

mitting taxations and other public dues, penal and arbitrary, or pecuniary mulcts: which proclamation, if it cannot free the son, he hath no other pretence to free him; and, if it would free him, as it cannot, the matter is not entire; for, if he had been produced at the day contained in the bond, which is long before that proclamation, when he had no defence, he would certainly have paid; and so can pretend no benefit of a subsequent proclamation. It was answered, That, albeit the bond contain a term to produce the son, yet it neither expresses the place, nor person in whose custody he should be put; and, therefore, as to these, it required a requisition of the charger, before which there could not be *mora*. *2do*. The suspender offers to produce his son solvent, and in as good condition as he was; and he might justly make use of his Majesty's proclamation supervenient. It was replied, That producing of him is not relevant, unless he renounce the benefit of the proclamation. *2do*. The proclamation excepts the case where bonds are granted, and excepts Duke Hamilton's right, who was not only general collector, but had an assignation from the King for satisfying of debt; and the King discharges only what belongs to himself, and not the taxations belonging to the Lords. The Lords found, That the producing of the suspender's son was not relevant, unless he renounced any proclamation after the term, whereby *res non est integra*; but did not dip in the proclamation.

*Vol. II, Page 305.*

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1675. *January 26.* WILLIAM LOWRIE *against* SIR JOHN DRUMMOND.

WILLIAM Lowrie,—having adjudged the lands of Scotstoun to the behoof of Mr John Drummond, the apparent heir,—pursues Sir John Drummond for reduction of a disposition thereof, granted by Sir Robert Drummond *in lecto*; which being sustained, as to the onerous causes in the disposition, and an account thereupon, Sir John gave in an article of 800 pound due by Sir Robert, by bond, to Mr Robert Bruce. Against which it was alleged, That this sum could not burden Scotstoun, because Sir Robert Drummond, having disposed his lands of Meedhope to Sir John for 33,000 merks, having assigned him debts extending to 20,[000] and the disposition containing a reversion upon a rose-noble; it did also contain this clause, that it should be leisome to Sir Robert, or his lady, to leave 3000 merks farther in legacy to whom they pleased; which Sir John should pay, if there were no redemption. *Ita est*, Sir Robert, by his bond to Mr Robert Bruce, orders Sir John to pay the same out of the sums for which he is liable by the bargain betwixt them, at which time there was no bargain but Meedhope; and it could not be understood of the 33,000 merks, which were expressly destinated for several creditors' names in the contract; and so could only be understood as a part of the 3000 merks which Sir Robert had power to leave; and, according to Sir Robert's will, Sir John paid the sum before the right of Scotstoun, which was granted; *in lecto*, expressly for payment of Sir Robert's debts. It was answered, That the faculty granted to Sir Robert was only to leave in legacy; and this bond cannot be found a legacy; and Sir John, having obtained the disposition only burdened with a legacy, had this hazard, that, as it is ordinary to parties never to make testament, if Sir Robert

should omit the same, he was free. And it was found, in the case of the Creditors of Swintoun, that old Swintoun, having disposed his estate to his son, with power to affect the same with wadsets, and having borrowed sums expressly upon that clause, yet the same was not sustained against the donatar, because they were not wadsets *in forma specifica*. It was replied for the pursuer, That the disposition of Meedhope, being gratuitous only, with the burden of 13,000 merks, the faculty to legate is not to be interpreted strictly, as if the lands had been bought for a full price; in which case, the hazard of not legating might have been a motive to make the bargain: but Sir Robert's will to burden Sir John was the thing truly meant; and though expressed under the name of legacy, because, *de jure*, legacies cannot burden heritage, Sir Robert's will, in his *liege poustie*, must be far more effectual. And, as to Swintoun's case, the reason why the creditors' personal bonds were excluded, was not because they were not *in forma specifica* contracted as wadsets, but because, being no real rights by infestment, they could not burden the fee in prejudice of the donatar of the fiar's forefaulture. And the equivalent is no way alike, for a personal right is less than a wadset; but the will of any person in his *liege poustie inter vivos*, is more than a legacy. And, albeit Sir John, who paid this sum, took assignation, he could not therewith have distressed Sir Robert; seeing he could not have excepted upon the 3000 merks, whereof he had power to legate, or otherwise he could have redeemed for a rose-noble; and so, seeing Sir Robert could not have been effectually burdened, neither can his heir, or his other estate. The Lords found, That Sir Robert Drummond's will, being expressed by this bond, to relate to Meedhope, and could be attributed to nothing but the faculty to legate; that the same was sufficient to burden that estate, though not in the form of legacy.

*Vol. II, Page 309.*

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1675. *January 26.* HECTOR M'KENZIE *against* GRANT.

ALEXANDER M'Kenzie, having obtained a decret of registration against Grant of Glenmoristoun, as representing his father upon the passive titles, Hector, as heir to Alexander, pursues transference. The defender alleged Absolvitor; because the decret of registration is null, in so far as it bears, That the defender was holden as confessed, being lawfully summoned; and doth bear, By a messenger-at-arms, personally apprehended; and therefore is null; because no party is ever holden as confessed upon another citation: and, therefore, decreets do still bear, that parties were holden as confessed, *because* they were lawfully summoned by a messenger-at-arms, "personally apprehended." It was answered, Though it useth to be expressed, and, being quarrelled *de recenti*, might be a ground to recal or reduce the decret, when the executions would be found to instruct whether it was personally by a messenger or not, yet the decret of registration being obtained *in anno* 1648, and never quarrelled till now, that there is a reduction raised; the same cannot be found null; because, *in actis judicialibus, omnia presumuntur sollenniter acta*. And, in this decret, the defender was compearing: and it cannot be presumed that the defender's advocate would have suffered him to have been holden as confessed, if