

ing for mails and duties, Lagg competed for preference on his absolute disposition,—his back-bond being discharged, or at least for all the debts he had paid of John Kirkpatrick's. ALLEGED,—He was *in mala fide*; for John was inhibited by her before the discharge of the back-bond; and, by the Act of Parliament 1621, as John, the debtor, could not prefer other creditors to her who had done diligence by inhibition, so neither could Lagg his trustee and cousin do it. *Vide l. 7 D. Quæ in fraud. creditor*; and Sir George M'Kenzie's observations on that Act; Stair, *8th January 1669, Newman*; *24th July 1669, Fleeming*; and *supra, 23d November 1687, Lord Ballenden*.

ANSWERED,—The inhibition not being intimated to Lagg, (as the Act of Sederunt, 19th Feb. 1680, requires,) he could not be *in mala fide* to take a discharge of his own back-bond, or to transact with John's creditors; and the inhibition is null, being executed at the wrong market-cross.

REPLIED,—He should have searched the Registers; and, *esto* the inhibition were wrong executed, yet it has the effect of a diligence to affect the right, on the Act of Parliament 1621, though it would not reduce posterior rights.

The Lords found the said Mary preferable upon her diligence to Lagg, except in so far as concerned his 2000 merks, and any debts he was cautioner in, or had transacted, before the inhibition. Lagg gave in a bill against this.

*Vol. I. Page 508.*

1684, 1687, and 1688. The DUCHESS of LAUDERDALE *against* The EARL of LAUDERDALE.

1684. *January 15.*—THE affair of the Duchess of Lauderdale against the Earl of Lauderdale, was reported by Edmonston; and the Lords found her factory (for she was out of the kingdom *animo remanendi*;) to the deceased Edward Masters, and Hugh Ross, yet alive, was not sufficient, the witnesses not being designed in the body, conform to the — Act 1681; and would not sustain the offer made by the Duchess's procurators, to produce a valid factory, *cum processu*, within two weeks, but *ante omnia* required one. *Vol. I. Page 260.*

1687. *August 29.*—The Duchess of Lauderdale pursues the Earl of Lauderdale for a riot, for dispossessing her, and taking away the keys of Lauderdale's castle, whereof she was liferentrix by tack. ANSWERED,—By an inventory of papers produced by herself on oath, in Yester's exhibition *ad deliberandum* against her, it appears she had renounced the liferent of the house, and he had a right from the creditors. *Vol. I. Page 473.*

1688. *February 24.*—The Duchess of Lauderdale seeking an adjudication against the Earl, for the English debt whereof he is bound to relieve her, and calling it summarily amongst the acts, without giving it out to see:

The Lords (though there were prior adjudications, which case only dispensed with the course of the roll, and no more,) ordained it to be seen and returned *in communi forma*. *Vol. I. Page 499.*

1688. *June 29.*—The Duchess of Lauderdale's charge against the Earl, was reported by Tarbet; but she, not being satisfied, obtained a hearing in presence. So it was debated and decided on the 11th of July. This was a charge on the

Earl's ratification, mentioned 1st December 1686, to purge the lands and moveables disposed to her, of all incumbrances, conform to a condescence given in: *1mo*, To pay 46 years bygone feu-duties of the lands of Duddingston, disposed to her by the Duke, due to the Lord Roxburgh, as Lord of the erection of the Abbacy of Kelso, of which they held, and whose minority made the years above 40 to be due. *2do*, To procure renunciations of two infestments of annualrent lying upon these lands. *3tio*, To purge Stephen Thornlie's comprising of the lands of Lethington and others, disposed by her husband to her. *4to*, To free the moveables of the Duke's funeral charges, contained in a decret obtained by Edward Masters, extending to £5000 sterling. *5to*, The Earl being found liable to relieve her of the English debt, *supra*, 12th February 1687, she craved he may pay two mortgages upon the lands of Ham, due to the Lord North, extending to £7000 sterling. ANSWERED,—That the Duke having bought the lands of Duddingston, with the burden of these debts, and having, by a most exorbitant donation, disposed them to his Lady, it must be strictly understood to be no farther than *talis qualis*, as he had them.—But his disposition to her, containing absolute warrandice, did cut off this. *2do*, He could not be liable to warrant against Thornlie's debt, unless it were instructed: and the seisine produced is not sufficient; as was found in her own case against Barnton, in making up Anderson of Hill's comprising. *3tio*, As to the moveables, they are the natural subject out of which funeral charges use to be paid: and she, having got the moveables, ought to defray that charge; else it should be like the Ægyptian slavery, who tyrannically exacted brick, though they did not furnish straw; and therefore, she having got the straw, ought to make her brick therewith. *4to*, The Earl's ratification bears, to relieve the heritage and moveables of all debts; which can be only interpreted of such as were *in rerum natura* at the time of subscribing of the ratification; which the funeral charges were not,—his brother, the Duke, being then alive. And, as to the mortgage, *non constat* that the right flows from the Duke, her husband; and therefore they are not bound to warrant it.

The Lords found, if she only craved a general ratification, that she needed not instruct the incumbrances; but, if she insisted for particulars specially condescended on, she behoved to instruct the same: but found the first three articles of Duddingston and Thornlie's debts sufficiently instructed, and decerned the Earl to purge them, betwixt and Candlemas next: but found him not liable for the funeral charges. And, as to Sir Francis North's English mortgages, found she ought to produce a right to these lands of Ham, from her Lord; seeing these incumbrances were not granted by him, but by herself.

*Vol. I. Page 508.*

See the numerous other parts of the Report of this case, pointed out in the Index to the Decisions.

---

1688. July 3. DUNDASS of ARNISTON *against* MITCHELSON of MIDLETON.

BOYN reported the competition between Dundass of Arniston and Mitchel-