

DECISIONS

OF THE

LORDS OF COUNCIL AND SESSION,

REPORTED BY

SIR JOHN LAUDER OF FOUNTAINHALL.

1692. *November 9.* ROBERT DUNCAN *against* HELEN JOHNSTON.

ROBERT DUNCAN in Musselburgh, having given in a bill of suspension of a decret obtained against him by Helen Johnston, relict of Robert Scott, on this reason ; that it was truly in absence, and that he being convened amongst many debtors, Mr. Thomas Skeen was marked compearing for him, and he produced a declaration under his hand, disclaiming that he was employed, or took a day to produce him to depone : The Lords thought their decreets on circumduction the weakest of all those *in foro*, and most easily suspended, seeing it was only to re-pone them to their oath ; yet they ordained the process to be produced, to see if Mr. Thomas Skeen returned the process, or appeared for him. And on production, it was found he had returned it for this defender, and so his declaration was upon oblivion, and a mistake ; though even in such cases it may be dangerous to allow such disclamations, unless where there are a multitude of defenders, and so a confusion in marking the advocate's compearances, or that it holds them as confessed on points referred to their oaths.

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1692. *November 9.* The CREDITORS of SIR GODFRY MACULLOCH of Ardwal, Competing.

PHESDO reported, that in the roup of the lands of Sir Godfry Maculloch of Ardwal, it was objected that the pursuer of the roup being but a single creditor, he

had led a simulate and collusive probation of the rental, (having a design for the lands,) and had not cited the co-creditors to see it led.

ANSWERED,—By the 17th act 1681, no creditors were to be cited but those who had infestments and were in possession ; and that only to the act of the roup, but not to the proving of the rental.

The Lords resolved to consider what had been the practice in this new law ; and, though they would not annul this roup, yet to prevent collusion for the future, they thought an act of sederunt might be made, that the whole creditors ought to be cited *in initio* to hear and see the probation of the rental also led. *Vol. I. page 517.*

1692. *November 11.* JAMES WILKY *against* HAMILTON of Monkland.

JAMES WILKY *against* Hamilton of Monkland, for payment of a sum which was provided to Mr. John, his father, in liferent, and to the said James in fee.

ALLEGED,—It was paid to the father, who had not only a liferent, but his son's right was only a substitution after his decease ; and he, as administrator to him, being then minor, had power to uplift and discharge.

ANSWERED,—The payment, though on a decreet, was collusive and fraudulent, in regard his father was a mere liferenter, and was then notoriously holden and reputed to be bankrupt by my Lord Mordington's breaking ; being put to fly to Berwick to shun captions, and having entered into articles with Monkland to give him down a part of the sum to pay him the rest, which instructed the collusion.

The Lords reduced the discharge, and found Monkland's payment unwarrantable, and therefore decerned him to pay it of new to James, the pursuer.

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1692. *November 11.* MAURICE TRENT and JAMES BROWN *against* WILLIAM DUFF.

MAURICE TRENT and James Brown *against* William Duff in Inverness, for a sum contained in a bond due to one Colonel Man.

ALLEGED,—He had paid it to Man's daughter, as administrator to him, on her discharge.

ANSWERED,—An English probate of wills was not a sufficient title to uplift sums lying in Scotland, without a confirmation here, as had been often decided in Dury ; for both *mobilia et immobilia sequuntur legem istius loci ubi sunt* ; and here Man had more daughters, and only one discharged, who by the English custom neither found caution, nor gave up inventories.

REPLIED,—If the subject were extant, and a competition between an English administrator and one confirmed in Scotland, our confirmation would be preferable, which was the case of the decisions cited ; but there being nothing now to confirm, it was unreasonable to put them to that expense.

The Lords assoilyed Duff ; but in regard the payment was after the intimation of the right made to James Brown, they modified L.4 Sterling to be paid to him for his expenses in this process.

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