

provided to, she could not crave any more ; and that the proper wadset being lucrative, and exceeding the annualrent of the money lent, she ought not to have the benefit thereof, but only that which was intended by her contract of marriage should be secured to her free of all burdens ; which was done by the right of the wadset so long as the same should remain unredeemed ; albeit, in the case of redemption, the heir would be decerned to employ 25,000 merks.

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1671. December 5. MR GEORGE SCOTT *against* MR JOHN ELEIS.

IN a reduction of a bond, granted by the said Mr George, for the sum of 1100 and odd pounds, as the balance of an account, upon this reason, That since Mr John was tutor to the pursuer, and that within three months after his majority, and *ante redditas rationes*, he did offer him an account, when he was upon his contract of marriage, refusing to go along with him, unless he would grant bond for the balance thereof ; whereas the articles themselves of the account were most unjust, and such as ought not to be allowed, and wherein the pursuer was circumvened ;—it was ANSWERED, That the pursuer being major, *sciens et prudens*, and having the account given him to advise the same for several weeks, he cannot be heard to reduce the same *ex capite fraudis*.

The Lords did assoilyie from the reason ; but superseded all execution for payment until the pursuer should insist in his count and reckoning against the said Mr John, that it might be found if he had as much in his hands as would satisfy and compensate the said bonds.

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1671. December 6. ALEXANDER MERCER *against* GORDON of TULLICHANDIE.

THERE being a wadset, granted by Seaton of Shethine to William Gray, provost of Aberdeen, of the lands of Meldrum, redeemable upon payment of the sum of 4000 merks ; as likewise, Mr James Skein did give a bond of corroboration, but suspended all requisition until some years thereafter ; at which time Tullichandie did grant a new bond, whereby he became obliged, that, in case two terms should run into the third unpaid, that then he should pay the sums contained in the wadset, he being assigned thereto for relief. Whereupon the said Alexander Mercer, as having right from the Earl of Haddingtoun, who had a gift of *ultimus hæres* to the said William Gray, did pursue the said Tullichandie upon that ground,—That there were three terms' annualrent outrun.

It was ALLEGED for the defender, That there never have been intimation made to him till long after three terms were outrun ; and that, in the meantime, the debtor becoming irresponsal by the diligence of other creditors : whereas Wil-

liam Gray, the wadsetter, had not so much as taken infeftment, nor did intimate to Tullichandie that he was not paid of the annualrent, until many years thereafter, that other creditors had obtained themselves infeft upon their comprisings; and so it was his own fault he was not secured; and, through his negligence, any assignation he was to make to the wadset and clause irritant, was altogether ineffectual.

It was REPLIED,—That the wadsetter, having secured himself by this bond of corroboration, which was in place of a sufficient cautioner for his debt, he was not obliged, in law, to be at the expenses to take infeftment, nor to do diligence against the principal debtor; but Tullichandie ought to have looked to his own relief; and the irritant clause, being committed by two terms running in the third, he ought to have inquired if payment had been made, and, in the case of not payment, should have satisfied the debt, and acquired an assignation to the wadset.

The Lords did repel the defence; and found, That William Gray, the wadsetter, was not obliged to do diligence against the debtor, nor to have taken infeftment, whereupon he might have been preferred to all other creditors,—he being in the case of a creditor who had secured himself by sufficient caution, whereupon he may rely so long as he pleases; and so it is not liable, upon that ground, that the cautioner is prejudged by suffering others to do more timeous diligence; unless the defender could allege that William Gray had fraudulently abstained from doing diligence, of purpose to prefer others.

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1671. December 10. SIR ROBERT BARCLAY *against* LIDDELL.

IN the forementioned action of warrandice, at Sir Robert's instance, against Liddel, being again insisted in,—it was ALLEGED for Barclay, That not only there was a clause of absolute warrandice in the assignation, but that it had this specialty, *viz.* to warrant the sums thereby transferred; which, not being ordinarily *inert* in such clauses, must import that the debtor is solvent.

It was ANSWERED, That these words imported no more but that *debitum vere subest*.

The Lords did find, That these words, in specialty, did not import that the debtor was solvent the time of the assignation, but only that the debt was truly resting owing, and that the debtor was not *tutus exceptione*.

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1671. December 20. MR ARCHIBALD STEWART *against* WILLIAM WEILLANDS.

WEILLANDS, after many years' service of the Countess of Murray, having given bond to her son, Mr Archibald, to remove from her service at the next term, or to pay 1000 merks, being charged to pay the penalty,—he did SUSPEND upon this reason,—That the bond, being of that nature, was unlawful, and against the liberty