

Kilmaronock's condition had existed, and he been free. But this accident arising from the unfaithfulness and baratry of the skipper or supercargo, that was such a *casus incogitatus*, and was not provided against; and they being of Kilmaronock's in-putting, he must be answerable for their deeds; *nam qui per alium quid facit, per se facere videtur*.---And all the writers on maritime law, and all the forms of insurances do never extend to such hazards and events. *2do*, Though the condition of returning was not performed in the strict literal sense, and *in forma specifica*, yet it was virtually and *equipollenter* fulfilled, in so far as the price returned and Kilmaronock drew his share of it. And, if the price had been to the owner's advantage, Kilmaronock would never have proponed this defence; and therefore, though it proved to their loss, he cannot be heard to obtrude this strict and rigorous not return; for *majus et minus non variant speciem, et qui habet commodum debet et sentire incommodum*, otherwise it would be a *societas leonina*.

REPLIED for Kilmaronock,—That maritime contracts are *optimæ et uberrimæ fidei*; and, whatever be the style of insurances, what hinders a man to provide, by additional clauses, for his own security; as is here done. And, by the Act of Sederunt, 1613, the Lords are bound to decide precisely in the terms of clauses irritant, as the parties have agreed: and though, in some cases, equipollents are received for implements, yet, generally, equipollences are not allowed, as in the cases of premonitions, requisitions, consignations, &c.; and law is plain and precise on that head,—*l. 8, § 2. D. de Condit. Institut. adimplenda est conditio in modo et forma præscriptis, alias pro defecta habebitur; l. Unic. § 4, C. de Cad. Tol.; l. 44, 45, 55. Dig. de Condit. et Demonstrat.* And Kilmaronock denies any accession to the selling of the ship in the Indies, or that the skipper or supercargo were more of his in-putting than the rest of the partners, who were as much bound to answer for their deeds as he.

The Lords, by a plurality of six against five, found, the ship never having returned to Britain, the condition of Kilmaronock's bond was not purified nor fulfilled; and therefore assoilyied him from the £300 sterling bond; but found him liable in the £30 sterling of premium.

This will not hinder Corbet to get his share of the price returned; which was so inconsiderable that it will not be the tenth part of what they probably might have expected by the voyage, if it had been prosperous and successful.

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1707. February 19, July 3, and December 26. JEAN GUINE against JOHN DOUGAL.

February 19.—JEAN Guine, relict of George Muir, goldsmith in Edinburgh, charges John Dougal, starchmaker at Dalry, on his bond, either to marry her, or to pay £100 sterling in case of failiye. He suspends, and alleges the bond to be forged, and that two of the witnesses were imposed upon to sign it, upon her promise that Dougal should come and own his subscription to them; which he never did, but now, on the contrary, disowns the same: and accordingly he had raised improbation of the said bond.

The cause being called in presence, it was ALLEGED for Jean Guine, the

charger,—that she, being trepanned with his false promises to marry her, was now with child to him. And though he had corrupted two of the witnesses to deny that ever they saw him subscribe, or own it, yet her bond was good and probative notwithstanding, seeing she had two other witnesses who had adhered to it: and her bond being sufficient by them, he, with a design to trick her, said there behoved to be four witnesses at it, and sent in thir other two, who now would redargue the bond: But she was not concerned; for the two affirming witnesses made a more plenary probation to confirm it than the other two disowning it could any ways invalidate the same. Likeas, she condescended upon Robert Hunter and several others, who had seen this bond before it was registrate against him; and all this clamour was raised because he had fallen in hands with another woman, whom he designed to marry.

ANSWERED for Dougal,—That the very inspection of the bond afforded suspicion, without any more; for, in the filling up of the writer's and witnesses' names and designations, they have spurred in upon his pretended subscription, and, by comparing it with his other writing, there would be a visible dissimilitude. And the two witnesses were ready to declare, that, when they were called in, a blank sheet was presented to them, with Dougal's subscription at the tail of it; and that one John Load filled up the bond above the subscription, and promised to them that he would bring Dougal to own it; and accordingly brought in one who personated Dougal, and called himself so;—but now they find it was one Sawyers, on which mistake they signed. And further offered to prove that Mrs Guine offered the witnesses a hundred merks and a suit of clothes, to abide at the truth of the bond; and that John Load had threatened them a mischief, though he should be taken with hot blood.

The Lords, before answer, ordained all the four witnesses to be examined on the verity of the bond, as also those who had seen it before registration, and any other qualifications either to astruct and adminiculate it, or to prove it forged. And it being moved that they might be secured, unless they found caution to appear at all the diets of the process, for fear of absconding or flying, yet the Lords forbore till they saw what they should depone; though two of them had incurred the hazard of the 5th Act of Parliament 1681, declaring them falsaries, unless either they saw him subscribe, or heard him own it to be his hand-write, and knew him to be the person he gave himself out to be. As to the discrepancy betwixt the witnesses, the doctors' brocard is,—*plus credendum duobus affirmantibus quam decem negantibus*. And, for trial of his subscription, *comparatione literarum*, the Lords caused him write his name before them, and compared it with the bond and other papers produced. *Vol. II. Page 351.*

July 3.—The cause between Guine and Dougal, mentioned *supra*, 19th February last, being again heard; and Guine pressing that all the four witnesses to her bond, and particularly John Load, might be examined,—there were so many qualifications of fraud and disingenuity brought against Load, that the Lords declared they would examine the other witnesses, before they would determine whether they would admit him or not; and ordained them all to attend at the examination, but removed all others, except the parties and their procurators; seeing, by the Act of Parliament for open doors, they may proceed in extraordinary cases with close doors. And this forenoon they examined Taylor and Blair, two of the instrumentary witnesses, *in presentia*, who clearly proved they

were cheated, tempted, and trepanned to sign witnesses to a subscription of a bond, called John Dougal's, but that they did not see him subscribe; only Load and Mrs Guine promised to bring John Dougal to own his subscription; and, after many shiftings, they at last suborned one Sawyers to come and personate Dougal, and say he was the man, and had signed the bond; which afterwards they found to be a mere trick: and that Load and Mrs Guine prayed them to conceal this contrivance, and abide by her bond as a true deed, and say it was Dougal's hand, and that he owned it to them: and that she promised each of them a suit of new clothes, and 100 merks. Guine being present, averred it was they that sought the bribe from her, and threatened they would disown the bond, unless she gave each of them fifty merks and a suit of clothes.

