

as, that part of the lands holding black or simple-ward, and part taxed-ward; the Lords put eighteen years as the value of the simple-ward, and twenty for the taxed; and that teinds, being subject to many burdens, were only worth fourteen or fifteen years' purchase, where they had an heritable right, or long tacks and prorogations; but if they had no right but kindliness, then five or six years' purchase; and may be bought from the patron or titular for nine years; and that mill-rent, being casual, was of less value than land-rent; and there being a mill in the ground, though it was fallen down, yet, having the barony thirled to it, the same deserved a separate valuation: and they put £5 sterling *per annum* upon it. And, coming to advise the probation of the estate's being bankrupt, they found it very narrow and scrimped; for, at the price determined as the *minimum quod sic*, the price extended to £48,000 Scots, and the list of debts was but £52,000, so it only exceeded the price in £4000 Scots, and which was made up of the penalties of bonds, termly failies, and other accumulations in the adjudications; and if these were deduced, the price was more than the debt. Besides, Mr Calderwood, in his oath upon the verity of his debt, confessed that he, and Martin his author, had been several years in possession; so it was contended, That, if he fairly counted, a great part, not only of his annualrents, but even of his principal sums, would be found paid; which would diminish the debt, and bring it to that pass, that the estate could not be reckoned bankrupt; besides, he was only cautioner in sundry of the bonds for Lanton and Cockburn, and so had his relief against them, which, when recovered, would still lessen his debt; so that he can never be called bankrupt.

ANSWERED,—The £52,000 is all principal sums; and there is a liferent of £50 sterling a-year affecting the lands, which, at seven years' purchase, will augment the debt in 6300 merks more; so it is clearly overburdened.

The Lords thought this point deserved to be better cleared, how far it was a bankrupt estate: And therefore remitted it to one of their own number to hear the parties thereupon.

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1710. *February 7.* ISOBEL STEEL *against* ROBERT INNES.

STEEL *against* Innes. Isobel Steel having been servant, by the space of several years, to Robert Innes, merchant, in a toy and sweetmeat shop in Edinburgh; and he, from time to time, missing sundry things, at last suspected the said Isobel; and having questioned her, she confessed her disposing on some sugar, confections, and small quantities of herring and beef. But he contending she had embezzled much more, and threatening her with delating to the magistrates to get her imprisoned, scourged, and banished for her theft, she, to prevent disgrace and public hearing, gave him an assignation to sundry bonds she had, which he said was the product of the money she made by his goods; but she affirmed it was legacies left her by some friends. But, after she was liberated and out of his house, she raised a summons of spuilie *against* him, for taking away her bonds out of her chest, which he broke up; and likewise intended a reduction of her assignation to him, on thir grounds,—That they were elicited and extorted by fear and concussion, by keeping her *in privato carcere*,

and terrifying her with whipping by the hand of the hangman; to redeem which shame she signed the assignations, which were not to have been delivered, but consigned and depositated in a third party's hand, till he should have time to discover any farther embezzlements; and if it should come near to the sums she had assigned, and in so far as he should liquidate his damages, he was to retain, and give her back the rest; and yet to this hour, (though several years have elapsed,) he has never been able to prove any malverse against her; and what she confessed were but trifles of giving away some meat and drink, which all servants do: and even her confession was extorted *per vim et metum*, and cannot subsist in law. And he should have pursued her before the magistrates, and not *jus sibi dicere* at his own hands.

ANSWERED,—It was a fair transaction; for he missing his goods, and challenging her, he, upon her own confession, might have got her punished; and if she, to redeem her own shame, willingly gave him right to these bonds, she cannot be heard now to quarrel the same; and he is ready to give his oath that she wronged him in much more.

The Lords allowed a conjunct probation, as to the manner of seizing on the bonds and eliciting the assignations; and if the same had been fairly delivered, or only depositated till he should liquidate his damage. And the probation coming to be advised, the Lords found her confessing some small embezzlement proven, and his threatening her with imprisonment; and that Kirkton, for her, proposed consigning the writs till farther discovery of the damage should appear; but that Robert Innes absolutely refused to consent thereto, affirming always his loss was much greater than the sum in the bonds. The Lords were in a strait, seeing inconveniences on both sides; it being dangerous to connive at pykeries and domestic thefts in servants, who had access at all times to our goods; and in merchants' shops it was not easy to trace all particulars that might be given away: and, on the other hand, for a small thing to disgrace servants, or take a right to all they have, might savour of cruelty and oppression; therefore they ordained Robert Innes first to give in a condescendence of what he lost by her, whereon he could depone, and then they would consider whether they would take his oath *in litem* upon it; as they did lately in a cause, *Alexander Forbes, goldsmith, against Dickson, his apprentice*, for embezzling some silver buckles and other things out of his shop. And the Lords did not think it an unlawful fear where a master threatens a servant, taken in theft, with prison, or other punishment, to bring them to a farther confession; for *qui jure suo utitur nemini faciat injuriam*. Some thought if he could not give some rational conviction, less or more, (though it did not make a full probation,) that his loss extended to the value of the sums assigned to him, he ought, both in conscience and justice, to restore the superplus to the poor woman; for though it was a transaction, (which of all pactions are most sacred and binding,) yet it had some marks of being elicited by impressions of threats and fears; and *metus citius cadit et præsumitur in fœmina quam in viro constante*. President Newton, at the 7th November 1684, *Forrester against Merston*, observes,—The Lords gave the master his *juramentum in litem* of what he wanted, but so as they modified and taxed his damage below what he by his oath of affection had made it; for such oaths of credulity may be restricted, without any suspicion or reflection of perjury in him who swears so.