

No 41.

THE LORDS found, That the absolvitor could not prejudice this pursuer, as to these points omitted, and that it could not have effect *inter alios*, except it had been *in re antiqua*, where the witness had died; that in that case, the testimonies out of the former process might be repeated; but as to the rental, the LORDS would not give the pursuer the sole probation, being so lubrick a point, as not only what it paid, but what the lands were worth, and it might have paid; and ordained witnesses to be examined *binc inde*; and found, that the bairns' portions not being paid *bona fide*, before the intending of this cause, could not prejudice the creditor; but ordained the defender to suspend on double pointing against the pursuer and the bairns; but in regard of so much ground in the matter, they declared they would not sustain the passive title to make him successor universal, but only as to the just price, and the cause onerous.

Fol. Dic. v. 2. p. 352. Stair, v. 1. p. 245.

1665. February 24.

Dame ELIZABETH DOUGLAS, and Sir ROBERT SINCLAIR of Longformacus, *against*
LAIRD of WEDDERBURN.

No 42.

One being dishabilitated by Parliament without citation or crime, and being rehabilitated, not *ex gratia*, but of justice, a gift of his forfeited estate found to fall of consequence, without citation of the donatar.

THE Lady Longformacus, as heir to her goodsire, William Douglas of Evening, who was donatar to the escheat and liferent of John Stewart of Coldingham, pursues the Laird of Wedderburn, for the teinds of his lands, which teinds pertained to the Abbots of Coldingham. The defender *alleged*, Absolvitor, because he has tack to run, flowing from the Earl of Hume, who was infest in the Lordship of Coldingham, and before that was Commendator thereof, by his Majesty. *2do*, John Stewart had ratified all rights flowing from the Earl of Hume, and consequently this tack, after which the donatar of his escheat could not challenge the same, for the ratification is equivalent, as if the tack were granted by the ratifier. The pursuer *answered*, That the defence upon the tack, and the Earl of Hume's right, ought to be repelled, because the Earl of Hume's right is reduced by the Parliament 1621, on this consideration, that the Earl of Bothwell being Commendator of Coldingham, had demitted the same in his Majesty's hands, whereupon the said John Stewart, his son, was provided by the King, Commendator of Coldingham; and thereafter, the Earl of Bothwell being forfaulted, the said John, and his other children, were dishabilitated, and declared incapable to bruik and enjoy his land and heritage, or to succeed to any person within this realm, by sentence of Parliament; whereupon the King provided the Earl of Hume to be Commendator of Coldingham; and thereafter, on the Earl's own resignation, infest him therein, in an erected Lordship, and thereafter, in the Parliament 1621, the King and estates, upon express consideration, that John Stewart was an infant,

noways accessory to his father's crimes, did therefore annul his dishabilitation, and re-habilitated him; and declared, that he should have right to the Abbey of Coldingham, in the same manner as he had before his dishabilitation; and rescinded all rights and infestments of the said Abbacy, granted by his Majesty, to any person of the said Abbacy since the said dishabilitation, in so far as the same might be prejudicial to John Stewart's provision, that he had before. After all which, John Stewart, upon his own resignation was infest in the property of Coldingham; so that the Earl of Hume's right being reduced in Parliament, and falling in consequence with John Stewart's dishabilitation, whereupon it was founded, the defender's tack following thereupon, falls also in consequence, as was already found by the LORDS, *in anno* 1628, betwixt the said William Douglas of Eveling and the Laird of Wedderburn, conform to an interlocutor, extracted and produced, which is sufficient *inter easdem partes*, and cannot be questioned *super eisdem deductis* now; albeit at that time, Wedderburn passed from his compearance, and so the decret against him was in absence, yet the interlocutor was ordained to be extracted against him by the LORDS, which is sufficient; and as for the ratification of the tacks granted by the Earl of Hume, the same was after John Stewart had resigned his commendatorship, and before he was infest in property. The defender *answered*; *1mo*, That the said reduction of the Earl of Hume's right was without calling of the defender, or of the Earl of Hume himself; *2do*, It mentions no particular right, or any person, but in general, all right; and so is but a private right impetrated from the Parliament, without hearing of parties; and therefore falls under the act of Parliament *salvo jure*; and as to the former interlocutor of the LORDS, the reason why the LORDS sustained the said rescissory act, was because they found themselves not competent to judge as to sentences of Parliament, or to annul the same upon the not calling of the parties, in respect that the act *salvo* 1621 relates to ratifications, but not to such sentences as this; but, by act *salvo* 1633, it is expressly declared, that that act, and all former acts *salvo*, should not only extend to ratifications, but to all other private acts impetrated without hearing of parties, and prejudicial to other parties' rights; and therefore now the LORDS ought to proceed upon the parties' right, without consideration of that act rescissory.

