

£20 or £30 sterling ; and seldom go that length. ANSWERED,—All modifications are *in arbitrio judicis*, with a due regard always to the party's damages.

6<sup>to</sup>, OBJECTED,—That his fees to lawyers and their number is contrary to the regulations, 1695, restricting to three advocates, and determining the salaries, in which his contravention subjects him to the penalty of £1000 Scots *toties quoties*. ANSWERED,—If I exceeded, you did much more ; seeing it is offered to be proven you had 13 advocates, and their honoraries were beyond the statute : so, you being *in pari casu*, the transgressions must mutually compensate.

7<sup>mo</sup>, OBJECTED,—He states in his account the expense of keeping two families, one at Campvere, the staple port, and another at Edinburgh ; as also his borrowing money upon interest, to carry on the plea, whereas law regards no extrinsic losses, but what are intrinsic, arising from the nature of the thing. ANSWERED,—These articles are *damna* arising from your fault and obstinacy, and enter the cause as much as my other depursements do ; and therefore crave the Lords may, in compliance with the Peers' order, proceed to modify and tax his expenses, and so prevent the ruin of his family.

The Lords, after advising thir objections, modified only £100 sterling, in lieu of all expenses. *Vol. II. Page 761.*

[See Robertson's Appealed Cases, page 24.]

1712. July 30.—Sir Andrew Kennedy gave in an appeal to the British Parliament for remeid of law, against Sir Alexander Cuming, for repelling the articles of his account of expenses, and modifying only £100 sterling.

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1711 and 1712. GEORGE MAXWELL, *alias* NAPER of KILMAHEW, *against* PETER NAPER, Merchant in Glasgow.

1711. February 21.—PETER Naper, merchant in Glasgow, being creditor to George Maxwell, *alias* Naper of Kilmahew, in upwards of £34,000 Scots ; and having incarcerated him ; after he had lain three months, they agree that Kilmahew should dispone to him certain lands irredeemably, in satisfaction of his debt ; but that Peter, out of respect to his chief, shall give a letter of reversion, to repone him to his own land, if, within three years, he shall redeem from him, with his own proper money, without borrowing it from others ; and that the favour shall be merely personal to himself, secluding his heirs and assignees. Within the three years Kilmahew procures the money, premonishes and uses an order of redemption, requiring Peter to denude ; who refuses, because not in the terms of the reversion, seeing he offered to prove by his oath it was not his own money, but borrowed from the bank ; which made Peter raise a declarator of expiration of the reversion, and that the lands were become irredeemable.

Against which pursuit it was ALLEGED for Kilmahew,—That the bargain was extorted from him by plain concussion and fear ; seeing he was let out the one day and the papers presented to him the next, with this certification, that if he refused to sign he would be re-incarcerated ; and the whip of a caption being kept over his head, it was *justus metus, qui in constantissimum virum cadere po-*

*test.* 2do, These clauses, being penal, are most unfavourable and odious: to take him obliged to pay it only with his own money, and within the short period of three years, was all one as to give him no reversion at all; for Peter knew it was utterly impracticable for Kilmahew ever to redeem in that manner. And it is plainly *pactum legis commissoriæ*, which both the Roman law and ours have always reprobated. 3tio, *Esto* the money were borrowed, yet as soon as it is delivered to me it becomes mine; for *in mutuo* there is an *alienatio sortis*, and the borrower becomes *dominus* of the *corpus pecuniæ*, and no farther inquiry is to be made whence it came. 4to, To show that it was no real sale, nor any adequate price paid for it, he offers to prove, that the land is so improveable beyond the present rental, that he can get two or three years' purchase more than Mr Naper has paid. And it is evident, *ex natura negotii*, he was concussed into the bargain, by inserting such rigorous and unusual clauses, to carry away his lands at an undervalue; so his disposing was by no deliberate choice, but, by a precarious colour of liberty, he was forced to yield whatever terms were proposed, or else go back to prison. And the laws of humanity will never favour such advantages taken of debtors in their straits and difficulties, having no other visible method to extricate themselves.

ANSWERED,—This is a plain breach of faith, and done with no other design but to concuss him to give a farther ease of his just debt; for it is very remarkable there is not one word objected against the original debt,—*et nihil tam consentaneum fidei humanæ quam ea quæ inter partes placuerunt servari*. And the Act of Sederunt, 27th November 1592, declares the Lords will judge precisely in all clauses irritant, conform to the express words thereof. And it is agreed that reversions are *stricti juris, nec ulterius extenduntur quam verba sonant, ideoque ad hæredes et assignatos non transeunt nisi eorum expressa fiat mentio*. (Craig, *lib. 2, Dieg. 6*;) for, *in reversionibus earem semper tenor attendendus est, et secundum eum denuntiatio et consignatio fieri debet*. And so the Lords decided, 17th January 1679, *Beatson* against *Harrower*, that, if there be a competent price, the lands are not redeemable but in the precise terms of the reversion, which must be *specificè* fulfilled. And the pretence of a higher offer is most irrelevant, and from emulation; for an imaginary value can never be the rule of buying, but the intrinsic worth of the thing itself must determine that; for the Lords may think victual estimated at £100 the chalder, and at twenty-one years' purchase, it is a pretty adequate price for lands in that part of the country. The pretence of the concussion is as frivolous and empty as the former; seeing it was *vis legalis*, and was done out of prison; and he can never quarrel the terms of the reversion, seeing he has made use of it for founding thereon an order of redemption.

