

1697. December 2.

BRUCE'S CREDITORS *against* JOHNSTON'S HEIRS and REPRESENTATIVES.

No 3.

A creditor who debars others, and is thereby subjected to account for his intromissions by a rental, must state the price of the victual at the fiars, reserving to the creditors to prove that he got a higher price.

IN a count and reckoning between Drummond of Riccarton and other creditors of Bruce of Newton, against the Heirs and Representatives of Johnston of Polton, and Mr Edward Wright advocate; Philiphaugh reported these two points. *Imo*, Polton and Wright having preferable rights, partly voluntary and partly legal, upon Newton's lands, they entered to the possession; and thereby debarring posterior creditors, it is now *contended* for them, that they must count for the whole rental, at least show diligence for it. *Answered*, They can be only liable for their actual intromission; because the common debtor had a partial and promiscuous possession *via facti*, whereby they were debarred. *Replied*, Your titles being universal, you must count for the whole; but whatever he could instruct the common debtor uplifted by force, they are willing to allow and deduct, though they should either have pursued him for a riot in violent uplifting, before the Privy Council, or else should have intimated to the other creditors the interruption he made to their possession. *Duplied*, If there was any appearance of collusion, whereby they had suffered the common debtor to possess, then it were just to make them count for all; but that connivance was not so much as pretended. THE LORDS thought there was less question as to the legal diligence by adjudication, &c. for creditors entering by such rights, and debarring others, must count for the whole rent, whether uplifted by them or not, unless they condescend on some impediment *via facti et juris*. But the difficulty arose as to the voluntary rights; for if their getting a part of the rents make them countable for the whole, especially in the Highlands, or where debtors are stubborn and cannot easily be dispossessed, this may ruin many creditors, and make them count for rents they never got, and so unjustly extinguish their sums without payment; for which see a decision, Burnet *contra* Burnet, No 9. p. 3478. So if, on the other hand, preferable creditors shall be obliged to count for no more but their actual intromission, they may let the rents squander, and getting their own annual rents, let the rest be carried away by the common debtor, seeing by the priority of their right they are always secure; and so posterior creditors shall get nothing. The inconveniencies were so apparent on both sides, that the Lords resolved to hear it in presence, before they decided an abstract point of so great importance. The second article in this count and reckoning was, at what rate they were to count, whether for the highest prices any neighbours in that country got for their victual, or at the Sheriff's fiars, or at the price they sold the victual at themselves? It was *alleged*, That the fiars ought not to be the rule here; because they are made for the common victual of the shire; whereas this lying in Bothkennar, or the Carse of Stirling, is better than the rest of the shire; and that in 1668, in the count between the Lord Elphinston and the Laird of Quarrel*, the LORDS took trial of the neighbouring heri-

* Examine General List of Names.

tor's price, as being above the Sheriff's fiars. *Answered*, Such rigorous specialities ought not to be regarded; but the common standard of the fiars must be the rule. THE LORDS would not precisely tie the posterior creditors to accept of the fiars, but allowed them to elect either the price actually received by Polton and Wright, or the fiars, any of the two they found highest.

No 3.

On the 24th June 1698, the LORDS advised this point; found them liable to count for a rental, because they had put in sub-factors, who were tied to diligence, but with deduction of what the common debtor had intromitted with, otherwise one creditor might collude with the bankrupt's possession, to the prejudice of the rest:

Fol. Dic. v. 1. p. 311. Fountainhall, v. 1. p. 799.

1734. *January.* HENDERSON *against* SIR ROBERT HENDERSON of Fordel.

No 4.

IN a case of the nature of that of Lady Samford against the Laird, No 2. p. 4413, the LORDS found the current prices must be the rule, and that the fiars are only to be laid hold upon when no other proof can be had of the real value. See APPENDIX.

Fol. Dic. v. 1. p. 311.

1760. *August 5.*

The TREASURER of Aberdeen, *against* Mr JOHN GORDON, and other FEUERS of the lands of Elsick.

THE TOWN of Aberdeen having purchased the lands of Elsick in the county of Kincardine, feued out the same in parcels, for payment of a duty consisting chiefly of meal, to the amount in whole of 188 bolls, to be converted yearly at the rate of the fiars of the county.

The fiars of the county of Kincardine for the year 1759, were struck by an inquest, in presence of the Sheriff, on the 21st February 1760, and thereby the fiar-price of meal was fixed at L. 4 : 16s. Scots per boll.

The feuers of Elsick presented a bill of suspension of their obligation to pay their feu-duties for that crop, on these grounds: *1mo*, The fiar-price is extravagantly high. The greatest price given for any farm-meal of that crop, can be proved not to have exceeded L. 4, Whitsunday payment; and the suspenders are willing to pay at that rate, though it can also be proved, that the current price of the best meal was only L. 3 : 10s. Scots: And the end of striking fiars is to ascertain the current medium price of grain. *2do*, The suspenders only became bound to pay by the fiars, supposing them to be struck in a just and regular manner; but these fiars were not struck according to the act of se-

No 5.

Objections to the fiars of a county, that they were exorbitantly high; that none of the jury were landed men; and that they examined no witnesses, were repelled. The objectors being bound to pay at the rate of the fiars, were obliged to account accordingly, in whatever manner the fiars were struck. They