

inclosed within a secret room, and not in their ordinary brew-houses, and by moveable eiks to their vats, which they can set on when they mask, and immediately thereafter take off; so that the gauging of their mask-vats by the surveyors cannot reach the true quantity of their brewing. And as to their spoiled brewings, they have always been allowed, upon showing the same to the surveyors. But they can have no abatement upon pretence of their own drinking, seeing all the heritors of the kingdom pay cess to be free of the excise of their own brewing; and therefore no brewer which hath no land can pretend that privilege, nor could any survey clear what were the brewers' own drinking, and therefore all behoved to go to oath. And as to taking back of barrels once sold and delivered, they are not obliged so to do, unless the drink were spoiled when delivered, and then it comes under spoiled drink; but if it be taken back upon the account of the strength, or not being well brewen, it can make no abatement.

The Lords found, That the Act of the Town Council, and long custom acquiesced to, was sufficient *inter concives*; and, therefore, sustained two merks upon the boll brewen by the common brewers: but found, by the same custom, that the survey should be the rule, unless the brewers offered their oaths; and that the spoiled drink should be allowed, upon being shown to the surveyors: but found no abatement to be given upon pretence of the brewers' own drinking, or of taking back of ale or beer once sold and delivered, except upon account of being spoiled: but found, that if the surveyors should discover and find any latent vat, or any moveable eik to a vat, or if such brewers as these were actually found, that such brewers should give their oaths, notwithstanding of the actual survey, as to their preceding brewing.

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1681. *February 2.* The MASTER of BALMERINOCHE *against* The LAIRD of POURIE.

THE deceased Lord Couper having, by a minute between him and the Laird of Pourie, sold the lands of \_\_\_\_\_; and Pourie being obliged, for the price, to pay 19,000 merks, or to allow the same in part of payment of the sum of 20,000 merks due by Couper to Pourie; there being mutual pursuits upon this minute, Pourie craved a progress of right, and to be relieved of the non-entry, in respect that the lands sold, holding ward of the Earl of Crawford, were in non-entry, whereupon Crawford and his donatar had obtained decret of general and special declarator; which being assigned to the Laird of Bandoch, he hath thereby uplifted the full rents of the lands for the year 1671, and sinceyne: and, therefore, Pourie being excluded, did obtain decret of pointing of the ground, upon his sum of 20,000 merks, out of the lands of Monifieth, sold by Balmerinoch to James Mauld of Balumbie. And Pourie is willing to quit the bargain; or otherwise, so soon as he shall be entered to possession, and the non-entry purged, to pay the 19,000 merks, with the annualrent thereof since he was entered to possession, except the years in which he was excluded by the non-entry: and, seeing the price was alternative, either to pay or allow, *electio*

*est debitoris* ; he will pay, and keep his infeftment on Monifieth, for 20,000 merks, entire.

It was ANSWERED for the Master of Balmerinoch, now succeeding in Couper's right, That Pourie cannot now claim an election ; because, by a decret produced in process, against Couper, he made election to allow ; and, though Couper offered to quit the bargain, and that because it was imprestable, Balmerinoch, who was heritor, refusing to concur, yet Pourie rejected the offer : and the Lords decerned Couper to fulfil, and to supply any defect in the progress, by absolute warrandice : and, therefore, seeing Pourie did enter in possession by virtue of the minute, and did continue several years therein, he cannot claim ten years' rent for the non-entry by the warrandice ; because he was obliged, by the minute, to procure the infeftment from the superior by his own moyen : and it was offered to be proven that he communed with the Earl of Crawford, the superior, for a gift of non-entry ; and the Earl having made him an offer thereof for a small sum, he advised with Sir John Cunninghame thereanent ; and that he would get no more for a non-entry than he gave : whereupon he acquainted Bandoch with the communing, who is his cousin-german ; and he obtained the gift from the superior, before ever he acquainted the Master of Balmerinoch that he might have proceeded with Crawford on that communing, for both their reliefs.

Pourie REPLIED, That during the dependence of Crawford's declarator of non-entry, he had several times desired the Master to agree with Crawford ; who refused, and said, he would not give forty pennies for the non-entry ; after which he might warrantably show Bandoch his communing with Crawford, and suffer him to take the right.

