

That in case 'we, or either of us, have occasion to sell the lands,' &c. which are words that can only apply to the two obligants. Nor is it any objection to this construction, That, in the obligatory part, they not only bind themselves, but their heirs; for, although a man oblige himself to do any thing in his own life, yet, notwithstanding thereof, he usually binds himself and his heirs that he shall do so; the consequence thereof is, That, if he contravene, the heir will be liable in damages, and obliged to procure to be undone what his predecessor did. Now, to apply this to the case in hand, if the obligants here had sold the land to another, and then died, the heir would be bound to make good the damage, and to procure the same to be undone; but, granting that it was perpetual, there is no force in the objection; seeing there is nothing inconsistent with the liberty of mankind, that one should lie under a perpetual obligation not to sell but in favour of one family, such being the import of every clause of redemption; and, if a man can lawfully bind himself, Why cannot he, in the same way, bind his heirs? Nay, there does not seem any thing to stand in the way of a man's obliging himself and his heirs not to sell at all, which is truly the case of entails; as it is the natural consequence of property, that every person may subject it to what conditions and limitations he pleases.

As to the distinction, That such bargains are not valid if the price is fixed at the beginning, it is without any foundation or authority whatever; if indeed the right of pre-emption arises from law and not by paction, then no price can be fixed; and, of consequence, the current price, at the time of sale, must be the rule. But it would prove a strange restraint upon property, if a person who intended to secure himself a certain price in the event of an eventual sale, should not have it in his power to do it. Nor is it to the purpose to mention the chance of lands rising in value; as the hazard of its falling lies on the side of the buyer.

THE LORDS found the obligation was no longer binding than during the life of Carseluth and his son, the obligants.

But, upon petition and answers, founded on the objection, That the contract of sale was unlawful, by being adjected to a loan of money,

THE LORDS found the contract, in so far as concerned the sale, *contra bonos mores*; and therefore not binding.

*C. Home, No 29. p. 54.*

1752. June 3.

ARCHIBALD STEWART, Clerk to the Signet, *against* ALEXANDER, Earl of GALLOWAY.

SIR JAMES STEWART of Burray, being pursued criminally before the Court of Justiciary, for the murder of Captain James Moodie of Melsetter, and not dar.

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No 16.

A party granted bond for a sum to an officer of

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court to induce him to procure a pardon for a crime. Found null.

ing to stand trial, was outlawed. Some years after, he appeared in London, and applied to his namesake, James Stewart of Torrence, who enjoyed an office about the King's person, to solicit his pardon; and, the more effectually to engage him, granted him a conditional bond for L. 100 Sterling, to be purified when the pardon should be obtained; and the pardon accordingly was obtained.

This bond was put in suit many years after, by the representatives of the creditor, against the representatives of the debtor, and many defences were stated. But the LORDS refused action, upon this medium, that it was a *turpis causa* to give a premium to any man attending the Court to solicit a pardon.

*Fol. Dic. v. 4. p. 29. Sel. Dec. No 9. p. 11.*

\* \* \* This case is reported in the Faculty Collection.

THE deceased Sir James Stewart of Burray was, in the year 1726, pursued criminally before the Court of Justiciary, for the murder of Captain James Moodie, and fugitated for non-compearance.

Afterwards Sir James came privately to London, and applied to James Stewart of Torrence, to solicit a pardon for him from his Majesty; and, on the 4th September 1730, Sir James executed a bond in the English form, obliging himself in the sum of L. 200 Sterling to James Stewart; and the condition of the bond is, that in case his Majesty should, at any time before the 3d of August next, grant a warrant for passing his most gracious and full pardon to Sir James, of all crimes and misdemeanours, and other offences whatsoever, against the laws of the realm, or any of them, by him heretofore committed; and that, within 20 days after such warrant happens to be granted, Sir James should pay to the said James Stewart, his heirs or assigns, the sum of L. 100 Sterling; then the obligation to be void, otherwise to stand in full force.

His Majesty, on the 12th of May 1731, granted warrant for his gracious and free pardon to the said Sir James of the killing of Captain Moodie, and of all accession thereto.

After the death of these parties, Archibald Stewart, as executor to the said James Stewart, brought an action against the Earl of Galloway, as representing the said Sir James, for payment of the sums contained in the said bond.

*Pleaded* for the Earl, That the condition of the bond never existed; for no full pardon was granted Sir James Stewart of all crimes and misdemeanours, but only a particular one for the murder of Captain Moodie.

*Observed* on the Bench, That the bond was *contra bonos mores*, as it was a stipulation of a sum of money for obtaining a pardon, which was truly no other than a bribe; and, therefore, no action could lie on the bond.

“ THE LORDS found, that, in regard no full pardon was granted to the deceased Sir James Stewart of all crimes and misdemeanours, no action lay for

the sums contained in the bond ; and also found, that no action could lie against the Earl of Galloway upon the bond in question." No 16.

Act. Ro. Craigie.

Alt. Elliot.

Clerk, Pringle.

B.

Fac. Col. No 9. p. 13.

1784. December 16.

JANET MASON against JOHN HENDERSON.

No 17.

Bonds at *respondentia*, may be confirmed by collateral security.

THE son of John Henderson, an Officer in one of the ships belonging to the East India Company, obtained from Alexander Robertson a loan of L. 100, upon his bond at *respondentia*. Within 30 days after the return of the vessel, he was to pay L. 122, and L. 1 : 2 for every month thereafter. As an additional security, John Henderson likewise became bound, in the same event, to make payment of the monies advanced.

The ship referred to completed the voyage ; but the borrower remained in India : And Janet Mason, the executrix of the original creditor, pursued John Henderson for the debt.

*Pleaded in defence*, By statute 19th George II. c. 37. it was enacted, ' That all monies lent on bottomry, or at *respondentia*, on vessels to or from the East Indies, shall be expressly lent *only* upon the ship, or upon the merchandise.' The stipulation elicited from the defender, therefore, by which the creditor obtained a collateral and personal security, was altogether illegal and void.

*Answered*, The extraordinary interest stipulated in contracts of bottomry, and *respondentia* bonds, was only permitted at common law, because compensated by the unusual risk run by the lender. But the addition of collateral securities, entitling the creditor to demand payment, whether the adventure prove successful or not, would totally change the nature of the bargain, and render it a cover for usury and oppressive dealings. And to such agreements alone the statute of the late King was meant to extend.

But it never could be intended to annul obligations such as the present, where nothing is exigible, either from the debtor or his surety, until the arrival of the ship. Here the creditor's purpose is not to secure himself against the hazards of the adventure, but against the insolvency of his debtor, which, after the voyage had been successfully performed, might have disappointed him of his payment. Nothing, accordingly, is more frequent in practice, than stipulations of this sort. Without them, indeed, in case of the borrower's not returning along with the ship, the creditor's claim would be entirely frustrated.

THE LORD ORDINARY over-ruled the defences ; to which judgment the LORDS adhered, after advising a reclaiming petition for John Henderson, with answers for Janet Mason.

Lord Ordinary, Gardenston.

Act. Whyte.

Alt. Mark Pringle.

Clerk, Home.

C.

Folk Dic. v. 4. p. 33. Fac. Col. No 185. p. 290.