

the clause of warrandice that the tacks were not for elusory duties, so that the rental was not the rule of the sale; and James Balfour had but a little before succeeded to them by his uncle's death, and knew not the rent; but the buyer had more opportunity to be acquainted with it, being Collector of the cess within that shire.

REPLIED,---The rental could not be for regulating the tenants' tacks; for there were lands inserted in the rental that were under no tack.

The Lords, before answer, allowed the witnesses and commurers at the disposition to be examined, what was the meaning of parties in signing a rental; as also to prove the value and yearly rent, how far it fell short of that subscribed rental; reserving, to the conclusion of the cause, if James Balfour's heirs shall be liable to make up the deficiency and inleak, in case any be proven.

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1700. July 11. MARY WRIGHT *against* The EARL of MAR, and ROBERT ALLAN and FERGUSON.

MARY Wright, relict of James Bruce, merchant in Alloway, pursues the Earl of Mar, Robert Allan, and Ferguson, his coal-grieves, on this ground, That her husband, (to whom she is executor confirmed,) lent, to the deceased John Keiry of Gogar, £3000; and he, as standing infeft in the Lordship of Mar, and manager of the coal, did allocate and sell to him 1000 chalders of coals, for his payment, and did ware and employ the £3000 on the refectation and maintenance of the coal-works and new sinks; and that the Earl and his factors had intromitted with these coals, and uplifted their price, and so ought to be liable.

ALLEGED, *Absolvitor*,---Because they no way represent the deceased John Keiry by any passive title; and he had no other right to the coals but only for behoof of the creditors of Mar; and there was no hypothecation, nor *nexus realis* on the coals, so as to hinder them from selling and disposing on them. It is true, if a *corpus* or *quantitas* had been assigned, or so many chalders presently lying on the coal-hill, or some other place, impignorated, there might have been something pled; but here it is only 1000 chalders of coals indefinitely and in general, without any special designation; which can give no hypothecation, seeing our law has not adopted that tacit hypothec, owned by the Roman lawyers, of the ware for the price, or houses and salt works for the expenses of reparation, unless in bottomry upon ships. And its being *in rem versum* gives no real right, no more than, if he had bought lands, or a parcel of wines or other goods, with the borrowed money, could he have pled an interest in the lands or goods bought with his money;—14th June 1676, *Cushney against Christie*.

The Lords found the pursuer had only action against John Keiry's representatives; and that neither the hypothecation, or *in rem versum*, affected the coals in this case; and therefore assoielyed the defenders.

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