

1707. February 15.

Lady MARY BRUCE and COCHRAN of Ochiltree Her Husband *against* Colonel JOHN ERSKINE.

No 6.

The property of stones, hewn from a quarry which had been removed by the donatar of the heritor's life-rent escheat, was found to belong to the donatar, and not one who had an infeftment on the land, and who had not pointed the stones, as he might have done.

THE deceased Earl of Kincardine having a stone quarry in his land, out of which stones of huge bigness and dimensions were brought; the Jews of Amsterdam resolved to rebuild their synagogue, applied to him for some shipfuls of these stones; but they being served otherwise, Ochiltree, as donatar to the Earl's life-rent escheat, enters into a contract with the Dutchess of Buccleugh, who was reforming her castle at Dalkeith, by which he sells her of the stones, to the value of upwards of L. 400 Sterling; and when he was going to deliver them to be shipped for Leith, Colonel Erskine alleging they belonged to him as proprietor, stopped by himself, his colliers, and salters, the transportation, and some of them were broke, and others of them were thrown into the sea; whereupon Ochiltree pursued the Colonel for a riot, before the Privy Council; but the debate dipping upon the point of right, the Council, before they would determine the violence, remitted it to the Lords of Session to determine the property of the stones, as a civil interest more competent to them than the Council; and accordingly it being called summarily before the Lords, it was *alleged* for the Colonel, that he stood infeft in these lands where the quarry lay, upon a disposition for relief of cautionry given by my Lord Kincardine to my Lord Cardross in 1678, where his charter expressly bore *cum lapidibus calce, et lapidicinis*, which gave him right to all the stones digged out of that ground, and the whole rents, fruits, and emoluments thereof, as well beneath as above the ground, in the same manner as he would have to a coal, or any other mine discovered in that land; as he could have pointed them on his infeftment, so he might very lawfully stop the carrying away thereof; and gifts of escheat being odious, gave him a more preferable right. *Answered*, Whatever right his relief could give him, (he always instructing it was purified by distress and payment) to the stones lying in the craig unwrought or not won, because they are *pars fundi*, yet that can never be extended to stones wrought, and separated from the bowels of the earth; for these become clearly moveable, and fall under the escheat; and though the Colonel as infeft in an annual-rent, might have pointed them, as he might have done, not only to any goods of the debtor, but even to other men's goods he found on his debtor's ground; yet not having *de facto* pointed, nor used that privilege of law, he can never compete with the donatar under whose gift they unquestionably fell; and though the hewing, dressing, and adorning them for ashlar work, did not introduce a new specification, so as to alter the subject, and make a different species, yet it made a great difference from what they were when lying in the craig, and rude mass; and no other creditor could claim them but with the burden of the *impensæ utiles et necessariae*, in the winning, hewing, polishing, and fitting them for use.—But here it was done by

the common debtor's expense, and not by the donatar. THE LORDS found, by plurality, the property of these stones belonged to the donatar, and not to the real right, not being pointed. Then it was started, if upon their returning to the Privy Council after this decision of the Lords of Session, there would be ground to fine the Colonel for his riotous obstructing the carrying them away, and occasioning so considerable a loss and damage to Ochiltree. Some said *malitiis non est indulgendum*; others thought the question anent the property being nice, and, *in ipsis juris apicibus*, the Colonel's opposition was to be excused.

No 6.

Fol. Dic. v. 2. p. 353. Fountainball, v. 2. p. 350.

1715. July 19.

MILN *against* LADY GALRAW.

FOUND, that a Lady's intromissions with the rents of her deceased husband's lands, for aliment and education of the apparent heir, were *bona fide*, till she was interrupted by a citation in an action for mails and duties against the tenants at the instance of an adjudger.

No 7.

Fol. Dic. v. 2. p. 353. Bruce.

* * * This case is No 40. p. 1759, *voce* BONA FIDE CONSUMPTION.

S E C T. II.

Real Security, after what manner loofed.

1626. June 21.

MURRAY *against* DISHINGTON and SCOT.

SIR JOHN MURRAY of Philiphaugh having paid, as cautioner for Sir Thomas Dishington, some sums of money, for his relief thereof he arrested in Sir William Scott's hand some monies addebted by the said Sir William to the said Sir Thomas, as resting of the price of the lands of Ardress, and upon the arrestment pursues Sir William to make the same furthcoming to him. The money was alleged by Sir William and Sir Thomas defenders, not to be subject to arrestment, seeing it was immoveable, being employed upon land to the said Sir Thomas his behoof, to whom the said Sir William had given charter and sasine for his security of the said money. It was *answered* by the pursuer, that that infestment was under reversion, and that Sir William Scot had used an order of redemption, and made consignment of the money, whereupon the lands were redeemable; likeas, after the consignment, he had appre-

No 8.
Money con-
signed in the
order of re-
demption of a
wadset, was
not found
moveable,
because the
order might
be passed
from, or
might not be
sustained.