The Lords fixed on that branch of the debate about the fulness and adequateness of the price; and allowed a conjunct probation of the intrinsic value of the land, if improveable or not; and what more he may get for it than Mr Naper has paid for the same.

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1712. July 29.—Maxwell of Newark, *alias* Napier of Kilmahew, being debtor to Peter Napier, merchant in Glasgow, in £34,800 Scots, by adjudications and otherwise; they enter into a transaction in 1706, whereby Peter gives down £4000 of his claim, (being accumulations and penalties,) and accepts of the lands of Napierston for the restricted sum of £30,800; but to show he was tak-

ing no advantage, he gives him a letter of reversion for four years, bearing, if Kilmahew shall, betwixt and Whitsunday 1710, pay him the said sum, then the lands should be redeemable, and he obliged to retrocess and renounce; but with this quality, that the redemption be only with his own proper money, without any borrowing, or interposing of any other person whatsoever. Kilmahew, at Whitsunday 1710, gets out of the bank the foresaid £30,800 contained in the reversion, and uses an order of redemption. Peter objects, it was not in the terms of the grant of reversion, but with money borrowed by one who coveted to wrest the bargain from him; however he was content to take his money, his damages also being reimbursed. And they refusing this last demand, instruments are taken on both sides, and the money returned to the bank, and each raises a declarator; Peter of the expiring of the reversion, and that the lands were irredeemably his, by incurring the irritancy: Kilmahew insisted in a declarator of redemption; and that the lands were lawfully redeemed, and he bound to denude on receiving his money. And the Lords, to know if it was a real sale, for a full adequate price, or was only a wadset and advantage taken of Kilmahew's low circumstances, allowed a conjunct probation, as to the true value, and if it was better than the price given for it; as mentioned, *supra*, 22d February 1711. The import of which probation came to this, that the master got no more rent than what was contained in the rental, at which it was set the time of the bargain; but that the tenants had subset parts of it, and got £200 or L.300 of excesse every year, besides a good wood on the ground; which showed the land was very improveable, and set below its true worth.

At the advising of this cause it was ALLEGED for Peter Napier,—That though he, *ex gratia*, and for personal respect to Kilmahew, gave him a reversion, yet it was a real sale, being twenty-one years' purchase, at L.100 the chalder; and the augmentation is but temporary, by lyming, and cannot stand. Neither is the heritor advantaged by it. And the order of redemption can never be declared, the terms of redeeming with his own money not being specially observed: whereas Craig, *lib. 2, Dieg. 6*, tells us, all reversions are *stricti juris, nec ulterius extenduntur quam verba sonant, ideoque ad hæredes et assignatos non transeunt nisi eorum specialis fiat mentio: nam semper earum tenor, (ut fit in investituris,) est servandus, et secundum eam denuntiatio et consignatio fieri debet.* All which is founded on that principle of the natural law,—*Nil tam consentaneum fidei humanæ quam ea quæ placuerunt inter eos servare.* Whereunto the Lords, by their Act of Sederunt, 27th November 1592, accord, by declaring they will decide in all clauses irritant, whether in real or personal rights, conform to the express words and meaning thereof, especially where it is no impignoration, but a fair and equal purchase. And the clause of redeeming with *his own money* was to prevent emulation of some invidious neighbours: and even that clause was sustained, 17th January 1679, *Betson* against *Harrower*. And though no law can force him to quit the bargain, yet he is content, being reponed *in integrum* to the state of his debt when he entered into that transaction, he not being obliged to gratify others with the abatement he then yielded to; for which see 8th December 1671, *Forrest* against *Brownly*; and 26th November 1672, *Duke of Buccleugh* against *Scot*. And the expenses of his infestment and of this process can be as little refused.

ANSWERED for Kilmahew,—He oppones his order of redemption and declarator raised thereon; and he shall have the sum contained in his letter of rever-

sion with its annualrents, if he will count for the rents of the lands, otherwise the rents must compensate the annualrents; and it was a most usurious griping unequal bargain, taking advantage of his circumstances, both excluding his heirs from the benefit of redeeming, and obliging him to an impossibility of doing it with his own money. What a jest was it to compliment Kilmahew with a power to redeem it within four years, but fettered hand and foot, that he must do it with his own money! Peter knew well enough that Kilmahew needed not have sold Napierton, if he could have commanded L.30,000; so this was a condition impossible, both *de jure et de facto*. *De jure*, it is *contra bonos mores* to insert such rigorous usuary clauses; *de facto*, because Kilmahew's circumstances put him out of condition to advance so much of his own as would redeem it: so Peter was secure against redemption, if that barbarous clause held. But law is more merciful than so. It repudiates all these conditions as illicit and *non adjectæ*. And the case of Betson and Harrower does not meet, for there no order of redemption was used.

The Lords declared the reversion and right of redeeming expired; yet, being *pactum legis commissoriæ in pignoribus*, they declared, if Kilmahew paid the sum contained in the reversion betwixt and the 11th of November, (being Martinmas-day in this present year 1712,) the same should be receivable to repone him to his land, whether it were with his own money or not. And that Mr Napier was to have right to this year's crop now on the ground.

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