

may, upon oath, exhibit and sequestrate, in one of the clerk's hands, the writs and evidents belonging to the said umquhile Thomas Brown, their younger brother's son, lest the same be abstracted or destroyed; especially the said Robert Leggat being an old man.

ANSWERED,—They were not members of the Session; Leggat having given over his employment as a writer two years ago, for the test; and this in effect is a summons *ad deliberandum* for inspection, and so ought not to come in thus summarily by a bill: and for sons and wives to depone, is a new style.

The Lords ordained the petitioners to insist *via ordinaria* by a process; and refused the desire of the petition.

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1684 and 1685. LORD BOYNE *against* The EARL of LEVEN.

1684. *November 20 and 21.*—MY Lord Boyn against the Earl of Leven is decided. Ogilvy of Muiry having sold the lands of Inchmartine to General Lesly, Earl of Leven; and the price being all employed for debt, except 8800 merks, for which Leven granted an heritable bond to Muiry; Boyn, as an assignee by Ramsay and other creditors of Muiry, adjudges the right of this bond from Muiry, and then pursues this Leven, Melvill's second son, for payment.

ALLEGED,—*1mo*, *Absolvitor quoad* 6000 merks of this bond, (which bond he proved, by a back-bond, was a part of the price of the lands;) because assigned to Wardlaw of Abden prior to Boyn's right, and transferred by him to James Melvill, for Leven's behoof. ANSWERED,—*Non relevat* against Boyn, who was a singular successor and adjudger, unless intimated prior to the citation on his adjudication, being only a personal right; and that Melvill's right was to Leven's behoof, was not proven.

REPLIED,—Abden was infest thereon; and so needed no intimation. DUPLIED,—His infestment was but base, and Muiry, his author, was never infest.

TRIPLIED,—The said base right was clad with possession, by receiving annualrents.

The Lords found any of thir three alternatives relevant to prefer Leven to Boyn:—*1mo*, That Muiry was infest. *2do*, That Abden's base infestment was clad with possession, prior to Boyn's adjudication. Or, *3tio*, That Abden's translation was lying blank in the Earl of Leven's charter-chest, and James Melvill's name filled up therein, for Leven's behoof.

Then Leven craved retention for eight bolls of augmentation which the minister had obtained, though, by the warrandice of the disposition, he was secured against all future augmentations. ALLEGED,—This was no legal distress; because, *1mo*, It was only decerned by the Sheriff of Perth; none being competent judges to it but only the Commission for Plantation of Kirks. *2do*, The minister was competently provided before, having 800 merks; and so could crave no more. *3tio*, It proceded on Leven's own consent. ANSWERED,—That Muiry, in a contract between them, acknowledged this augmentation.

The Lords having advised this debate, in presence, they found, in respect of the correspective writ, *viz.* the back-bond and tack, that the sums in the bond

pursued upon, is a part of the price of the land ; and therefore allow retention for the seven years' tack-duty, and the four bolls of the liferent : but find the base infestment in Abden's person does not import an intimation ; and therefore, that my Lord Boyn's diligence of adjudication and executed summons will prefer him, except the defender will instruct that Muiry was infest upon the heritable bond : and find that the Earl of Leven was not *in bona fide* to make payment, unless he prove that the right in James Melvill's person was to the Earl of Leven's behoof : and find no retention as to the defects of the rental, in respect they are not proven, and the term is circumduced : and find, he ought to have retention of the minister's augmentation, the defender producing the sheriff's principal decret, whereof a double is only now produced : and allow the retention of the said augmented stipend, according to the price that was paid for the rest of the land, the stock and the teind having been sold at one price. And also sustain the defender's reply, That, albeit they should not prove that Muiry was infest upon the said bond, yet they offered to prove that Abden was in possession by payment of annualrents ; at least, that the debt was paid by the Earl of Leven to Abden, and the assignation was blank in the Earl's charter-chest, before the pursuer's adjudication : and assign the 15th December next to prove the same.

This deduction, sought on the account of the rental, is founded on the *Ædilitian* edict, and the action *quanti minoris* I would have given you of price, if I had known the rent of the lands to have been less than what it was given up for.

This cause being again heard on the 9th of January 1685, The Lords refused to sustain compensation or retention for the minister's stipend, in regard there was no legal distress before the year 1655 ; which Ogilvie of Inchmartine, and the Lord Deskford, and Muiry, his sons, were only bound to warrant ; and found the sheriff's decret was no legal distress for constituting the stipend ; but allowed compensation for the tack-duty, and four bolls of victual : though it was alleged, that these could not prejudice Boyn, the pursuer, who was a singular successor, and it was not liquid nor constituted before his right. For the Lords found the obligation prior to his right, and that the fiars of the years now produced, proved the prices of the victual, and so instantly liquidated it.

Then it being ALLEGED,—That Boyn was paid, and his debts extinguished, by a sentence of forthcoming obtained by Ramsay his author ; and they making faith that this was *noviter veniens ad notitiam* ; though it was in a concluded cause, yet the Lords sustained the allegiance, that the pursuer's author did obtain a decret of forthcoming against Boyn, as debtor to Muiry ; and that, at the time of the said decret, Boyn, now pursuer, was debtor to Muiry, probable *scripto vel juramento* ; and assign the 1st February next *peremptorie* to prove. And they proving any ground of debt against Boyn, then allow him to prove paid before the date of the said decret and arrestment ; and ordain my Lord Boyn to produce his assignation from Ramsay. *Vol. I. Page 311.*