

1706. July 27.

The MARQUIS of MONTROSE against JOHN WALKINGSHAW of that Ilk, and
WALTER LORD BLANTYRE his Assignee.

THE Marquis of Montrose, as infeft in the Dukedom of Lennox, having raised reduction and improbation of a tack of the lands of Darnley, &c. (which are a part of the said Dukedom) set by the Dutchess to John Walkingshaw of that Ilk, and assigned by him to the Lord Blantyre; and having produced an extract of the side of the tack signed by Walkingshaw, obliging him in payment of the the tack-duty, for satisfying the production; the defender *contended*, That the pursuer could not satisfy the production with such an extract which is not the writ called for in the summons, viz. a tack betwixt the Dutchess of Lennox and Walkingshaw, but only the extract of the tack subscribed by Walkingshaw; more than the defender by producing thereof could have hindered certification to go out against him at the pursuer's instance.

Replied for the pursuer; This is one of the sides or doubles of the tack mutually interchanged according to the English custom, where it is sufficient that either party sign a double. And seeing the defender cannot deny upon his oath of calumny that it is one of the sides of the tack which are literally the same, and that himself hath that signed by the Dutchess; the Marquis may hold the production satisfied with the extract of the side signed by Walkingshaw; especially considering that he does not insist *ex capite falsi*, or to have the tack annulled because not signed by the Dutchess, but upon this special ground, that the same is set in diminution of the rental, which the Dutchess had not power to do.

Duplied for the defender; That his oath of calumny in such a case could not be duly required, since law allows the ordinary *inducia* for production of the double signed by the Dutchess; and if it were otherwise, the pursuer of a reduction needed only to produce a copy of any paper called for, and crave the defender's oath of calumny if he has reason to deny the same to be a true copy, which would overturn all form. But in short, the defender can never be bound to answer to that writ which could not defend his possession, not being signed by the Dutchess; and law allows him terms for producing any double in his own custody.

Triplied for the pursuer; If a copy had been produced by the Marquis, and he had craved any principal of such a tenor to be reduced, no ground in law or reason could hinder it. Besides, the extract produced differs vastly from a copy; for by Walkingshaw's signing his side, he obliges himself to the tack-duty, and acknowledges the other double to be signed by the Dutchess, since the extract produced bears, that both parties have signed these presents. And as it would have afforded diligence to the Dutchess for the tack-duty, so it ought to satisfy the production in order to reduction at the Marquis's instance.

No 46.

The parties in a tack having, conform to the English custom, signed but one side of it, the extract of the copy signed by the tacksman, produced by the letter's singular successor was sustained to satisfy the production, in a reduction of the tack at his instance against the tacksman.

No 46. Nor again is it a novelty, to reduce and even improve writs upon production of copies; July 6. 1669, Barclay *contra* Captain Barclay, No 133. p. 7417; for if the principal differ from the copy produced, the principal writ continues safe, and the reducer gets his labour for his pains.

THE LORDS found that the extract satisfied the production.

Forbes, p. 132.

Nota, The Session, because of the Parliament's sitting, was adjourned to the 4th day of February 1707; and the time and space betwixt the 1st day of November 1706, and the said 4th day of February declared not to be reckoned in any annual prescriptions. But in respect of the adjournment aforesaid, the month of March 1707 was added to the sitting of the Session, acts 1st, 4th, and 5th, Session 4. Parliament 1. Q. A.

1708. *January 28.*

Sir Hugh DALRYMPLE of North-Berwick, President of the Session *against*
Sir JOHN INGLIS of Cramond.

No 47.

Whether a reduction of an act of litiscontestation might be repeated, without awakening or transferring?

MY Lord President having given in a bill to the Lords, representing that he had transacted with all the creditors upon the estate of North-Berwick, purchased by his Lordship at a public roup, except Sir John Inglis of Cramond, against whom he had obtained a decret of declarator of extinction of his debt, and therefore craving up his bond for the price according to the act of Parliament 1696; Sir John presented a counter-bill, upon which a hearing was allowed to both parties.

Alleged for Sir John Inglis; He had raised reduction of the decret against him upon this ground, that the same was not only in absence, but null, in respect there was a depending process at the instance of his father against the tenants of North-Berwick, wherein the Lord Balmerino, my Lord President's author, was compearing, and an act extracted, which ought to have been awakened and transferred against Sir John; and my Lord President, an assignee to a litigious right, who is in no better case than his author, could raise no new separate process neglecting the former. For *lue pendente nihil innovandum*; and it would occasion confusion and multiplicity of pleas, if one party were allowed to relinquish a depending process, and raise a new one at his option.

Replied for my Lord President; That though he had no other title but as assignee by my Lord Balmerino, he may repeat, as he does, a reduction of that act upon which Sir John summarily quarrels his decret; but as purchaser at the roup he has a special and unquestionable interest to bring the competition to a decision; without being concerned in any former question about mails and duties before the sale. Nor is it of any moment to object, that the pursuer's title of the sale was a disposition from the Lord Balmerino; for any person