1702. *February* 10. JEAN WALLACE *against* SIR THOMAS WALLACE.

THE deceased Sir William Wallace of Craigy, in his contract of marriage with Dame Jean Menzies, daughter to Pitfoddels, provides his estate to his heirs-male; and, in case there shall be only one daughter of that marriage, his heir of tailyie is obliged to pay her £20,000 Scots. This case existing, Jean Wallace, the only child of that marriage, pursues Sir Thomas Wallace her uncle, and the apparent heir-male and of tailyie, as lawfully charged to enter heir, to pay her the foresaid £20,000, with annualrent, after her age of twelve years.

ALLEGED,—No process against him as heir-male, till the heirs of line be discussed; which is the pursuer herself, and her sister Margaret by another marriage; and wherever remoter heirs stand obliged to pay a sum, the lineal heirs are always to be first discussed.

ANSWERED,---The pursuer has already insisted against Margaret, the other co-heir, and got a renunciation from her, and none will say she ought to discuss herself; likeas he ought to condescend upon some discussible subject and estate to which they may fall, else the calling them is sufficient. And he has no prejudice; for he can easily liberate himself, by renouncing to be heir, seeing no other passive title is insisted on; and if he refuse to give in a renunciation, he ought to be liable.

The Lords decerned, unless he would renounce; and found he ought to do it, without any farther discussion of the heirs of line. *Vol. II. Page* 144.

1702. *February* 10. JAMES SINCLAIR *against* MURRAY of CLAIRDEN.

MURRAY of Clairden having married the daughter of Murray of Pennyland, she, in her contract of marriage, dispones her father's lands to Clairden, her husband; and he, in contemplation thereof, undertakes the payment of some of her father's debts, and particularly of 2000 merks to Maciver of Lickmellum. James Sinclair, having right by progress to these debts, pursues Clairden for payment. His defence was,—My engagement was mutual, *et intuitu* of a right from my wife to her father's estate of Pennyland; but, *ita est*, I find now that she had no valid nor sufficient right; so that I have raised reduction of the contract *ob causam dati causa non secuta;* for, I having undertaken the debt in contemplation of the estate, and that failing, my obligement *cadit in causam;* and the law says,---*Sive ab initio sine causa promissum est, sive fuit causa promittendi, sed quæ facta vel secuta non est, dicendum est condictioni locum fore:* and Stair, *tit. Conventional Obligations,* observes, That the failure of the mutual cause of a contract operates even against an assignee for an onerous cause to exclude him.

ANSWERED,—Your obligation to pay is simple and absolute, and clogged with no condition or quality of the validity or efficacy of your wife's right, and so you took your hazard; neither is there any thing condescended on, to instruct either the defect of the right or the preferableness of any other thereto; and it was easy for him to abstract and conceal the rights. And, in a decision in the late times, betwixt the *Earl of Lauderdale and the Duchess,* the Lords found

the mutual cause ceased where there was a legal bar and impediment to the performance, by an expired apprising.

The Lords considered who was in possession of the lands; and, finding they were liferented, they repelled Clairden's defence and reason of reduction: and found him liable, unless he instructed some distress, or preferable right, totally exclusive of his; or that the superior had obtained certification against their writs; or that there was some plain nullity or defect in his wife's right; in any of which cases they would allow him to be farther heard.

It was also ALLEGED,—That James Sinclair's author being no party-contractor, he could not found on this clause. But the Lords found, That *acquirere possumus etiam per alios*; *et, ubi id agitur*, the parties-contractors can neither alter, discharge, nor innovate the same. *Vol. II. Page* 144.

1702. *February* 11. SAMUEL MACLELLAN *against* THOMSON of DENINNO.

SAMUEL Maclellan, merchant in Edinburgh, against Thomson of Deninno. Samuel, as executor to Patrick Thomson, pursued James Thomson, brother to the said Patrick, for payment of £18,678, conform to an account; and he having deceased *medio tempore*, and Patrick Thomson, his nephew, succeeding to him in the lands of Deninno, Samuel transfers the process against him for constituting the debt; and he being forced to flee out of Scotland, on account of a slaughter, Colonel Erskine takes the gift of his escheat for the behoof of his children, and of Margaret Lumisden his lady, and compears in the process, craving the account may be restricted to what James Thomson had in his lifetime upon oath acknowledged.

ANSWERED,---You have no interest to stop the constitution of the debt; for the defender, being conscious of the justice thereof, has, by a docket at the foot of the account, acknowledged the same, and consented that decreet pass against him therefore, and discharges any advocates to appear in the contrary.

REPLIED,---The donatar has sufficient interest, if he see unjust debts accumulate to burden the subject of the escheat, to appear and oppose the same; and there was never any more circumvened than this poor man, to the ruin both of himself, his lady, and children: for, besides his signing to the whole account, whereof many of the articles are false, he has also given a bond for 40,000 merks to Samuel Maclellan, his brother-in-law, whereupon to adjudge his estate; and there were such evidences of his facility, prodigality, and levity, that there were sufficient grounds for the Lords judicially to interdict him; which not only may be done upon a process of declarator and cognition, but likewise *incidenter*; where it arises in another process, the Lords have done it *ex proprio motu.*

It was thought, where a man confessed a debt under his hand, and renounced all defences, discharging any to appear in the contrary, the Lords could not refuse a decreet, and that constitutions of debts could not be stopt on pretence of circumvention and imposition; therefore they decerned here, but declared they would reserve all *contra executionem*, and take these grounds then to consideration; and, if they saw cause, they would grant a judicial interdiction.

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