

1700. *January 17.* The MAGISTRATES of ABERDEEN *against* TURNER of TURNERHALL.

JOHN Turner, a Scotsman, having lived many years abroad in Dantzick, and acquired a great estate by merchandising, and having no children, he disposes of his estate, by leaving the greatest part of it to Robert Turner his cousin, in Aberdeenshire; and appointed fifty chalders of victual to be bought with it there; and appoints him to pay the yearly mortifications following, *viz.* 400 merks to four bursars in the Marischal College of Aberdeen,—two to be presented by the Magistrates, and the other two by his heir; and 500 merks to be yearly distributed amongst decayed burgesses and their widows, in the town's or craftsmen's hospital, or elsewhere. The lands being, according to the defunct's appointment, bought, Turnerhall his heir, and the Magistrates of Aberdeen, falling at variance about the power of executing and applying the pious mortifications, there were mutual declarators raised by both parties, Wherein it was ALLEGED for the Town,—That, *quoad* two of the four poor scholars, they were clearly founded in the testament as to the right of presentation; and, as to the legacies bequeathed to the poor in their hospital, they being undoubted patrons, that founded their right of nominating to these also; and he must pay to what persons they present, and in such quotas as they think fit to distribute the same.

ANSWERED for Turnerhall,—That though their right of presenting two bursars appears to be simple, and not clogged with craving his consent, yet, in the posterior clause, it is declared his consent is to be adhibited to all that was mortified: and though he was wholly ignorant of the Scots law, (having nominated his heir and conveyed his heritage by testament,) and had forgot the grammar propriety of his own mother tongue, yet he writes in a plain, honest, intelligible style; and that clause must run through and affect the whole, and needed not be repeated at every article.

The Lords for explicating the matter, and to render the mortification effectual, that none be discouraged to leave pious legacies, on apprehension that they are too oft misapplied, they ordained the Magistrates to give in a list yearly to Turnerhall, of their two bursars; and him to give in his objections, if he was not satisfied with the nomination,—if they passed by the mortifier's relations or the like; and, in case of discrepance betwixt them, appointed the Masters of the University to arbitrate and determine, that they might not on every occasion come to the Lords of Session. And, for the poor burgesses and widows, ordained the distribution to be twice a-year; and Turnerhall, that he be not obliged to unnecessary attendance, to get a list of the persons; and if he does not acquiesce, the same is to be determined by the Ministers of Aberdeen and kirk-session, if the parties given up in list deserve it, or others whose necessities may be more clamorous and pressing. Whereby the consent of the mortifier's heir is not wholly neglected.

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1700. *January 18.* WILLIAM WIGHTMAN *against* THOMAS JOHNSTON.

THE Lords advised the cause, William Wightman, merchant in Edinburgh,

against Thomas Johnston, skipper in Queensferry. The case was somewhat new. Johnston, being in Holland, buys a ship from Archibald Wightman, who gives Archibald a bill for £6000 Scots, as the price of it, on his wife, who accepts the same. Archibald transfers and indorses the bill to be payable to William Wightman, merchant, his uncle; and, shortly after that, breaking, his creditors in Holland, particularly the carpenters, smiths, sailmakers, and ropers, who had built and outreiked the ship, arrest and seize on it, by virtue of the hypothec given them by the Dutch law, till they be paid for their furnishing. Johnston seeing the ship will certainly be evicted from him, and being charged on his bill, on the Act of Parliament 1681, summarily, he suspends, on this reason, That he offered to prove, by the letters of advice and invoice sent alongst with the bill, that it was a part of the price of the ship; and the same being arrested, it was *ob causam datam causâ non secutâ*; and therefore he could not pay the bill till the ship were cleared of its debts and delivered to him; otherwise, this were *bis idem exigere*, to exact the price, and yet he not to get the ship; and, in mutual contracts, both parties must perform, ere they can require implement from the other. *Qdo.* This has been a plain trick betwixt an uncle and nephew, in defraud of Johnston, a lawful creditor; and so, by the Act of Parliament 1621, he must instruct the onerous cause; especially seeing the indorsation does not bear value received, but value as per account.

ANSWERED,—Whatever exceptions are receivable against bonds and other grounds of debt, the same are never admitted against bills of exchange; else commerce betwixt this and foreign nations should be stopped, and money circulation marred: for, at the beginning, all was done by permutation and barter of goods; and, for obviating the difficulty occurring in excambions, money, as the standard of goods, was invented: But inconvenience and danger arising in carrying it, the Italians introduced banks and bills of exchange; which should be as current as the delivery of a bag of money from hand to hand, and should, *fictione brevis manus*, be reputed as present money, and payable *latori presentium*, without any more inquiry. And the charger is not concerned what was the cause of the bill, unless it had expressly bore it. And declarations or back-bonds apart can neither qualify nor affect bills, whatever they may operate against other writs, else all trade will soon be ruined, and strangers will no more trust us: and, by the law of nations, and the French edict of Versailles, no exceptions, though of compensation, are receivable against bills of exchange. And the Act of Parliament 1621 relates only to bonds, contracts, and other such writs, but not to bills of exchange.

The Lords thought declarations apart not sufficient to stop the currency and execution on bills; yet that fraud and dole was a just exception against all bargains; and therefore, before answer, ordained the letters of advice, and all others relating to this bill, to be produced: And found, That, being a conjunct person, and the bill's indorsation only mentioning value per account, he ought to instruct the onerous cause of transferring the bill to him, especially his nephew bankrupting so soon after. And, though there were no diligence against him at the time, according to the Scots form, because he was then in Holland, yet, according to their custom, he was placaded and had fled; and each nation had their several ways,---as the Romans, *missio bonorum in possessionem*, and by the *annotatio bonorum*, and the like.