

state of bastardy : and it is fit the law of the place should regulate this affair, especially he having denied there was ever any marriage betwixt them ; and what else could drive him to this confession, so prejudicial to his own honour, but merely the force of truth ? *Magna est vis veritatis quæ inter tam obstantia erumpit* ; which is fortified by the mother's silence, never craving adherence nor a share of his estate. What motive could this proceed from, but her consciousness of the want of a legal claim ?

The Lords were loth to stain any gentlewoman's birth or reputation ; yet, having balanced both probations, they, by plurality, found the cohabitation, as proven, did not amount to prove a lawful marriage, and therefore assoilyied the sister, and preferred her to the estate. *Vol. II. Page 647.*

On the 7th July 1711, an appeal was given in against this interlocutor.

1711. *June 22.* MAXWELL of BARNCLEUGH *against* FRAZER and LAUHLISON.

THE six-merk land of Kerse, belonging to one John Kilpatrick, being kirklands, they paid £120 Scots of yearly feu-duty to the lord of erection. Kilpatrick gives off a part of thir lands to Frazer and Lauchlison, extending to the half ; and, by their charters, obliged them to pay a small blench duty *pro omni alio onere*, with absolute warrandice. Maxwell of Barncleugh adjudges thir lands from Kilpatrick in 1680 ; and, being forced to pay the £120 of feu-duty to the lord of erection, he raises a process against thir two sub-vassals, who had a part of the six-merk land subset to them in feu, and craves they may relieve him of a proportion of this £120 of feu-duty he has paid to the lord of erection, effeiring to the share they possess of the whole feu liable in that sum.

ALLEGED,—That Kilpatrick's authors, above 90 years ago, feued out these parcels to their authors, whereon they are infest ; and, past prescription, have never paid more than the blench-duty contained in the reddendo of their charters ; neither could he exact any more from them, seeing he got a full adequate price, and disponded the feu, with absolute warrandice, against all further burdens. It is true the Crown or lord of erection might distress any part of the six-merk lands for the whole, unless they had confirmed the sub-feu ; but then he behoved to give them an assignation for their relief against the rest of the lands : And you, Barncleugh, being only an adjudger, you have no better right than Kilpatrick your debtor had, from whom you have adjudged it *talis qualis* as it stood in his person. Now, if he were pursuing us, his vassals, to burden us with a part of his feu-duty, we should exclude him *exceptione doli*, and as contravening his warrandice : we being obliged to pay him no more but the duty contained in our reddendo, and noways bound to relieve him of any part of the feu-duty he owes to his superior or the lord of erection. For, we being infest long before Barncleugh's adjudication, that makes it real against him, and he must warrant the feus, just as his author was bound to do ; and, when he pays the whole feu-duty, he disburdens his own lands, and can lay no part of it on the defenders, who can be burdened with no more than the reddendo of their charters.

ANSWERED,—Thir sub-vassals having a part of the six-merk land, there can be nothing more just than they should bear a proportion of the feu-duty payable

for the whole. And Barneleugh being a singular successor, he can never be liable in the personal warrandice given by his author; for the true remedy was to have got an infestment of relief against the said feu-duty, which real warrandice would have defended against this pursuit; but that being neglected, ye have no recourse but only your personal warrandice against Kilpatrick the disponder's heirs: and his adjudication can never subject him to his author's personal warrandice, more than it can make him *passive* liable to fulfil and implement his deeds. And, as to the pretence that a master might as well seek relief from his tenant of what he pays to his superior, as a vassal to distress his sub-vassals beyond his *reddendo*, such remote parallels, which noway quadrate, serve only to darken and involve the case. For a master getting his rent and tack-duty has no more to crave; but a sub-feu, by the nature of feudal rights, stands really affected with the original *reddendo*, as *debitum fundi*, that may be exacted from any part of it.

The Lords differing in opinion anent this point, they ordained it to be heard in their own presence.

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1711. *June 27.* GEORGE WILSON of SANDS *against* GEORGE MACKENZIE.

WILSON against Mackenzie. Alexander Deuchar needing some money, and resolving to try the bank, he prevails with George Mackenzie, in August 1709, to draw a bill on him, payable to John Campbell, Deuchar's servant, for £60 sterling; which being presented to the bank, it seems they did not think the drawer's nor acceptor's security sufficient, and therefore refused the money. This made Deuchar to deal with George Wilson of Sands, to accept the bill conjunctly and severally with him, on which he gets the money; but the bank having protested the bill against Sands, he is forced to pay the money, and gets the treasurer's discharge on the back of the bill; and then raises a process against Mackenzie the drawer for repayment of the money to him.

ALLEGED,—I drew no bill upon you, but only upon Alexander Deuchar; and if the bank refused to honour it, Deuchar ought to have returned my bill, and put me in my own place again; and could not, with any honesty or fairness, apply to Wilson, to join with him in the acceptance without my knowledge or consent: whereas I never employed Wilson to join his credit to get the money from the bank: and Wilson was too rash to accept unless he had first consulted me; and if he did it to gratify Deuchar, and follow his faith, to him he must go for relief, seeing it is positively offered to be proven that Wilson's name is superadded in the direction, and when I signed the bill there was none named but Deuchar; and that it was so presented to the bank singly with his name, and was refused, till a few days after it was brought back again with Wilson's name, and then Deuchar got the money. And to evince that Wilson relied on Deuchar, he took an heritable bond for his relief, and is thereupon infest in his lands of Comry; and therefore he can never have regress against Mackenzie the drawer.

ANSWERED for Wilson,—That, by the very nature and conception of the bill, Mackenzie the drawer must be liable to repay him, because the bill has this