein Mr. Winrahame, being pursued already for relieving him of that sum, has deponed and denies, that to his knowledge, he was ever paid for these bolls of bear; which being seen, my Lord Gosfoord would suffer no probation which would any way choke the oath to be led, and therefore, with very much precipitation decerned Mr. Robertstone to pay the price acclaimed; so that Mr. Robertstone's referring it to his oath in the other process was the neckbreak of this.

*Advocates' MS. No. 332, folio 132.*

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1672. *February* JOHN MAISSON *against* ISOBEL RIND, Relict of JAMES MURE, and OTHERS.

IN January, 1672, there was called a reduction intended by John Maisson, portioner of Innerask, against Isobel Rind, relict of umquhile James Muire, and several other persons, heritors and possessors of a tenement of land lying within the town of Edinburgh; the case was as follows:—

John Laury, merchant in Edinburgh, dispones to Henry Seaton, his good-brother, in *anno* 1612, a dwelling house in Edinburgh, for relief of sundry cautionries wherein Henry stood engaged for him, with this provision, that how soon he should be relieved and repaid of his cautionries by this disposition, or otherwise, then this disposition to become null, and he, his heirs and assignees, shall be liable to renounce the same to the said John Laury, his heirs and assignees, &c. In 1613, Mr. William Kelly comprises this tenement, disponed, for the sum of 200 merks, contained in a bond granted by the said John Laury to him thereupon; and in *anno* 1631, he dispones and assigns this comprising to John Maisson; who now, upon the comprising, intents reduction of Henry Seaton's right, (which Henry had disponed to James Muire, and James dispones it to Isobel Rynd, his spouse, in liferent) against the said Isobel and others, upon this reason, that he offers him to prove the sums of money wherefore the said disposition was given to Henry Seaton, are more than paid by intromission with the mails and duties of the said tenement and others, at least they are relieved thereof by the granter; and so their disposition, conform to the quality it bears in its own bosom, expires, and all that has followed upon it becomes null, and his comprising now takes place.

The pursuer urging we might take a term in the reduction, I ANSWERED, we would take no term, because the pursuer's active title being allenary a comprising led in 1613, it could never be a ground of this pursuit, because long ago prescribed.