

though the bond bears date five years ago, yet Cheyn had neither demanded annualrent, nor done diligence thereupon.

In consideration of these circumstances, the Lords, *ex officio*, ordained witnesses to be examined upon the reasons foresaid; and, if need be, that George Cheyn be examined *ex officio*, how he got this bond, when, and for what causes.

*Vol. II, Page 675.*

1679. *February 13.* MAXWELL *against* LINDSAY.

MAXWELL of Cowhill raiseth reduction of a decreet-arbitral, pronounced betwixt him and ———; as being *ultra vires compromissi*, and pronounced after the expiring of the submission.

The defender ALLEGED Absolvitor, Because the pursuer had ratified the decreet arbitral, and acknowledged himself debtor for 2000 merks decerned thereby; and, in corroboration thereof, had disposed land for the same.

The pursuer REPLIED, That he was under caption when he granted the said right; and there was no abatement granted to him, but he gave security for the whole sum decerned; neither did he ratify the decreet-arbitral, nor pass from all question against the same, but only, in corroboration thereof, granted security: and though he had made actual payment upon distress, it would import no homologation, nor would exclude him from reduction of the decreet and recovery of the money.

The Lords repelled the defence founded upon the security granted, in respect of the reply,—that the defender was under caption: which, though it would not reduce the deed as done by force, yet it did not import homologation, as in the case of voluntary payment without distress.

*Vol. II, Page 693.*

1679. *February 18.* LAIRD of WEDDERBURN *against* SIR ROBERT SINCLAIR.

JOHN Stuart, son to the Earl of Bothwell, having obtained a *commendam* of the abbacy of Coldingham; the Earl his father being forefault, and his posterity dishabilitated to bruike estate or dignity in Scotland, John's *commendam* fell by the dishabilitation; and the abbacy was erected in a temporal lordship, in favour of the Earl of Hume, who gave a tack to Wedderburn's predecessor for 3000 merks of grassum, of the teinds of Kello and Kimmergem, which were parts of the abbacy. But thereafter the King grants a re-habilitation to John Stuart, bearing to be upon commiseration that John was an infant the time of his father's crimes, and noways accessory thereto; which was in March 1621. Thereafter there are several contracts betwixt Henry Stuart, brother to John, for John's behoof, and John himself; whereby the Earl of Hume disposes all right he has to the abbacy in favour of John; and consents, that, in the subsequent Parliament, John's re-habilitation by the King should be ratified, and that he should procure an erection to himself of the abbacy: whereupon, in August 1621, there is an Act of Parliament ratifying the King's re-habilitation to John,

and rescinding all right to the contrary. Whereupon John demitted his *commendam* in the King's hand, and obtained the abbacy erected to him and his heirs heritably; which right comes in the person of Douglas of Ivelay. Dame Elizabeth Douglas his heir, and Sir Robert Sinclair her husband obtained a decret against the Laird of Wedderburn, for the full value of the teinds of Kello and Kimmergem for many years; in respect his predecessor's tack fell in consequence by John Stuart's re-habilitation, and the rescission of the Earl of Hume's author's right by Act of Parliament: upon which decret Sir Robert apprises Wedderburn's estate, and, amongst the rest, the teinds of his own lands. Wedderburn hath raised reduction of this decret on this reason,—that it is null, in so far as there being a defence admitted to Wedderburn's probation, that, by the contracts betwixt the Earl of Hume, John and Henry Stuarts and Ivelay, their rights were burthened with all deeds done by the Earl of Hume, which might import warrandice against the Earl; for which incident was sustained; and thereupon Sir Robert Sinclair, and several others, had deponed concerning their having of the writs, for proving of Wedderburn's defence; likeas one of the contracts betwixt the Earl of Hume and the Stuarts was produced. And yet Sir Robert took out a decret, circumducing the term unwarrantably, because neither the writ adduced *ad modum probationis* was advised, nor found not to prove; neither was the incident closed by advising the oaths taken therein; till which were done the principal cause slept, and there could be no progress therein by circumduction of the term. And now the whole writs are produced for proving that John Stuart's right, from the Earl of Hume, was with the burden of all rights granted by the Earl, importing warrandice; and particularly Wedderburn's tack, which though it bare only warrandice from the Earl's fact and deed, yet that warrandice was incurred; in so far as it is evident, by the writs produced, that the Earl of Hume colluded with John Stuart, to suppress his own right of erection, and to suffer John to get his re-habilitation ratified in Parliament, rescinding the Earl's right, and obtaining a new erection to John, upon the demission of his *commendam*; for which, by the contracts, John is obliged to pay the Earl 4000 pounds sterling, with an annualrent of 300 pounds sterling yearly; for which the Earl bruiks the abbacy to this day: so that the Earl, by his own deed, had suppressed his own right, with which Wedderburn's tack fell in consequence.

