1740. *July* 25. ALISON and JEAN M'BANE *against* WILLIAM ORMISTON.

THE M'Banes being creditors to Ormiston, adjudged some tenements belonging to him; upon which they afterwards took out a decreet of maills and duties, and recovered some small sums due of the rents of these tenements. But as there was still a considerable part of the debt not paid, they applied for a horning on the decreet. And for them it was pled, that there was nothing to hinder a creditor's using all the diligences the law has provided, either against the person or effects of his debtor, until he thereby operate his payment. That the matter had been carried so far by the practice of the court, that separate diligences led against different subjects, whether belonging to the same or to several co-debtors, are found entitled to be ranked each for the whole debt upon every several fund, but so as the debt shall be once drawn out of them all; so much does the law favour the accumulating diligences, when the intent is only to draw once payment of a just debt: so that it would seem contrary to the genius of the law, to maintain that, because a creditor had once led an adjudication, by which he was not able to operate his payment; therefore it shall not be now competent to him to affect a new subject of his debtors, which he may afterwards discover, either by adjudication, arrestment, or any other diligence. And, if that is competent, there does not appear any reason why personal diligence should not also be competent, if that is found the properest and easiest method of making the debt effectual: nor that it should make any odds whether the adjudger has been in possession or no; except that, in so far as he has been in possession, his diligence must be restricted; and, if he does not so restrict, it will surely be found unwarrantable.

As to the ground of doubt arising from the Act 1672 it is plain the clause forbidding diligence to be used by an adjudger, only refers to the case where the adjudger is in possession by virtue of a special adjudication, by which the lands adjudged must amount to the full value of the debt, and a fifth part more; and it is subsequent to this part of the statute, that the general adjudication is introduced: to which there is no provision annexed against the creditor's doing other diligence either against his debtor's person or other effects; but the matter is left upon the same footing as it was by the former law, which does not hinder a creditor to use all manner of diligence until he recover actual payment of his debt.

The Lords passed the bill of horning.

N. B. There was no memorial in this case but one for the M'Banes.

No. 154. *page* 258.

1743. *July* 21. GEORGE DEMPSTER, Merchant in Dundee, Pursuer, *against* JAMES FERGUSON of Kinmundy, Defender.

ANNO 1732, These parties entered into a contract, whereby the defender obliged him to deliver to the pursuer, at Peterhead, yearly, 350 bolls farm-meal, the growth of the defender's lands, specified in the contract, and that for a certain pe-

riod; and to pay one merk Scots for each undelivered boll, and that, by and attour performance; as on the other hand, the defender obliged himself to pay L4. 10s. Scots for each delivered boll; and each party bound themselves to performance, under the penalty of L100 Sterling.

Both mutually performed their stipulation to each other, till the year 1739, when Kinmundy fell short 53 bolls of the quantity he ought to have delivered for that year, and likewise of the whole quantity he ought to have delivered for crop 1740; for which the pursuer brought an action against him for damages, concluding for the sum of , being the difference betwixt the price stipulated by the contract and the current price of meal in the country at the time.

In defence, it was ARGUED that there was so great sterility these years, particulary the last of them, that the tenants were not able to deliver their victual conform to tack; in which case the law liberates them, though no provision is made with respect thereto in the tack: In the same manner, as the case of an extraordinary scarcity is not provided for in this contract, the law must consider what the *præsumpta voluntas* of the parties was with regard to such event. To illustrate this, let us suppose one buys the cargo of a ship coming from the East or West Indies; sure if the ship sunk at sea, the seller will not be liable in damages. It merits likewise to be considered, that an heritor of lands entering into such a contract as the one in question, is not dealing like a merchant who is to purchase, where he can have it, a commodity he wants to sell; but what he disposes of allenarly are the farms paid him by the tenants: it depends upon them how far he is able to perform it, and not upon himself; and what he is able to make them pay, so far he is to deliver: but if there was war, pestilence, famine, &c. as the seller behoved to lose himself, the buyer was not to grudge the loss of the profit he would have made upon the calamities of the country. The fair construction therefore of the contract is, that the subject of sale in view of the parties, was the rents of the particular lands; and if, by a general disaster, the tenants were unable to pay their master, it could never be intended that he should be obliged to deliver what he could not receive himself. No law sure could have compelled him to do an act of barbarity, and lay his lands waste, by distressing or starving his tenants. In a word, as to what victual was delivered, he is willing to account for the prices he received; and as to what was not delivered, the damages cannot go higher, at any rate, than a merk for each undelivered boll, the penalty for not delivery being liquidated to that sum by the contract itself: for as to the last penalty of L100 Sterling, that, if the contract has any meaning at all, must refer to expenses.

