

Rig was not only agent in that cause, but had also an interest, and, by the suppressing thir papers, possesses the lands of Balap, whereas they were clearly preferable to him : and the mentioning them in the certification produced does neither presume nor infer their redelivery ; because the extractors, having a full inventory of them and a receipt, they hold them as if they were in their hands, because they can command them back, upon the receipt, when they please ; and that they have copied the writs from the inventory appears by the scroll produced.

The Lords found, The determining the *third* defence would put a final period to the whole ; so waved the *first* and *second* : and as to the *third*, Considered there were inconveniencies on both sides ; for writs are frequently given back by advocates and agents, and their receipts forgot to be retired ; and it were a great hardship, after many years' silence, to make them liable to produce the papers, or make up the value. On the other hand, what security can the lieges have for the documents and evidents of their properties, when they are borrowed up by the contrary party's agent, upon his receipt, if that shall not be found probative, but eluded and taken away by presumptions ; which is of dangerous and threatening consequence to the people. Yet the plurality of the Lords found, The mentioning and inserting the writs in the certification posterior to the receipt, and the evidence that the process itself was given back, presumed the redelivery of the whole after so long a time ; and assoilyied the defender ; especially considering his father had, upon oath, denied the having.

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1698. June 17. PATON of KINALDIE against STRACHAN of GLENKINDY.

PATON of Kinaldie, as assignee, charged Strachan of Glenkindy on his bond. He repeats his reason of suspension and reduction as coincident, that it was extorted from him by concussion, being pursued before the Highland Justiciary for a theft committed by one in his ground, and, though he delivered the man, yet they threatened him till he gave bond ; whereas, *noxæ deditio*, he should have been free.

ANSWERED, 1mo.—This is not good against an assignee for onerous causes ; 2do. *Instrumenta quarentigiata*, such as our registrate bonds, should have summary execution, as appears by the French and German lawyers ; and, even by the common law, restitution craved *ex capite metus* is refused *ubi morandæ tantum solutionis gratia eam peti suspicio est*,—L. 2, C. ad Leg. Cornel. de Falsis. And, if the casting in of a reduction were sufficient to stop execution, then every debtor would raise it ; whereas the reduction should only be reserved, as accords, that the charger may have his *induciæ legales*.

REPLIED, to the *first*,—*Vis et metus* being *actio in rem scripta*, it meets singular successors *licet per mille manus res transiit* : To the *second*, Though a reduction recently intented, after he is charged on the bond, may be suspected as done *animo protelandi*, and so ought not to be summarily received ; yet here it is offered to be proven the reduction was raised before the charge, and delivered to the messenger to be executed ; but he was prevailed on to forbear till

the party were first charged ; and, seeing *dolus nemini prodesse debet*, it must be reputed as if it had been made litigious before the charge.

The Lords allowed him to prove this prevarication of the messenger ; and, in the meantime, before answer, allowed a probation of the qualifications of the concussion, and any alleviations to take them off ; and declared it shall be *cum onere expensarum* if the suspender succumb in proving his reasons of reduction, and the fraud and force founded on, seeing the same are summarily admitted ; whereas, in strict form, the letters ought to be found orderly proceeded in the suspension ; reserving his reduction for repetition, as accords of the law.

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1698. *February 18 and June 21.* CUNNINGHAM of CORSEHILL'S CREDITORS against CUNNINGHAM of ROBERTLAND.

*February 18.*—IN the ranking of the Creditors of Cunningham of Corsehill, and Cunningham of Robertland, this important controversy occurred :—Corsehill's creditors claimed the lands of Robertland, because Corsehill, their author and debtor, stood publicly infest therein under the Great Seal.

ANSWERED by the Creditors of Robertland,—Corsehill gave a back-bond declaring his right was but in trust ; and Robertland continued the whole time, for the space of many years, in possession of his own estate, and was reputed heritor to the view of all the country ; so the creditors of Corsehill could never lend their money on the faith of his being infest in Robertland.

REPLIED,---A back-bond does affect a real right aye till infestment pass ; but, after that, it is reputed no more but a mere personal obligation, effectual against the granter and his heirs, but noways against his singular successors, who, seeing their debtor publicly infest, are not concerned in any such trust ; nor can they, *per rerum naturam*, know it, these latent back-bonds going to no register. See *20th June 1676, Brown against Smith* ; and *Stair's Instit. b. 3. tit. 1. num. 21.*

The Lords observed a manifest *pugna* in this case betwixt the ἀνεξέδικαστον and the ἐπιείκεια ; the *strictum jus* on the one hand, and equity on the other ; which was much properer for a parliamentary decision ; therefore they deferred the hearing and determining it till June, that if a Parliament intervened they might apply.

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*June 21.*---The Lords advised the competition between the Creditors of Cunningham of Corsehill and Cunningham of Robertland, about the estate of Robertland, (mentioned 18th February 1698.) Corsehill acquires an old apprising on the lands of Robertland, and grants a back-bond, declaring the trust, and obliging himself to denude at the sight of some particular person. Corsehill was infest, and the apprising expired in his person, without any order of redemption. Both of them being broken with cautionaries, the Creditors of Corsehill, who had also adjudged Robertland, finding their debtor infest therein, pursue for the mails and duties of these lands. Robertland and his Creditors oppose, and urge that the trust is not only instructed by the back-bond, but is notour to all that country ; and Robertland always continued to possess his own estate, and Corsehill never pretended any right to it.