

by submission or decreet-arbitral, but the right of moveables, which was then confirmed.

The Lords having considered that the general discharge was of all debts and claims; and granted by the pursuer, who was major, *sciens et prudens*, and in all probability could not but consider the whole debts belonging to his brother, when he made this submission; did sustain the defence founded upon the general discharge; unless it were taken away by the defender's oath: and found her not liable to prove payment after so long a time, her husband having right to that debt, both by contract and *jure mariti*; and never having done any diligence by the space of 20 years, for instructing that he was frustrated, the law presumes *in favorem matrimonii*, that the wife's obligation hath been satisfied; and is so strong a presumption that it cannot be taken away but by her oath.

Page 528.

---

1676. *January 17.* WILLIAM LAWRIE of BLACKWOOD, and MR JOHN DRUMMOND, *against* SIR JOHN DRUMMOND of LOGIE ALMOND.

In a reduction, at the instance of Blackwood, who had comprised the lands of Scottistoun, which were disposed to Sir John by Sir Robert Drummond of Meidhope, upon the reason of deathbed,—it being ALLEGED for Sir John, that the disposition was made for onerous and adequate causes of the value of the lands; there being a count and reckoning, and Sir John having condescended upon many debts to him by Sir Robert, and the relief of many other debts, to which he was obliged:—

It was ALLEGED for Blackwood and Mr John Drummond, to whose behoof the comprising was led, That there ought to be defalked the sum of three thousand merks, wherein Sir John was debtor to Meidhope, by a special provision in the disposition of the lands of Meidhope, whereby, besides all the debts therein enumerated, which he was to undertake, he became obliged to pay three thousand merks to any person to whom Sir Robert should appoint, or legate the same during his lifetime; and so *intus habet*, and cannot crave that all sums should be allowed to him, but with defalcation of that debt.

It was ANSWERED for Sir John, That his obligation for that three thousand merks was conditional; in case the lands of Meidhope were freed from all burdens and incumbrances, in which case he was only liable: but so it is, that the whole estate was affected, at the instance of one Logan, with a comprising against Sir Robert, as cautioner for Hamiltoun of Binny, the legal whereof was expired before Sir Robert's death: as likewise there was an infestment of annualrent, for which infestment was given out of his estate, for another cautionary, wherewith Meidhope's estate was burdened, and never relieved thereof during Sir Robert's lifetime; so that Sir John was forced to take order with the annualrenter, and compriser, and upon his great charges and expenses to purchase these rights, and redeem the lands, which did far exceed the foresaid sum of three thousand merks; and, therefore, he was not obliged for the said sum, for which he was only bound conditionally, as said is.

It was REPLIED, That Sir John acquiring these rights, having now the estate of Meidhope disburdened, and having disposed these rights, and thereby affected the principal lands, for whom Sir Robert was only cautioner, and thereby

got relief of the cautionary ; and having incapacitated the heirs of Sir Robert, or his creditors or legators, to pursue for their relief, and as he is now liable for the said three thousand merks, either to the creditors or legators, who shall be found to have best right :

The Lords did find Sir John liable for the said debt, upon this reason, That he was not able to assign the right of comprising and annualrents which he had purchased, without allowing to him the charges and expenses he had been at in purchasing the same : Which seemed hard, seeing the condition of his obligation was not fulfilled by Sir Robert himself ; and there was a necessity for him to acquire these rights, and to seek his relief, the heir or creditors never having interposed or desired to satisfy the charges he had been at ; so that, in reason, his just disbursements ought to have been deduced.

Page 529.

1676. *January 21.* MR PATRICK HOME, Advocate, *against* The EARL of HOME.

IN a pursuit, at Mr Patrick Home's instance, against some of the tenants of Coldinghame, compearance being made for the Earl, who offered to defend upon a right to the lands,—it was ALLEGED for the pursuer, That he having transferred his title against the Earl, *passivè*, as heir to his brother, he could not be heard to defend the tenants, unless he had a title in his own person ; in which case he was content to debate, seeing thereby he behoved to be heir.

It was REPLIED, That albeit the transferring was given against him as heir *passivè*, yet that did not hinder him to defend upon any other right, without being heir.

The Lords did repel the allegiance, and found that the transferring being only against the Earl *passivè*, it could not hinder him to defend upon any other right which he had acquired *singulari titulo*.

Page 532.

1676. *January 21.* MRS HOME *against* The said MR PATRICK HOME.

THE said Mrs Home having given in a petition to the Lords for payment of a yearly annuity, which she was provided to by her father, the Lord Renton, as being her only aliment,—it was ANSWERED, That he could not be decerned upon a naked petition, but there ought to be an ordinary action raised, and he cited ; and the same ought to proceed according to regulation, it being for a civil debt.

It was REPLIED, That he was a member of the College of Justice, being an advocate, and this being in effect an alimentary action, it ought to proceed summarily upon a bill.

It was DUPLIED, That the petition not being against him for any malversation in his calling, but being the ground of a civil action, he was in the common condition of all other lieges.