

## S E C T. XIV.

*Turpis causa.*—Sale to a *White Bonnet* at a Roup.—Obligation not to oppose reduction of a Verdict of Fatuity.—Transacting a Crime.—Transacting Church Penance.—British Subject purchasing a Captured British Ship.—Combination of Offerers at a Sale.—Combination to raise the rate of Wages.—Combination against receiving Money of a particular Coinage.—*Pactum contra utilitatem.*

1745. February 8. Lord LOVAT against FRASER of Strowie.

CAPTAIN SIMON FRASER, who, in the year 1693, had been condemned for high treason, granted to Fraser of Strowie, condemned at the same time as one of his accomplices, a bond for 4000 merks, of date 7th March 1702, and payable at Martinmas 1708, with annual rent after the term of payment, on the narrative, that he was justly resting owing to him that sum; and containing this condition inserted after the testing clause, 'And these presents to stand in force on condition the said Hugh Fraser stands faithful to our interest, otherwise not.'

Strowie assigned the bond to his son the present Strowie, and the Captain now Lord Lovat, raised a reduction thereof, alledging it was *ob turpem causam*.

After some procedure in the action, a proof was granted to both sides before answer, concerning the cause of the bond, which being led, the import thereof came to be pleaded upon, when it was *alleged* for Lovat, That he had the misfortune in his youth, to entertain different notions of the interests of his country from his present sentiments; that, accordingly he was convicted of high treason, and fled to France, from which he returned to Scotland in 1702, and gave the bond in question to Strowie one of his accomplices, as he did several more of the like strain to others, to encourage them to be assistant to him in his designs; that it was proved Strowie was not in circumstances to advance the money, his estate having been evicted for a debt which was transacted by the late Hugh Lord Lovat, and he suffered to continue in the possession; the pursuer himself, had supplied him with provisions and necessaries, and had educated this defender; and old Strowie, who assigned the bond, had wrote my Lord a letter, testifying how much he was displeas'd with the use his son made of it, for he had only intended he should use it as an introduction to his Lordship.

## No 92.

A bond was granted by a highland chief to one of his vassals, both of whom had been condemned for high treason, "on condition, that the latter should be true to the interest of the granter." The Court reduced the bond; but it being afterwards discovered, that prior to the date of the bond, the parties had been pardon'd, the Lords found, that the bond in question was not granted *ob turpem causam*, and assoilzied from the reduction.

No 92.

*Pleaded* for Strowie ; The pursuer's own lawyers had taken a great deal of liberty with his character, in accusing him of crimes which the defender contended he was innocent of ; that he had always the same attachment to the true interest of his country, and the lawful government thereof, having served King William as a Captain ; that, on the death of Lord Hugh, he went north to take care of the pretensions his family had to the honours and estate of Lovat, which he did in a warm, and not quite justifiable manner ; that he carried off by force the Lady Dowager Lovat ; that there being a project of a marriage between a son of my Lord Salton's and the young Lady the heiress of Line, he had threatened my Lord, and failing to intimidate him, seized him on his coming into the country, and kept him prisoner ; for which actions he was prosecuted for high treason, but the libel was restricted to treasonable rising in arms, and there was no proof of any intentions against the government ; that Strowie, who appeared to be in the possession of his estate, had suffered exceedingly on his account, which was a good cause for the bond, the onerosity whereof he was only put to astrict. Captain Fraser had lived at his house with a band of men ; on his condemnation, the country was invaded by the Atholmen, who plundered Strowie's house, and did great damage, as did also the regular troops, by whom it was garrisoned ; his Lady was turned out, and 200 sheep, 20 black cattle, and 8 horses carried away ; and that the letter mentioned, was impetrate from him at my Lord's house ; and the minister who attended him on his death-bed had deponed, he solemnly declared he did not know whether he had signed any such letter or not.

That Lord Lovat brought no evidence for his allegations, and the presumption was for the justice of the cause of the deed ; it was not proved that he was then engaged in unlawful designs, he had formerly been in the service of the government, and that he was afterwards in its interest, his actions in the year 1715 shewed, when Strowie joined him ; and it was in history, that, at the time of granting this bond, he was actually treating with the Duke of Queensberry ; besides, the clause in the end was not the cause of granting the bond, but had been thrown in after it was writ out ; and it might be controverted if it were probative, being after the testing clause, and so the writer not designed ; but, allowing it its full force, clauses that will bear to be interpreted in a lawful sense, ought to be so interpreted ; and this might be understood of being faithful to his lawful interests, especially when this interpretation was so consistent with the subsequent actions of the parties, that in itself it inferred no more than was implied in ward-holdings, which did not oblige to rebellion ; and Lovat's own sense of fidelity to him, appeared by an earnest letter he wrote in the year 1718 to the clan Fraser, in which, looking upon himself as dying, he exhorted them to be faithful to the heir-male of the family, to stand by one another, and preserve a close connection with the Campbell's, and particularly to adhere to the last and present Dukes of Argyle, whose fidelity to the government was sufficiently known.

