

1678 and 1679. SIR JAMES HAMILTON *against* SIR ALEXANDER FRASER of Doors.

1678. *February*.—*SUPRA*, folio 295, num. 615, in the margin of Glenfarquhar and Kair's action, we have marked that the Lords refused a bill given in by Sir James Hamilton, craving Sir Alexander Frazer of Doors his oath, whether or no the bond of £800 sterling he has assigned to Burnet of Leyes, was not granted by his father *sub spe numerandæ pecuniæ*, and if some of it was not paid to him since; because they were not in a process. Whereon they raised an action against the doctor, and craved his oath thereon.

ALLEGED,—He, having assigned it for onerous causes, could not depone in prejudice of his assignee for onerous causes; who concurred.

REPLIED,—He declared whatever Sir Alexander should depone, should not prejudice the assignee, nor be obtruded to him, but only infer recourse of warrantance against Sir Alexander. This Newbyth sustained, and therefore repelled our allegiance.

Then we produced a letter posterior to the bond, wherein Sir James his father acknowledges this debt; and this, joined with the bond, being *geminata confessio*, was so strong that it should relieve Sir Alexander from deponing now, *post tanti temporis intervallum*, being thirty years. Yet the Lords ordained him to depone, and granted commission to Messieurs Erskin and Forrester.

Then we ALLEGED,—That Sir James pretended he had some writs for administrating his summons; and therefore craved, that either he should pass from all writ, or then, upon oath, to produce all he had, and transmit them, with the commission to London, that Sir Alexander might see them. This the Lords ordained him to do; and he, upon oath, exhibited all, that nothing might be kept up to be the ground of a new plea. The interrogatories were adjusted, and inserted in the commission. *Advocates' MS. No. 733, folio 321.*

1678. *July 30*.—In the declarator pursued by Sir James Hamilton against Sir Alexander Fraser of Doors, (26th February 1678;) the Lords having advised Sir Alexander's oath, which acknowledged the ticket of £300 sterling produced to him was his hand writ, and a part of the 800 pounds' bond, but was paid; and denied that the bill upon his wife, for £200 sterling, related at all to this bond, &c.

The Lords, after debate, having considered the said oath, they sustained the ticket of £300 sterling to be deduced; and restricted the double English bond of £1600 to the single sum of £500, with annualrent to Whitsunday 1646, at which time they found the £100 ticket ought to have been deduced; first out of the annualrent then due of the said L.500, and then out of the said principal sum. And find, that the residue of the said principal sum ought to bear annualrent from the date of the bond, aye and while the payment be made of the said principal sum; and refuse to allow the unsubscribed bill for L.200.

It was CONTENTED, the Lords behoved to consider the oath complexly, and not separate the quality of paying that L.300 ticket from the rest, since though they had writ to prove it by, yet in effect it was a null writ wanting witnesses, and which nullity was only supplied by Sir Alexander's oath, and so must be taken as he has deponed, in the whole complication. And in the 14th Nov. 1677, *Edgar* against *Ewing*, the Lords refused to divide the said Ewing's qualified depo-

sition. Yet, in a case of *Sir James Murray of Skirling's* in 1671, where a debt (which they could prove by writ) was referred to his oath, and he confessed it, but withal deponed it was paid; the Lords divided the quality from the oath, and found it proved the debt but not the payment, which resolved into an exception, and which they only would allow him to prove *aliunde*. See Durie, 1st July 1624. Vol. I. Page 12.

1679. *January 22.*—Sir Alexander Fraser of Doors against Sir James Hamilton, (30th July 1678.) The Lords having then ordained annualrent from the date of Sir James his father's bond till payment, Sir James presented a bill of suspension, and craved, since it was a double English bond, it might be regulated by the law of England; and so he might be no farther liable than in the double sum, which *ex eventu* here was less than the annualrents.

ANSWERED,—If the *cursus usurarum* had been stopt by payment, before the interest swelled bigger than the double of the sum, then the debtor would have had his election, and would rather pay the annualrents than the full double bond. *Ergo, quem sequitur commodum, eundem debet et sequi incommodum*; and double English bonds, by our Scotch law, *ex quadam ἐπιμελεια, et moderatione juris*, are ever interpreted to be the principal sum and its annualrents; the double being a *pœna* with them, (when the canons of the Popish church discharged annualrents;) and with us, to exact it were usury. And though, by the Roman law, *l. 27 C. de Usur.* Justinian discharges *usuras currere ultra duplum sortis*, yet we have no such way *quo sistitur usurarum cursus*, with us. See anent the interpretation of English double bonds, Dury, 27th February 1627, *Lawson*.

Notwithstanding whereof, this case being reported to the Lords, they sustained the calculation of annualrents only until the same amounted to the double of the sum advanced to and received by the debtor; and found the suspender, Sir James, was not liable to the annualrents which exceeded the said double bond: and which the Lords decided without so much as one contrary vote. *In dubiis, quod minimum, benignius, et levius debitori, id sequimur, L. 9 D. de R. J.* Vol. I. Page 35.

1679. *January 23.* GEORGE YOUNG against JOHN HAY and ANDREW KER.

In the wrongous imprisonment and oppression pursued by George Young, late bailie in Winchburgh, against Mr John Hay, sheriff-depute of Linlithgow, and Mr Andrew Ker his clerk; the Lords found the libel relevant, and proven by the defender's own answers, as much as might infer an arbitrary punishment; in so far as Woodcockdale confessed there was such an act in their shire, discharging any of the inhabitants of the sheriffdom to pursue before any other court, except themselves and the commissaries. And they found it an absurd act, and prejudicial to regalities; (yet it is known that several courts and judicatories in Scotland make such acts;) and that he justified and defended the fining of George Young in fifty pounds Scots, and his imprisoning him on that act. Therefore they rebuked him publicly, and ordained him, so soon as he went home, to raze said act out of the sheriff-court books. And fined him in L.100 Scots, to be given to George Young for his charges and expenses. *Sub velamine*