

1686. November 19. PATRICK HALIBURTON *against* HUGH BLAIR.

THERE is a debate between Patrick Haliburton, merchant, and Hugh Blair, vintner, upon whom the hazard of a puncheon of Frontiniac wine, sold by Patrick to Hugh, and refused by him as insufficient, and never a perfected bargain, should fall; especially if it be embezzled before the delivery.

The President said, if it was a consummated bargain, the damage redounded to the buyer; *periculum erat emptoris non venditoris*. But, to discover if it was a complete bargain, the Lords, before answer, appointed a probation to be led, if tasting and spealling of a puncheon was the symbol of a perfected vendition of wines. Spealling is the cutting off a speal, that, by joining it again, they may know the property of the puncheon they had chosen.

On the event of the probation, Hugh Blair lost the cause.

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1686. November 24. GEORGE BROWN, &c. CREDITORS of YEOMAN of DRYBURGH *against* JANET NISBET, Lady Dryburgh.

THE case of George Brown, late Provost of Dundee, and the other Creditors of Yeoman of Dryburgh, against Janet Nisbet, Lady Dryburgh, was reported by Kemnay. By a contract with her son, she had restricted her jointure of 16 chalders of victual to 1000 merks yearly, under an irritancy, that, if two terms should run in the third, she was to be in her own place: and this being incurred, she craved to recur. ALLEGED,—This could not be declared in prejudice of the innocent creditors, minors, ignorant of that clause; and she had, *dolo affectato*, suffered it to fall, and the very next day after Martinmas raised her summons, which was *nimia diligentia*; and they cited *Riccarton's case, supra, 23d March 1686*.

The Lords decerned in her declarator, and declared the irritancy; but superseded extracting till Candlemas next, and, in the mean time, allow the creditors to purge by actual payment to the pursuer; in which case they restrict her to the terms of her last contract: but declared, in time coming, if the creditors suffer the irritancy to be incurred, the Lords will not allow them to purge; but ordain the pursuer to give intimation that she is not paid, before the elapsing of the second term, and that to the real creditors by instrument.

The Lady gave in a bill complaining of this interlocutor, and craving it might be re-considered upon sundry grounds; but the Lords adhered to their former interlocutor, with this addition, ordaining the present or succeeding factors to make payment to the Lady upon her discharge, *primo loco*, before any of the creditors.

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