

The President and some others wrought vehemently for this interlocutor, and but narrowly carried it. Sir George Lockhart was out of all patience at it, for he would lose about L.2000 by it. He pretended he cared not for his particular, but to see the arbitrariness and illegality of the decision. It was much pressed, that it should only be restored or allowed where the debtor required the same; and that being disobeyed, then to be usury; but they were inexorable, and would not alter one punctilio of it; alleging there was no way to secure the retention to debtors but this. But since they appealed to the act of Parliament 1647, they should have taken it complexly; for it is declared by that act, that no debtor shall have the benefit of this retention, save he who pays his annualrents within the space of an year after it is due; but there is no such salvo in favours of creditors in the act 1672. Yea, by the 24 act, in 1640, there is only six months allowed them; so that if they paid not their annualrents termly, they forfeited the said privilege. But the said act 1672, is guilty of many other inequities: which see in the special reflections upon the said fourth act.

Advocates' MS. No. 419, folio 225.

WINTER SESSION.—Anni 1673.

November, 1673.

TITUS charges or pursues upon a bond granted to him by Sempronius. Sempronius alleges the obligation is null, being suspended upon his own option; and where *contractus confertur in meram et liberam voluntatem unius contrahentium, nulla oritur obligatio nisi voluerit; l. 3, D. de Contrahenda Emptione; l. 13, C. eodem*; and that it depended on his arbitrament, he subsumed and proved, in so far as the bond contained an express clause, declaring the sum should be payable at the debtor's conveniency, and whereof he was absolute judge.

ANSWERED,—This condition not being annexed to the obligatory part of the writ, but merely to the execution or exaction, it did not impede *quin nata erat obligatio et verum suberat debitum*. See *Vinnius, ad parag. Atum, Institutionum, de Emptione et Venditione. Vide supra, 23d February, 1671, Viscount of Oxenford's daughter, (it is No. 148.) In jure verba debent cum effectu accipi; in contractibus non præsumuntur otiose adjecta, et ea semper sumenda est interpretatio ut actus potius valeat quam pereat seu distrahatur*. See *Hadington, 25th February, 1623, Lyon and Scot; and l. 12, D. de Rebus Dubiis*; and the many other laws there quoted in the margin. And, therefore, albeit the sum in the bond was declared payable at his conveniency,* yet this clause is elusory, but must be reduced *ad arbitrium boni viri*, and be interpreted *κατ' ἐπιεικειαν, secundum bonum et æquum*. Which I think the Lords would follow either by examining the onerous cause of the obligation, and the other circumstances of the ability of the debtor

* This, *Alisat, ad legem 125, D. de verborum significatione*, expounds, *rationally, so soon as his other debt is all paid.*

and necessity of the creditor, and make them condescend what was acted, treated, and communed betwixt them, the time of the granting thereof; or would assign a competent day, betwixt and which the debtor should pay it, either in whole or in parcels: and so supply the defect of what was agreed amongst them, and render it effectual, since the debtor's own discretion will not. See Labeo's interpretation of this clause,—*Do centum nomine dotis cum commodissimum esset; id est, quam primum sine turpitudine et infamia dari potest.* L. 79, p. 1, *D. de Jure Dotium.* See this already marked by me, *alibi.* *Wissembach, ad legem, 125. D. de Verborum Obligationibus.*

Advocates' MS. No. 420, folio 225.

1673. November. SIR JAMES DOUGLAS of Smithfield *against* JOHN HAY of Hayston.

SIR JAMES DOUGLAS of Smithfield, uncle to the present Earl of Morton, pursues a reduction against Mr John Hay of Hayston, one of the Clerks of Session. The case was, Sir James Hay of Smithfield being obliged to pay L.2000 Sterling, *nomine dotis*, with his daughter, to Sir James Douglas, who married her; and having thereafter disposed his estate to William Hay, his second son, he relieving John Hay, the eldest son, of all debts he could be liable for as apparent heir; Sir James Douglas intents a pursuit against William, for payment of his L.2000 sterling. Mr John Hay of Hayston being then, in 1657, advocate to, and adviser of, William Hay, procures a bond, wherein Sir James Hay, the said William his father, was obliged, conjunctly with one Archibald Hay, a cousin of his own, to Mr Dickson at London, in L.1000 sterling; and having got an assignation thereto, he thereon obtained a decret against William Hay and his brother John, for payment, and used all means to stop and impede Sir James Douglas in his pursuit, till he had comprised the lands of Smithfield for that debt, and was infest; and then gave way to Sir James Douglas' diligence and decret, and who also comprised and was infest; but it was before the act of Parliament 1661, bringing in all apprisers within year and day *pari passu.*

Sir James Douglas, on his comprising, raises a reduction of Hayston's comprising, on thir reasons; *1mo*, As to the bond granted to Dickson by Sir James Hay and Archibald Hay, (which is the ground of Hayston's comprising,) though Sir James Hay be first named therein, and so in the construction of the English law he is presumed to be principal, and the other only cautioner; yet it appears by the presumptions mentioned in the informations resulting from Dickson the creditor's oath, whom the Lords caused examine *ex officio*, and other grounds, that truly Archibald Hay was principal, borrowed the money, and applied it to his own use. And as it was his debt, so it was paid out of his means and estate; for Archibald, by his testament and codicil relative thereto, ordained Sir John Lenthall, keeper of the King's Bench, to be relieved, who was pursued by Dickson the creditor, for suffering the said Archibald to escape furth of the said King's Bench, where Dickson had incarcerated him upon judgments and sentences obtained against him, and ordained the satisfaction and relief to be furth of the price of Stockley Park; and accordingly, Mr Andrew Hay, who was executor and administrator to Archibald.