

and bring them in *pari passu*: but this was to give too great power to an instrument.

The Lords came to no conclusion in this case, because he had delayed too long; but thought it deserved regulation by an act of sederunt.

*Vol. I. Page 648.*

1694. December 7. JOHN MAXWELL *against* The VISCOUNT of TARBET.

JOHN Maxwell, grandchild to the Bishop of Ross, having obtained decret against the Viscount of Tarbet for some feu-duties of lands, now belonging to Tarbet, holding of the Bishop of Ross;—Tarbet's reasons of suspension were, 1st. The lands pertained to the Laird of Innes at that time, and he offered to prove he had paid these feus; 2d. *Esto* they were owing, the most he could crave was to poind the grounds; and cannot make him personally liable for any years preceding his possession and entry to the lands.

The Lords thought both the reasons relevant; but, in regard there was a decret *in foro* against Tarbet for these feu-duties, they desired the reporter to consider the decret, if these allegiances were proponed, and if Tarbet got a term to prove payment, and succumbed, so as the term was circumduced against him; for in that case he ought not to be reponed. And if, in the first summons, he was craved to be personally liable, and proponed not this defence against it, then it was *competent and omitted*.

*Vol. I. Page 648.*

1694. December 7. WILLIAM SCOT *against* DOUGLASS of ARDIT.

WILLIAM Scot, son to Bristo, against Douglass of Ardit, on the passive titles, for payment of sundry debts contained in his predecessor's bonds. ALLEGED,—Robert Douglass, my predecessor, disponed to James Scot, your cedent, his whole personal and moveable estate, under a back-bond, bearing, That he, being paid and relieved of all debts, either then due or which afterwards he should acquire, he should denude himself of the remanent benefit of the debts and goods assigned in favours of the said Robert Douglass, his other creditors; and if there were any superplus after that, the same was to accresce to the said Robert, his heirs and representatives; and *ita est* the sums and goods assigned were much more than would have paid all the debts due to James Scot of Bristo; and therefore he either is paid, or might have been paid. ANSWERED,—William Scot, the pursuer, is content to hold account for all his father's actual intromissions, conform to his stated account left under his hand; but cannot be farther liable, especially for the debts in the account-book, whereof there was no instructions delivered to him. REPLIED,—Though James Scot's back-bond does not precisely tie him to diligence, yet, *inest ex natura rei*, when I assign you to my debts, and give up my account-books, it being a moveable subject, you ought not to suffer it to perish, but should have pursued the debtors in the count-

book ; and, if you had no other mean of probation, you should have referred the debt to their oaths, and constituted them one way or other ; which I could not do, having denuded in your favours, and given up my books. DUPLIED,—The back-bond shows the assignation to the debts is not taken in satisfaction, or as *donatio in solutum*, but only in farther security and corroboration ; and, if it be a *mandatum*, it is only *in rem propriam*, and noways a trust for the other creditors and debtor,—all the obligation being on payment ; so that you should either have paid me, or required me to do diligence in order to my own payment.

The Lords thought the case deserved a hearing in their own presence, how far the nature of the thing could oblige James Scot to do diligence.

*Vol. I. Page 648.*

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1694. December 7. MR RORY M'KENZIE OF PRESTONHALL *against* The MARQUIS OF ATHOLE.

THIS was a charge on a bond for £3,170 Scots. The reason of suspension was,—He offered to prove, by the charger's oath, the true cause of the bond was only the clerks' fees for extracting a decret of locality given to the Marquis on Argyle's estate in 1684, when it was under forfeiture ; which being now rescinded, it was *causa data causa non secuta* ; and he was content it should be modified and restricted to an ordinary fee, payable in such cases. ANSWERED,—The King, to whom the right of Argyle's estate devolved *jure coronæ*, might burden it with what he pleased ; and accordingly, by a letter, had ordained Mr Rory, as clerk, to get for each such decret half a year's rent of the lands contained in that locality. REPLIED,—There was a *jus quæsitum* to the creditors before that letter, in regard the King had, by his letter under his Great Seal, vested the estate in several trustees, to be distributed and given out among the creditors. DUPLIED,—This did not divest the King, they not being the creditors' trustees, but his Majesty's. *2do.* My Lord Athole was not then a creditor, but, *ex post facto*, acquired in some old debts upon the estate ; which cost him little or nothing. *3tio.* He homologated the King's letter by granting bond : Though it was urged that it was granted in obedience ; and so could be no homologation, the letter being impetrated *per subreptionem et obreptionem* ;—as was found in the cases of the *Earl of Morton* and *Lord Yester*, and lately in the concussion pursued by the *Earl of Lauderdale* against the *Earl of Aberdeen*.

The Lords repelled the reasons, and also that founded on the *condictio ob causam non secutam* ; though some of the Lords inclined that Prestonhall should at least instruct that Athole made benefit by that locality, and possessed it several years. But the plurality thought that unnecessary ; in respect he had given bond, and which was a favour, rather than to have put him to lay down ready money. Others proposed, whether Argyle would not, by his act rescisory, get repetition from Athole of the bygones of that locality he had intromitted with ; for, in such a case, it were hard to make the Marquis pay for what he made no benefit, at least what can be evicted from him. But it was ANSWERED, *1mo.* Argyle was not in this process ; and so it was *super jure tertii*. Next, he was not donatar, but got it as a creditor.

*Vol. I. Page 649.*