

No 227.

Of the same date, Allan, in answer to this letter, declared his acceptance of the bargain ; adding, that the meal should be delivered in three weeks.

Within the time appointed, Coutts shipped 600 bolls of meal, of crop 1753, from Portsoy for Irvine, and made offer of it to Allan.

Allan not having occasion for the meal, refused it, on this ground, That, in terms of the letter, it was not of crop 1754.

Coutts having brought a process against him, he founded his defence on the strict terms of the letters, which bound him to receive meal only of crop 1754.

Answered for Coutts, The words, " of crop 1754," had been put in by the inaccuracy of Fairy, instead of " crop 1753 ;" that crop 1754 could not be in the intention of parties, because it was impossible it could be delivered of that crop from Portsoy to Irvine in three weeks after the date of the letters ; seeing the gentlemens farm-victual in that country are not deliverable till betwixt Yule and Candlemas.

Replied, When an impossible condition is annexed to a bargain, the effect of it must be, to void the bargain altogether ; l. 31. Pand. De obligat. et act. ; Stair, lib. 1. tit. 3. § 7. ; and again tit. 10. § 13.

" THE LORDS found Allan liable for the price of the meal offered to be delivered."

Act. *Sir John Stuart, Ferguson.*

Alt. *J. Dalrymple, Lockhart.*

J. D.

Fol. Dic. v. 4. p. 125. Fac. Col. No 81. p. 144.

DIVISION VII.

Blanks in Writs filled up, at what time presumed.

1670. *January 15.*

Lady LUCIA HAMILTON *against* The Lands of DUNLOP and PITCON, and the CREDITORS of HAY of Montcastle.

No 228.

An inhibition found to reduce a disposition, because the dates, being filled up

LADY LUCIA HAMILTON being assigned to a bond of 4400 merks, granted by George Hay of Montcastle to the Earl of Abercorn, she inhibits the said George, and denounces, and apprises his lands of Birklands and others, and thereupon pursues reduction against Dunlop and Pitcon, and certain other creditors, in

favour of whom there is a disposition granted of the said lands by George Hay, and insists on this reason, That, albeit the disposition bears to be for sums of money and causes onerous, yet, by a clause therein, it is expressly declared, that it is granted to Dunlop and Pitcon, for satisfying of the debts due to them; and to the effect they may sell the lands for payment and satisfaction of the said John Hay's other creditors underwritten, for the sums after specified; after which words, there was left a large blank, which, by ocular inspection, is now filled up with another hand than his who wrote the body of the disposition; and which article, so filled up, is in the same case as if it had been set upon the margin and subscribed, or as if it had been in a several writ, wanting witnesses, and cannot be holden to be of the same date of the disposition, but must be presumed to have been filled up after the pursuer's inhibition, and after she had denounced and apprised the lands; and, therefore, as to these creditors so filled up, their rights, which are granted by Dunlop and Pitcon, the entrusted persons, long after the pursuer's inhibition and apprising, the same ought to be reduced.—It was *alleged* for the Creditors-defenders, That the reason, as it is qualified, is noways relevant against them; *first*, Because the disposition granted to Dunlop and Pitcon, being of the whole lands, and they infest accordingly, being long before the pursuer's inhibition and apprising; and the said disposition and infestment being to the creditors' behoof, albeit their subaltern rights from Dunlop and Pitcon be posterior, *nihil refert*; and whereas it is *alleged*, That their names and sums are filled up in the blank, after the inhibition and apprising, with another hand, and so must be presumed of another date,—it is *answered*, That the subscription at the foot and body of a writ did necessarily infer, that the whole blanks were then filled up, unless the contrary be proved; neither use the names of fillers up of blanks to be expressed; and it cannot be presumed, that any man in prudence would subscribe a blank writ, till the blanks were first filled up; *2do*, Though it could be proved that the blank was filled up after the inhibition, yet the general terms of the clause being inserted, *a principio*, with the same hand, *viz.* for satisfaction of the said George his creditors, it is sufficient, although the particulars were inserted after.

3tio, It is offered to be proved, if need be, by the oaths of Dunlop, Pitcon, and the witnesses inserted, that, before the subscribing of this disposition, these creditors filled up were particularly communed on to be filled up, and no other. The pursuer *answered*, That there being here pregnant evidences of fraud, by interposing entrusted persons, and preferring of some creditors to others by the debtor, who was insolvent, and had no more estate, in that case, the filling up of the blanks must be presumed fraudulent and posterior, unless the creditors prove it was truly filled up before the inhibition; otherwise it opens a door to all insolvent persons in this manner to exclude any of their creditors from payment, and to have such clauses ambulatory at their pleasure: Neither doth the general part of the clause suffice, unless it had been in favour of the disponder's creditors generally, or indefinitely, which would have comprehended the pur-

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by the hand
of another
person than
the writer of
it, were pre-
sumed to have
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tion, unless
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was proved.

No 228. suer; but it being only of the creditors underwritten, if these were not underwritten till after the inhibition, they have no place; and as for any verbal communing or agreement, it cannot be effectual, until it be redacted into writ, which was not till after the inhibition.

THE LORDS found, that the blank being filled up with another hand, and so substantial a clause, and the writer not being expressed at the foot, that it was to be presumed to be posterior to the inhibition, unless the creditors prove by the witnesses inserted, or others above exception, that it was truly inserted before the inhibition and apprising, wherein they would not admit the oaths of the persons entrusted; and they had no respect to the allegiance, that it was communed and agreed upon before the subscription.

Fol. Dic. v. 2. p. 154. Stair, v. 1. p. 660.

* * * Gosford reports this case :

IN a reduction, raised at Lady Lucy Hamilton's instance, of a disposition of lands made by Dunlop and Pitcon unto other creditors, *ex capite inhibitionis*, in so far as the blank for inserting of creditors' names in the disposition was filled up after the pursuer's inhibition; it was *answered*, That the disposition being now filled up, and infestment taken thereupon, and being of a date prior to the inhibition, could not be reduced, albeit the creditors' names were inserted thereafter, that being only a perfecting of a prior right; *2do*, The date of the filling up of the blank was not probable but by the defender's oaths, and the oaths of Dunlop and Pitcon; *3tio*, They offered to prove, by Dunlop and Pitcon's oaths, that it was communed before the inhibition, that these names should be filled up.—THE LORDS did sustain the reason of reduction, notwithstanding of these answers; and found, that a disposition, made to creditors' blank, could not be filled up to the prejudice of any other creditor doing diligence; as likewise, that the defenders behoved to prove the date of the filling up by others than Dunlop and Pitcon, who were most suspected to have been accessory to the contrivance; seeing the creditor's name inserted in the blank was by another hand-writing than was in the body of the disposition; and, therefore, that the date of the filling up should be proved, *per testes omni exceptione majoribus*. Likeas, they found that communing before the inhibition was not relevant to sustain the filling up thereof in prejudice of the inhibition intervening: Which the LORDS did, to take away the benefit of such contrivances, which were so frequent.

Gosford, MS. No 227. p. 91.

1678. July 9.

HENDERSON *against* MONTEITH.

No 229.

In a reduction of a disposition, at

MONTEITH of Randifoord having disposed his estate to Robert Monteith, younger of Carruber, Sir John Henderson of Fordel being Randifoord's sister-