

1702. January 9. JOHN MITCHELSON *against* RICHARD RAE.

JOHN Mitchelson, merchant in Dumfries, having right to a wadset of some lands belonging to the Earl of Nithsdale, redeemable on 7000 merks, he enters into a transaction with Richard Rae, an English travelling merchant, who advances him the said 7000 merks; and Mitchelson, by a minute, obliges himself to dispoise the said wadset-right to him, or else to repay the 7000 merks. When he comes to convey, it is found he wants the original wadset; whereupon Rae refuses to accept of a disposition with such an evident defect; and, being charged on the minute, he suspends on that reason.

ANSWERED for Mitchelson,—That he sold the right *talis qualis* as it stood, in which case *caveat emptor*; and there were adminicles enough to supply the want of the first contract, seeing the Earl of Nithsdale had acknowledged the right, by entering some of the intermediate authors; and he was in peaceable possession, undisturbed. And Rae was to blame in disclosing the defects of his own right, which could be easily proven in a tenor; and he had only given warrandice from his own fact and deed, and not against the defects of the title.

REPLIED,—There was a most unjustifiable design to overreach and deceive the defender; *et jura subveniunt deceptis*. If there had been an abatement of the sum on account of this want, there might have been a pretence that he took his hazard; or, *2do*, If Mitchelson had honestly told him he wanted the first contract; in any of these two cases, he might have pled a purgation from dole: But here Rae pays him in the sum at the full extent; and it is not pretended that he was acquainted with the defect: therefore it is a clear circumvention, and Rae ought to have his 7000 merks back again.

Some inclined to supersede extracting the decret against Mitchelson for some competent time, as a year or the like, in which Mitchelson might prove and make up the tenor: But the Lords, having an indignation at the advantage taken, did decern immediately for repaying the 7000 merks. Cicero, *de Officiis*, decides the same way, and calls it against moral honesty to conceal the defects of goods or other rights in the matter of bargaining.

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1702. January 13. THOMAS SMITH *against* WILLIAM BROWN, *alias* CRICHTON.

THOMAS Smith pursues William Brown, *alias* Crichton, of Crawfordstone upon the passive titles, as representing his father, for payment of 300 merks, contained in a bond granted by him to Margaret Dempster, to whom Smith is confirmed.

ALLEGED,---Absolvitor from 200 merks of it; because there is a discharge written on the back of the bond, acknowledging that sum paid; and though it be not signed by the creditrix, yet it bears to have been, because she could not write; and it is subscribed by three witnesses.

ANSWERED,—It is neither subscribed by herself, nor by notaries for her, and yet it bears, in the body of it, that it is subscribed by her; and therefore it