ANSWERED,—That, in considering the import of the contract, it was necessary to have in view the pursuer's situation, who is a merchant dealing in victual; who no doubt comes under many stipulations to others, both at home and abroad, to furnish them with victual: and if those that are bound to him shall be encouraged or allowed to fail in the exact delivery, either when they can dispose of it at higher rates than those contracted for, or when they have a mind to do a piece of favour to their tenants; the certain consequence must be, the absolute undoing of the pursuer in the way of trade. The words of the contract itself are clear, without providing that the delivery should be dispensed with upon any contingency: on the contrary, if the delivery was not made in due time, the defender is

bound to pay a merk for each boll undelivered, and that by and attour performance. As to the plea, that the tenants were not able to perform their part, the pursuer contends he is not bound to inveigle himself in such questions, either of how much they paid, or were able to pay; his business is with the defender alone; if he cannot pay the number of bolls stipulated in specie, the rule of law must take place *loco facti impræstabilis*, &c. The pursuer stipulated for a certain quantity of meal yearly, the growth of certain lands, which he knew produced good meal; and if the defender either will not, or cannot perform, he ought to make up to the pursuer what he thus suffers by not performance.

Nor will the principles of the civil law aid the defender, which frees the seller, if the thing sold is lost or destroyed before delivery; because, in this case, he was bound to deliver the meal at Peterhead, and only after such delivery was the pursuer to run any hazard. *Si venditor ad traditionem tenetur*, is always deemed an exception from the general rule. Besides, the plea offered for the defender can never avail him. He gives his tenants what [eases] he thinks fit: what he gets he sells at such prices as he thinks proper; leaving it to the pursuer to make out the prices the best way he can. Sure this is not fulfilling the contract.

The Lords found the defender liable to the pursuer, for the current prices of what meal he received from the tenants.

No. 246. *page* 393.

1743. *July* 21. MARY M'QUHIRTER *against* ROBERT MILLAR.

IN the contract of marriage betwixt the said Robert Millar and Elizabeth M'Quhirter, he provided her to a tack of certain lands that he possessed, during her widowity; "And further obliged himself to provide her a livelihood of 1000 merks during all the days of her lifetime, and to the heirs to be gotten betwixt them; which failing, the one half of the sum of 1000 merks to return to the said Robert, and his heirs whatsoever: but prejudice to Elizabeth and her foresaids either to accept of the 1000 merks, or that portion of free goods that may fall to her by law, (if it shall please God first to call him;) being at her option, or her foresaids, which of them to take or leave."

The marriage dissolved by the wife's death, leaving issue but one son, who lived in family with his father, and, like other eldest sons of their rank, was assistant to him in the management of his farm. The son died without being confirmed executor to his mother, or establishing in his person any title to the third of moveables his mother was entitled to by law; whereupon Mary M'Quhirter, as nearest of kin to Elizabeth her sister, brought an action against Robert Millar, to account to her for his wife's third of moveables.

ARGUED for the pursuer,—That it was evident from the contract of marriage, that none of the provisions therein contained, were intended to be in satisfaction to the wife, or her nearest of kin, of the third of moveables which she was entitled to in the event of her predeceasing her husband: on the contrary, the only provision is her liferent, in case she survived him; therefore the present claim