

many of them ; and then did bring and made offer of them, which he was not bound to accept of:—

It was ALLEGED for the shepherds, That they did refer to the pursuer's oath that they did make offer of his own lambs, and so were no farther liable.

It was REPLIED, That he could not be obliged to depone, it being a matter which did not consist in his knowledge ; and it being an ordinary trick in shepherds to change their master's good lambs for worse, the presumption in law did militate against them, who refused a natural trial.

The Lords did sustain the libel to find the shepherds liable for the true price of the lambs, which his neighbours got for that same gang and quality ; and found, That the presumption against the shepherds, in refusing to separate, did prove against them, and did free the master to give his oath upon what he could not know.

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1677. *January 23.* JOHN HAY of MOUNTCASTLE *against* LADY LUCIA HAMILTON and the CREDITORS of MOUNTCASTLE.

IN a reduction of a bond of 4500 merks, granted by George Hay of Mountcastle, and John his son, as cautioner to the Earl of Abercorn, and assigned to the Lady Lucia, and of a decret of suspension following thereupon, *in anno* 1658, by the English Judges ; whereby, they finding that the bond was conditional, upon the procuring an infestment from the King, as superior of the lands bought from Mountcastle, which were held formerly of Duke Hamilton ; which being *factum imprestable*, they did deduce 2000 merks of the sums due, and decerned for the superplus. The reason of the reduction was, that the decret was most unjustly given ; because, albeit there was a charter offered by the Protector during the late usurpation, yet, before the decret, the Duke and Duchess of Hamilton being restored, who refused to resign the superiority, and as yet doth refuse, the bond was null, as being *causa data causa non secuta* ; and therefore the decret, finding the letters orderly proceeded, was most unjust, and the Lady Lucia ought to count for the whole rents intromitted with, by virtue of the comprising following upon that decret.

In this process compearance was made for the creditors of Mountcastle, whose rights she had reduced upon an inhibition served against him, or any other who had given her bond or security, and so were forced to agree with her, and pay her what was contained in her decret ; for which she, having assigned her comprising to Mr Archibald Fleeming, who did dispone the same to the creditors, and which disposition Mountcastle had ratified ; and so it was ALLEGED for the Lady and the Creditors, That the reason of the reduction was noways relevant ; *1st.* Because the decret of the English Judges was not only never recovered *debito tempore* ; but likewise was in itself most just, and could never be reduced ; because the bond granted by Mountcastle, being for a part of the price of the lands sold, albeit it did bear that condition to obtain a resignation from Duke Hamilton, to be holden of the King, and that the Duke, during the usurpation, and since the King's restoration, doth altogether refuse

—*loco facti imprestabilis succedit damnum et interesse*; and the sum deduced being more than a year's duty, which the superior could only crave if he had been charged upon a comprising, which did supply the condition.

It was ANSWERED for the creditors; 1st. Because all their bonds and securities being reduced by a decret of the Lords, *ex capite inhibitionis*; they were forced to agree with the Lady, and pay her the whole sums that were due to her; whereupon, having gotten a right ratified by the pursuer, he could never quarrel their rights. 2d. The pursuer had concurred with Lady Lucia Hamilton to reduce their rights, and had consulted her advocates and clerks, and so was *in pessima fide*.

It was REPLIED to the *first*, That the ratification made, by the pursuer, of the creditors' rights could not prejudge the reduction; because, when he subscribed the same, he was lying prisoner in the tolbooth, and had been prisoner for the space of a whole year and more, during the time of the surcease of all justice and government, before the King's restoration, when there was no remedy, by a suspension or act, to be set at liberty. And, as to the *second*, it was denied that ever he did concur with the Lady to reduce the creditor's rights.

The Lords, having considered this case, and finding Lady Lucia's comprising to be long since expired, and so would take away the right to the whole estate, did sustain the reduction; but so that the comprising should be effectual for the true sums due her by the decret, and to the creditors who had gotten a right, notwithstanding of the ratification of the creditors' right, so that Mountcastle might redeem upon payment thereof: but likewise, they found, That it was relevant for them to prove that Mountcastle did concur with the Lady to reduce their rights, by informing and agenting; which being proven, that their right should stand as to the whole sums due to them, until they were redeemed.

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1677. January 23. SIR ALEXANDER BRUCE of BROOMHALL *against* JOHN MUIR, and ISOBELL BOSWALL, his Spouse.

IN a multiplepointing, raised at the instance of the creditors of Munquhannie, against the said Sir Alexander and John Muir; who were competitors as to the preference of the fourth part of the sum of 9000 merks, upon a contract, whereby Craigtoun, for the said sum, did grant an heritable right of an annualrent effeiring to the said principal, out of the lands of Munquhannie; and whereby he was obliged to infest David Wemyss in liferent, for all the days of his lifetime, and, after his decease, Elizabeth Wemyss, his daughter, spouse to John Boswall, in liferent; and Mause, Janet, Margaret, and Geills Boswalls, in fee; heritably, and equally amongst them, and their heirs lawfully to be gotten of their bodies; which failyieing, the heirs to be gotten of the said Elizabeth Wemyss; which failyieing, to return to the said David Wemyss, his nearest and lawful heirs whatsoever: Two of the said sisters, *viz.* Mause and Geills, having died without heirs of their body, after the said infestment; and the other two sisters having children, and thereafter the said Elizabeth having daughters, whereof one was married to John Muir; did crave to be preferred to Broomhall as to the fourth part of the said principal sum, by a right from Elizabeth

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