It was REPLIED, That albeit the Master, while the matter was dubious, and before sentence, refused to treat with Crawford, being advised by his lawyers he was secure,—yet, after decret of declarator had passed, Pourie having entered in communing with Crawford, in which Crawford had offered the non-entry for a small sum, he was *in pessimo dolo* not to take it, and enter himself, as he was obliged by the minute ; but much more, because, as his oath acknowledges, he was advised, by Sir John Cunninghame, that he would get no more allowed in the price than he gave out ; that, without acquainting the Master, he should have acquainted Bandoch, his cousin-german, with his communing with Crawford, who knew nothing of it, and was nothing concerned to take the gift of non-entry, which is now produced, and bears an express obligation to receive Pourie *gratis*. And though, in one clause, it mentions that Pourie should be received upon production of a right, yet there is a posterior clause to receive him simply upon the terms of the old infeftments ; which old infeftments Pourie acknowledges, by his oath, were in his hands : all which is against that *bona fides* which is most exuberant in the contract of emption and vendition. Yea, Crawford was taken obliged not to receive Balmerinoch without he were compelled process.

It was DUPLIED for Pourie, That, albeit Bandoch took an obligation of Crawford to receive Pourie, out of his respect, and by no procurement of the Master's ; Pourie was not obliged to make use of Bandoch's favour to Bandoch's prejudice, and to the Master's advantage, who had refused to treat with Crawford. And albeit the minute bears, that Pourie should enter himself with the superior, by his own moyen, which is the common style of irredeemable dispositions, and which imports that the composition to the superior, of a year's rent

for the entry, should ly upon the buyer; yet that could not oblige the buyer, unless the seller had infest himself, and delivered a clear progress, and had subscribed procuratories of resignation, or charters for confirmation; none of which was done in this case.

The Lords having considered these points severally, whether the obligation in the minute, That Pourie should infest himself by his own moyen, and the superior's obligation and Bandoch's gift, should free the seller of the hazard of the non-entry, which he might have shunned by that bond: which coming to the question upon Saturday was eight days, the Lords found that not relevant to lay the damage of the non-entry upon Pourie. And then coming to the second point of the fraud, in bringing in Bandoch without acquainting the Master, which, by a former interlocutor, they had found relevant to liberate the seller from the warrandice, as to the non-entry; but thereupon Pourie having craved the master's oath of calumny, he did depone, That, during the dependence of the declarator of the non-entry, Pourie had desired him to agree with Crawford; and that being advised by his lawyers, he would be secure, he had refused to treat, but that Pourie had never spoke to him thereof after the decret of declarator.

The Lords resumed the former interlocutor. And whereas it run in these terms:—That, after an agreement between the superior and Pourie, he could not warrantably acquaint Bandoch to take the bargain, without first acquainting the seller,—The Lords did declare that their meaning was not of an agreement perfected, but of a communing importing an offer by the superior; and they did adhere to the former interlocutor. And having reëxamined the Master, he deponed, That neither during the process of declarator, nor any time thereafter, did ever Pourie, nor any from him, acquaint the Master of any communing with Crawford anent the non-entry; nor did he ever know thereof, till Bandoch had obtained the right.

The Lords found, That that oath of calumny did not prove that Pourie did acquaint the Master of his communing with the superior; and that, having entered in possession of the lands upon a minute of sale, he could not warrantably bring in another to take the gift of non-entry, whereby he was excluded from his possession, unless he had first acquainted the seller with his communing; in which case, if he did either refuse or neglect to follow the communing, and purchase the non-entry, the buyer was blameless and free, though he acquainted a friend to take the non-entry. But, because the Master's oath was only an oath of calumny, the Lords remitted to Pourie's probation, whether or not he acquainted the Master of the communing with Crawford anent the non-entry, *scripto vel juramento*; and ordained Bandoch to depone what he paid to Pourie for the non-entry; and found the Master liable, by the warrandice, to pay Pourie what Bandoch paid to the superior, and no more.

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1681. *February 4.* M'KENZIE of SUDDIE *against* The COUNTESS of SEAFORTH.

MACKENZIE of Suddie, having confirmed himself executor-creditor to the de-