2do, The act of Parliament prohibits and annuls all restitution of forfeiture by way of grace, in so far as may be prejudicial to those who *bona fide* acquired rights from the King *medio tempore*; and so the rehabilitation of John Stewart cannot prejudge the Earl of Hume, or the defender, who had right from the Earl. It was *answered* for the pursuer, That there was no difference in the two acts *salvo jure*, albeit the last was more express than the first, containing the same in effect. *3tio*, John Stewart being dishabilitated by the Parliament, without citation or crime, might justly be rehabilitated *eodem modo*, without citation, and that not by way of grace, but in justice, as not accessory to the crimes; and albeit forfeitures may not be taken away by way of

No 42.

reduction, by the act of Parliament 1584, cap 135, yet that cannot be extended to the dishabilitation of their children, so that the Parliament doing nothing prejudicial to any party's right, but restoring John Stewart to his just right, *eo ipso*, the Earl of Hume's right fell in consequence, as founded upon John Stewart's dishabilitation, and with it the defender's tack.

THE LORDS repelled the defence upon the tack, in respect of the reply, for albeit the act of Parliament 1633 be much larger than the act *salvo* 1621, so that thereby the LORDS might have cognosced upon John Stewart's rehabilitation as without citation, if it had wronged any other person's right; but finding that it was an act of justice, wronging no person's right, they found the same relevant.

Fol. Dic. v. 2. p. 350. Stair, v. 1. p. 276.

1665. June 24.

IRVINE against STRACHAN.

No 43.
Compensation liquidated against the principal debtor sustained against the cautioner, whose right was accessory, altho' not called in the decreet of liquidation.

ALEXANDER STRACHAN, as assignee by Patrick Gordon, charges John Irvine to make payment of a bond of 500 merks, which being suspended on this reason, that the cedent was debtor to the suspender in a greater sum, being obliged for the growth of certain lands of the crop 1633, and certain bolls of meal, as the duty thereof; the charger *answered*, That this was not liquidated against him, nor against his cedent, before his assignation. The suspender *answered*, That it was liquidated before in so far as there was a decreet of liquidation obtained against the principal party for whom the cedent was cautioner in the contract, which must be sufficient against the cautioner, albeit he was not called, because his obligation was but accessory; unless he could instruct collusion; and this decreet of liquidation proceeds upon probation of witnesses.

THE LORDS sustained the compensation, and found the liquidation sufficient, being against the cautioner, though he was not called against this assignee, seeing the decreet was before the assignation.

Fol. Dic. v. 2. p. 351. Stair, v. 1. p. 287.

. Newbyth reports this case:

IN a pursuit at Alexander Strachan's instance against John Irvine, for payment of a debt, there being an exception of compensation proponed, whereof the ground was payment of bolls of victual; and it being *alleged*, that the bolls not being liquidated, there could be no compensation, albeit there was no decreet of liquidation obtained, in regard the ground thereof, viz. the payment of bolls, was existant before; and found, that the liquidation might be proved at any time, but, in this case, it was a decreet of liquidation already which made it much more clear.

Newbyth, MS. p. 29.