

1697. December 16. SANDS of Langsyde against SANDS in Shyres-mill.

SANDS of Langsyde pursues a reduction of a disposition of his lands now filled up in the name of John Sands in Shyres-mill, his nephew, on this reason of fraud and circumvention, that he had subscribed it blank many years ago, and having taken a sickness 18 months, wherein physicians gave him over, his nephew prevailed with his wife to steal this blank disposition out of his cabinet, and deliver it to him, whereupon he filled up his own name in it, and took saine, and served inhibition thereon; and therefore craved his nephew might condescend and prove how he came by the said disposition, and when his uncle gave it. *Answered*, I am bound to prove nothing, but to oppone the right now in my hands, which presumes a fair delivery, unless you convel and redargue it by my oath.—THE LORDS found he needed not prove delivery; but the defender having raised a declarator against his uncle, that he should contract no debt subsequent thereto, till first the cause thereof be cognosced to be onerous, that he may not defraud nor disappoint the effect of his disposition; *answered*, The same is expressly burdened with all debt contracted or to be contracted by him, at any time in his life, so he may grant a bond equivalent to the value of his estate, by which it may be affected, adjudged, and carried away. *Replied*, That clause must be *civiliter* interpreted only of necessary debts. THE LORDS considered the disposition being gratuitous, without any onerous cause to support it, he might in the same manner grant voluntary and gratuitous bonds, seeing that power of contracting was equivalent to a power of revoking and altering; and therefore inclined to assoilzie from the nephew's declarator, and found he might contract debts or grant bonds at his pleasure.

No 8.
A party dis-
posed gratui-
tously, with a
faculty reser-
ved to burden
with debts
real and true.
Found that
the debts
must be so
far onerous,
as to arise out
of rational
acts of admi-
nistration.

1698. January 26.—This being again reported, and the clause bearing, that the debts must be real and true; the LORDS found this clause behoved to import more than the debts not to be false, but also that they were not mere gratifications to evacuate the disposition, but they behoved to be so far onerous as to be rational deeds of administration. What if he borrows money, and then spend or gift it, or mortify it to a pious use in his own lifetime?

Fol. Dic. v. I. p. 144. Fountainhall, v. I. p. 802.

1699. December 15. FULLERTON and Others against ———.

THE LORDS advised the mutual declarators pursued by Fullerton of that ilk, and Bailie of Monkton, the Laird of Adamston, and others, for the right of gathering the wreck and wair on that coast, mentioned 16th July 1697*. These neighbouring gentlemen having been in use to gather wair for gooding their land, not only on the shore opposite and adjacent to their own lands, but also

No 9.
Sea wreck
comes not un-
der the clause
*cum piscationi-
bus*.

No 9.

on the lands fronting the barony of Corsby, belonging to Fullarton, as being more plentifully cast out there than upon their own sands; he intends a declarator of the property of all the wreck cast out opposite to his own lands, and that they may desist from leading or gathering any from that place. They raise a counter declarator, not to exclude him, but that they had a cumulative right of carrying away wreck from the lands contraverted, for dunging their grounds, the tenants whereof would not pay so much rent by far if they were deprived of this benefit and servitude; and there was more than sufficiency for both, and it was malacious *et in æmulationem vicini* to debar them. Monkton and Adamston's charters bore 'with wreck and wair' in the *tenendas*, which the LORDS found sufficient to give them right to the wreck on the shore so far as their lands went. But that did not their turn; for there was little in that part; therefore they had been in use to go along the shore with their carts, till they came to Corsby's rocks, where abundance is to be found. And it was contended, though the clause 'with wreck and wair' did not give them the property and right of it, save only of what was ejected near their own lands, yet it was a sufficient title for prescription by possessing immemorially by taking it off the shore, though adjacent to another heritor's land, and that they had *de facto* possessed so for forty years bygone, they, their author's and tenants; for the wair being *inter res communes*, which is repute *nullius*, it therefore belongs to the King; and being *inter minora regalia*, it may be prescribed by a long possession in another man's ground, even like a *communis pastura* or a part and pertinent, and needs no other title, as was found in the case of a servitude of thirlage (which this resembles,) 23d July 1675, Kinnaird *contra* Drummond, 24th June 1665, Montgomery *contra* Wallace; and 13th January 1680, Brown of Nunton *contra* the Town of Kirkcudbright, where both parties were continued in the possession of a salmon-fishing, because neither of them had perfected their prescription by possession so as to exclude the other; and the same remedy should take place here*. Yet see the 17th July 1677, Ross *contra* M'Kenzie*. And though *usus maris est omnium communis*, yet Skeen *de verb. signif. voce* Wair, shews that every man has right to gather wair, cockles, and other things cast out upon the shore, till the King appropriate the same, by giving the sole privilege thereof to any of his vassals in their charters, and gives very antient decisions for the same. THE LORDS did not decide this, though many of them inclined to think that a clause with wreck and wair, was a title sufficient to prescribe it by 40 years possession, even without the bounds of their barony. But they proceeded to a second point, which seemed clearer, *viz.* if one who was heritor of that ground on the shore where the wair was gathered, had interest to interrupt this prescription, though his charter wanted the clause of wreck and wair; and it was argued he could not, because prescription and interruption being *termini correlativi*, he who could not prescribe might as little interrupt; but one who wanted that in his charter, could never, by 100 years

* See All the above quoted cases *voce* PRESCRIPTION, (What title requisite in the positive prescription.)

possession of wair, prescribe it, because it was *sine titulo*; ergo he could not interrupt legally, and if he did it, it was only an act of ill neighbourhood; yet the LORDS found such an heritor, though wanting 'wreck and wair' in his charter, might stop and impede others from prescribing such a right on the shore of his own ground, and that his infeftment in the lands gave him a sufficient interest so to do. Then Monkton recurred to their clause *cum piscationibus*, as including the gathering of wair, as *majus sub minore*, as pasturage contains casting of divots, &c. But the LORDS found, that these was quite distinct, and that wair came not under the clause *cum piscationibus*. See PRESCRIPTION.

Fol. Dic. v. 1. 144. Fountainhall, v. 2. p. 73.

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S E C T. II.

Demonstrative or Taxative.

1624. January 22. DRUMMOND against DRUMMOND.

DAVID DRUMMOND deceasing in England, and leaving Archibald Drummond his executor, left in legacy L. 50 Sterling to be given to Patrick Drummond out of the readiest of the sums owing to him by the Laird of Spot. He pursues the executor, who *alleged* he ought not to pay him, because the sums owing by Spot were heritable, and so belonged to the heir.—THE LORDS found, That the wrong destination of the money should not frustrate the legatar, especially the pursuer offering him to prove that the executor had introritted with as many moveables as would satisfy the same.

Fol. Dic. v. 1. p. 145. Spottiswood, p. 194.

* * Durie reports the same case :

In an action Drummond *contra* Drummond, one David Drummond in his testament leaves the sum of L. 1000 in legacy to a legatar, to be paid out of another particular sum owing to the defunct, which sum, out of which it was left to be paid, was heritable; and thereupon the executor, who was convened for payment thereof, defending himself, that he ought not to pay it, being destinate out of an heritable sum, which was not testable;—THE LORDS found, That albeit the legacy could not receive effect, by payment out of that sum particularly, yet nevertheless that the legacy remained good, to affect the defunct's other moveables with the payment thereof, if he had as many as might satisfy the same; and therefore admitted to the pursuer to prove, that there was

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A legacy of a particular sum payable out of a certain subject, which was found to be heritable, was sustained notwithstanding against the executor; this being understood demonstrative only, not-taxative.