There not being time to transcribe their oaths *in mundo*, and the clerk being ordered to do it against the morrow, it was suggested, that Mrs Guine and Load being now evidently convicted of a gross forgery and falsehood by thir two witnesses, if they were not secured, they would certainly flee and evade punishment; therefore the Lords granted a warrant to imprison them, containing the cause, in terms of the late Act of Parliament 1701. And though it was moved that bail might be received for their appearance, yet, the crime being capital, it was refused: and in regard the witnesses not having signed their depositions, they not being fully transcribed, and they might be tampered with to abscond, which would stifle the probation; therefore they were also committed to prison till to-morrow, that they might sign their oaths; not for punishment, but only for custody and security, that they might not be bribed to run out of the way. Some moved that Load and Mrs Guine should be made close prisoners, without the benefit of pen, ink, or paper; but this was thought unjust, during the dependence of the trial, to debar their lawyers or any other from advising her in the matter; only, the Lords ordained them to be kept in two separate rooms. And, seeing Dougal had neglected to crave that she might abide by the bond, *sub pœna falsi*, which is usual in the very entry of all improbations, though, in her bills and pleadings, she had all along owned the bond, and used it as a true deed; yet the Lords allowed her till to-morrow to deliberate whether she would judicially abide at it or not; seeing she might have been led upon this contrivance out of revenge against Dougal, who had refused to marry her, by the said John Load's advice, who seemed very expert in such tricks. And if the Lords, on advising the witnesses' depositions, improve the bond, and find it forged, then they may remit Guine and Load to the criminal court to be sentenced capitally, conform to the Acts of Parliament against the users and counterfeiters of false writs, where the Lords' decret will be *probatio probata* to the assize. And, as to the woman, all the power the present establishment of the Privy Council has, is not to commute the punishment, and banish, as they might have done before, but only to supersede execution of the sentence for a time, till they consult the Queen.

Thir witnesses had formerly emitted declarations on a precognition and expiscation made by the Queen's advocate and solicitors to try the fact; which the Lords, to put them at freedom, without any prelimitation, ordained to be cancelled; but they being found not subscribed, there was no need of it, they being at absolute liberty to depone, without any regard thereto. Some were for inquiring into the quality and bygone life of her witnesses, they seeming to be poor and low in their condition; but there being no legal objection made against

their hability, farther than Load's and Guine's assertion, that they sought bribes from her, the Lords found no cause as yet shown to doubt of the verity of their oaths, and what they had deponed.

Complaint also being made against Boswal, the fourth witness, and one Sawyers, who feigned and personated himself to be John Dougal, the Lords granted a warrant to apprehend them, seeing they had absconded on the delation already made. I find, where, by alleviating circumstances, the punishment to be inflicted for falsehood falls to be *minor capitali*, such as banishment, fining, pillorying, whipping, branding, &c. the Lords had been in use, without remitting them to the justice-court, to apply the punishment themselves; as appears by the sederunt-books, 13th June 1651, and Durie, 14th July 1638, *Dunbar* against *Dunbar*.
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December 26.—John Load being brought from prison, who was accessory to the forgery betwixt Dougal and Guine, mentioned 3d July 1707, he, rather than undergo trial, electing banishment, also enacted himself to depart out of the kingdom of Great Britain, never to return, in manner foresaid; [in manner mentioned in the case below, 26th December 1707, page 685.] And George Drummond, keeper of the tolbooth, desiring to be heard, before they were dismissed, for what was due to him, the Lords ordained them to pay for what meat or drink he had furnished to them; but, being very poor, liberated them from house-dues. And appointing him to give in his account, they recommended him to the Lords of the Treasury for his payment; though the town should truly be at that expense, they being obliged by law to keep a prison for debtors and malefactors. And upon their enacting themselves as foresaid, they were instantly liberated and dismissed from the bar: and this severity may be a wholesome caveat to beware of such practices for the future. Some moved they might be delivered to a captain of the recruits, to serve as soldiers in Flanders; but the other method was judged more legal.
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1707. *November 7 and 8, and December 9 and 26.* Her MAJESTY'S ADVOCATE
against WILLIAM HUNTER and OTHERS.

November 7 and 8.—Much of thir two days were spent in trial and expiscation of a forgery. Her Majesty's advocate gave in a complaint and libel to the Lords, against one William Hunter, shoemaker in the Potterow, bearing, That one Robert Guine having been a mariner on board the Unicorn, a ship belonging to the African company, there was £10 or £11 sterling owing him of bygone wages for his service; and these debts being, by the late Act of Parliament about the Union, declared that they should be satisfied out of the equivalent, this Hunter having got a factory, which Guine had given to one John Hodge to uplift it, he went to the commissioners for distributing the equivalent, and got up the money; but they, being informed that Guine was dead, refused payment till it should be confirmed. Whereupon Hunter fell upon a contrivance to serve an edict before the Commissaries of Edinburgh, for confirming Hodge, and Margaret Guine his wife, alleged sister to Robert the creditor; and having got a certificate of the sum due, he caused a boy, called Gilbert Halliday, sub-