

Montboddo compeared, and offered to prove she had judicially renounced her liferent in these lands : but she having replied, That it was only consigned in terms not fulfilled to her, and so never a delivered evident ; and sundry witnesses being examined thereon, the Lords found the renunciation was never delivered, and so preferred the lady. But the tenants suspending again upon multiple-poining, Montboddo craved to be preferred on an old wadset-right he had acquired in, and whereto the lady had consented. She ALLEGED, *1mo.* No regard to this interest, because it was competent and omitted in the first decret, where, in a competition on this same subject, and betwixt the same parties, the lady was preferred.

ANSWERED,—*1mo.* That preference was only for any thing then seen, without any declarator or conclusion against Montboddo, in which case competent and omitted is clearly foreign to this matter ; *2do.* Montboddo was then minor.

The Lords repelled the lady's allegiance, and found it yet receivable ; *2do.* The lady contended, that, Montboddo having first acquired the infeftment of annualrent, and then the right of property, the *just nobilius* of the property did wholly absorb and extinguish the annualrent, which was but a servitude, and they were incompatible.

ANSWERED,—It was an undoubted principle, That purchasers might make use of all the rights in their person against third parties competing with him, as separate distinct rights, even without a reservation ; but much more where it is expressly provided, as here, that the irredeemable disposition shall not prejudice the heritable right.

The Lords also repelled this objection, and found no confusion in this case, but that he might found on any of the rights in his person.

Then, *3tio.* ALLEGED for the lady,—She must have the benefit *actionum cedendarum* : You standing infeft in more lands than those I liferent, if you be preferred, you must assign me, for my relief to the other lands, after the payment of your own annualrent.

ANSWERED,—Whatever favour might be in ordaining one to assign in the ordinary cases which emerge, Montboddo can never be decerned to do so in his circumstantiate case, because that were to assign against himself, he having purchased in the irredeemable right ; and so it would evidently tend to his own damage and detriment, and to make him put weapons in his adversary's hands.

REPLIED,—Though I consented to that infeftment, yet it was *intuitu* and in contemplation that I saw sufficient lands behind for my security, beside what would pay the annualrenter ; and, by your acquiring the property, you have lessened my fund.

The Lords thought this point deserved to be heard in their own presence.

*Vol. II. Page 158.*

1702. November 17. DANIEL ARTHUR and PATRICK COUTTS *against* ARCHIBALD COCKBURN.

DANIEL Arthur and Patrick Coutts against Archibald Cockburn, merchant in Edinburgh, for payment of 500 crowns contained in an accepted bill.

ALLEGED,—That he offered to prove, by Stephen Denis, merchant in Bourdeaux, their constituent's oath, that he had got payment of that sum from Mr Galt the drawer. And a commission being directed for taking his oath at Bourdeaux, the same was disappointed by Monsieur Mercie, the commissioner named, his refusing to accept; and being now craved to be renewed, the difficulty occurring to the Lords was, That the war being now declared with France, no commission could be directed to Bourdeaux; for that were corresponding with the Queen's enemies, contrary to the Act of Parliament. For obviating whereof, the Lords ordained them to condescend upon a place where the commission should be executed, either lying within the Queen's dominions, or the countries belonging to some of her allies, such as Germany, Holland, and the like.

Vol. II. Page 160.

---

1702. November 21. The EARL OF SUTHERLAND *against* ARBUTHNOT OF KNOX and SIR THOMAS BURNET OF LEYES.

THE Earl of Sutherland pursued Arbuthnot of Knox, as tutor to the Viscount his nephew, and Sir Thomas Burnet of Leyes, his cautioner, for some debts. Compensation was craved, in respect it was offered to be proven, That the Earl had intromitted with sundry lock-fast trunks and bundles of goods out of the house of Arbuthnot, and carried them away. The Earl acknowledged the taking the Viscountess his daughter's *paraphernalia*, and habiliments of her body. But they alleging farther intromission, the Earl took instruments thereon, and protested, seeing the allegiance was defamatory, if they succumbed, they should be liable to him in reparation of his honour. And they having failed in the probation, he circumduced the term, and extracted this decret thereon some years ago; and now gives in a bill to the Lords, complaining, That, by such a base allegiance, they had done what in them lay to wound his reputation, if it had not been above all attack; and therefore craved they might be fined in a thousand pounds sterling, and what further censure the Lords should inflict upon them, as having incurred the *præmunire* of *scandalum magnatum*.

ANSWERED,—They were ready to purge themselves upon oath, that they did not propone it *animo injuriandi*, but only for preservation of their pupil's right. *2do*. They were not obliged now to answer on a bill, there being no more process depending, but terminated by an extracted decret; and, where *lis est finita*, parties cannot be drawn in without a new citation. *3tio*, There can be no just exception taken at a legal allegiance, such as vitious intromission is; and as our law has introduced that passive title, *Qui sapit delictum*, and is the same with the *crimen expilatæ hæreditatis* in the Roman law, so no man can be censured for proponing it, though he succumb, if he was willing to give his oath of calumny, that he had reason to propone it. And there is neither law nor statute in this kingdom defining what shall be esteemed and reputed *scandalum magnatum*, or determining its punishment, though these cases might well be pursued before the Privy Council, who, no doubt, would give a suitable redress; lesser scandals and private verbal injuries belonging to the cognition of the commissaries.