It was ANSWERED for Sir Robert, That he opposed his decret *in foro*; and, for what is alleged upon not advising the incident, or contract then produced, it is not relevant, unless Wedderburn, at the circumduction of the term, had proponed the same; so that it is competent and omitted, and is not now receivable; especially seeing nothing could have been alleged, either upon the oaths in the incident, which were all *negativè*, or upon the contract then produced, which could not prove. Neither can all which is now produced prove the allegiance that Wedderburn's tack would have inferred warrandice against the Earl of Hume, upon his own deed; for he did no deed, but only omitted to oppose John Stuart's re-habilitation, and produce his right in Parliament, he being then minor; so that an Act of Parliament having passed, the Lords, by their interlocutor upon the like process, *in anno* 1627, found that they could not cognosce upon the Act of Parliament for re-habilitation of John: which interlocutor cannot be quarrelled, but must have the same effect now. And there is no

doubt but the Parliament can, *ex plenitudine potentia*, rescind the Earl of Hume's right; but the Lords cannot, upon the Act *salvo*, cognosce upon the same.

The pursuer REPLIED, That though his procurator, being absent and sick, did not object the circumduction of the term, yet a writ produced *ad modum probationis*, and *ab initio* marked when produced, by the clerk's hand; he could not warrantably give out the decret upon circumduction, though no objection had been made, unless he had had warrant from the Lords, upon representing that a writ was produced, and oaths upon the incident, and neither advised. And though these could not then have proven the point, they would have stopped the circumduction, and put the cause to the roll of concluded causes: so that any writ, before it came in course to be advised, would have been received. And the very contract then produced, with the act of re-habilitation, were sufficient to prove the point, *viz.* The collusion of the Earl of Hume, not only by mere abstaining to produce his right, which the law interprets a fact; as when a party suffers certification in an improbation against his own right, whereby the rights derived from him fall in consequence, the parties not being called; but much more here, where it is not only so, but an evident contrivance for great sums of money: for, if the Earl's right had been produced in Parliament, their justice would have obliged them to have excepted the Earl's right; for though it be a severe law, yet it is an unquestionable law, that the posterity of forefault persons may be dishabilitated, and a valid right granted thereupon by the king; which could not, by any voluntary act of re-habilitation by the king, be annulled; so that the Parliament would only have re-habilitated John Stuart, with the exception of the Earl of Hume's right, much more with exception of Wedderburn's tack from the Earl, for causes onerous. And albeit the Lords, *in anno* 1627, had, by their interlocutor, found, That the Act *salvo* could not warrant them to cognosce upon a special Act of Parliament of re-habilitation, yet the case is now altered by the Act of Parliament 1633, ordaining the Lords to judge of the rights of all parties, past and to come; without respect to private Acts of Parliament, proceeding without citation, or hearing of parties; and declaring that to be the meaning of the Act *salvo*, in that and all preceding Parliaments.

The Lords found, That a writ having been produced *ad modum probationis*, and oaths taken upon the incident, though *negativè*, that the decret upon circumduction of the term was unwarrantably given out by the clerk, without representing these things to the Lords, though no objection was made by the party: and found the writs now produced did prove that John Stuart's right was burdened with all deeds done by the Earl of Hume, importing warrandice; amongst which Wedderburn's tack was enumerated; and that the disposition of the Earl of Hume's right to John Stuart, for great sums, and not producing the same before the Parliament, was a fact inferring warrandice against the Earl of Hume: and therefore reduced Sir Robert Sinclair's decret, and the apprising following thereupon; except as to Sir Robert's own teinds, which he had uplifted and consumed by virtue of the said apprising, not only from the citation, but to the sentence also.