*Pleaded* for Lovat; That it plainly appeared no onerous cause was given; that the granter and receiver were both convicted of high treason, and the bond granted to secure the acceptor's fidelity was *ob turpem causam*; that the expenses incurred by Strowie could be no cause, because they were never brought to account, there being understood a mutual tie in the Highlands between superior and vassal, which binds the one to support, and the other to protection; and besides, they were incurred in an unlawful enterprize, in which they were both concerned; that they could not be so very great, because it was proved, that the men who staid at Strowie's house, were maintained with the rents of the estate of Lovat, which the Captain had seized; that genuine accounts had been published of plots he was engaged in at the time of granting the bond; but supposing it originally good, Strowie had forfeited the benefit of it, by adhering to the interest of the heirs of line, whose factor he had been.

That it was proved the old man had owned the letter, expressing his resentment of his son's conduct, when he was well in his health, and quite sober.

*Pleaded* for Strowie; That the pursuer was so far from plotting against the government at that time, that, if Bishop Burnet might be believed, he was earnest and active in their service; that the bond was not merely a gratification for services, but an indemnification for real losses which were proved, and must have been very great, notwithstanding what was brought from the estate of Lovat; that it was on this account, might be inferred, from its being granted with a cautioner, to whom the Captain gave a bond of relief; that the clause appeared not to have been preconcerted, but added, and if any unlawful interest had been intended, it would not have been express in the bond, and Strowie constantly adhered to him in all lawful ones, having joined him with another gentleman, at the head of 100 men before the taking of Inverness; that the condition was not suspensive, but resolute, and must be understood to be purified at the term of payment, which was long before any pretended adherence to any other interest; and, *lastly*, The letter taken from Strowie at Lovat's house, *remotis arbitris*, shewed his own apprehensions of the weakness of the cause.

*Pleaded* for Lovat; The cautioner was his brother, the heir-male of the family, and who was not in circumstances to add any security to the obligation. It was thought by some of the LORDS, that though Strowie's losses, which were proven, might have been cause to have indemnified him, yet bonds of this nature, given to persons to secure their adherence, were dangerous, and might be perverted to bad purposes, the tendency of them being to render in all things the receiver subject to the granter, and were therefore *contra bonos mores*; that for this reason, bonds of man-rent were reprobated; and that the great power of chieftains was of bad consequence.

THE LORDS, 30th November 1744, reduced the bond.

A petition was given in, which was ordered to be answered; and in both these papers, the two parties strongly asserted their several allegations, that Lo-

No 92.

vat was, or was not, at the granting of the bond, an enemy to the government : But, at advising, Strowie's lawyers pleaded, they had made a discovery of a remission recorded in Chancery, both to Lovat and Strowie, by which the presumption flew off of their being then engaged in unlawful designs ; and it also appeared, he was afterwards fugitated for the same crime at the instance of the party injured, which process could not have gone on, unless his former condemnation had been taken away by the remission.

*Answered* ; This was a remission never accepted of, which shewed his obstinacy at that time, and made the case worse ; and, at the Chancery they registered the King's signatures, though not past the seals.

It was *argued* on the Bench, That there was a difference between the cause of an obligation and a resolute condition ; that turpitude in the cause would annul the bond, but in the other case it would vitiate the condition, and the bond become pure. With regard to the new production, Lovat was safe by the pardon to which the seals could be put, at any time during the granter's life ; that it had certainly past one seal before it came to the Chancery, and the ordinary way of recording, was on the passing the seals ; so it had probably past them all, and was in his possession.

THE LORDS, 25th January 1745, in respect of the remission prior to the bond, instructed by the record of Chancery produced in Court, found the bond in question was not *ob turpem causam*, and that the reasons of reduction were not proven ; and therefore assolizied.

*Pleaded* in a reclaiming bill, That the bond was null, as being a bond of manrent, and contrary to the statutes discharging leagues and bands, a practice early prohibited by our law, and the fatal tendency whereof, sufficiently appeared by the commotions in the last century in this country.

THE LORDS refused the bill, and adhered.

Act. *Hamilton-Gordon & Graham jun.*  
Clerk, *Hall.*

Act. *R. Dundas, Lockhart, & H. Home.*

*Fol. Dic. v. 4. p. 25. D. Falconer, v. 1. p. 69.*

1753. July 7.

ANDREW GREY *against* CHARLES STEWART, JAMES GREY, and JAMES MILLER.

No 93.

A sale made at a roup to a white bonnet is void, and the next highest offerer will be preferred.

JAMES GREY exposed his lands to be sold by public roup to the highest offerer. At the roup, James Millar was seemingly the highest offerer, and Andrew Grey was the second. Soon after the roup, James Grey, the seller of the lands disposed them to Charles Stewart, for whom it was pretended that Millar had offered by commission. Andrew Grey, the second offerer, insisted in a reduction of the sale made at the roup to Millar, and of the disposition made in consequence of that sale by James Grey to Charles Stewart ; and he contended that