

1702. *January 9.* JOHN MITCHELSON *against* RICHARD RAE.

JOHN Mitchelson, merchant in Dumfries, having right to a wadset of some lands belonging to the Earl of Nithsdale, redeemable on 7000 merks, he enters into a transaction with Richard Rae, an English travelling merchant, who advances him the said 7000 merks; and Mitchelson, by a minute, obliges himself to dispoise the said wadset-right to him, or else to repay the 7000 merks. When he comes to convey, it is found he wants the original wadset; whereupon Rae refuses to accept of a disposition with such an evident defect; and, being charged on the minute, he suspends on that reason.

ANSWERED for Mitchelson,—That he sold the right *talis qualis* as it stood, in which case *caveat emptor*; and there were adminicles enough to supply the want of the first contract, seeing the Earl of Nithsdale had acknowledged the right, by entering some of the intermediate authors; and he was in peaceable possession, undisturbed. And Rae was to blame in disclosing the defects of his own right, which could be easily proven in a tenor; and he had only given warrandice from his own fact and deed, and not against the defects of the title.

REPLIED,—There was a most unjustifiable design to overreach and deceive the defender; *et jura subveniunt deceptis*. If there had been an abatement of the sum on account of this want, there might have been a pretence that he took his hazard; or, *2do*, If Mitchelson had honestly told him he wanted the first contract; in any of these two cases, he might have pled a purgation from dole: But here Rae pays him in the sum at the full extent; and it is not pretended that he was acquainted with the defect: therefore it is a clear circumvention, and Rae ought to have his 7000 merks back again.

Some inclined to supersede extracting the decret against Mitchelson for some competent time, as a year or the like, in which Mitchelson might prove and make up the tenor: But the Lords, having an indignation at the advantage taken, did decern immediately for repaying the 7000 merks. Cicero, *de Officiis*, decides the same way, and calls it against moral honesty to conceal the defects of goods or other rights in the matter of bargaining.

*Vol. II. Page 137.*

1702. *January 13.* THOMAS SMITH *against* WILLIAM BROWN, *alias* CRICHTON.

THOMAS Smith pursues William Brown, *alias* Crichton, of Crawfordstone upon the passive titles, as representing his father, for payment of 300 merks, contained in a bond granted by him to Margaret Dempster, to whom Smith is confirmed.

ALLEGED,---Absolvitor from 200 merks of it; because there is a discharge written on the back of the bond, acknowledging that sum paid; and though it be not signed by the creditrix, yet it bears to have been, because she could not write; and it is subscribed by three witnesses.

ANSWERED,—It is neither subscribed by herself, nor by notaries for her, and yet it bears, in the body of it, that it is subscribed by her; and therefore it

must be presumed to have been written either without her warrant, since it was produced in process, or else to have been done *spe numerandæ pecuniæ*.

REPLIED,---Memorials, though unsubscribed, are probative, especially writs in count-books, or notes on the backs or foots of bonds, though not written with the parties' own hand, nor subscribed by them; as Stair observes, *Institut. book 4. tit. 42.*

The Lords thought this case singular, and were inclining to sustain the discharge on the back of this bond to assoilyie from the 200 merks, in regard it was of a very old date, more than thirty years ago, and never quarrelled all that time: But it being suggested that the creditrix in the bond died shortly after the date of the said discharge, therefore they remitted to the Ordinary to try when she died, and if it was ever questioned in her lifetime.

*Vol. II. Page 138.*

1702. *January 15.* JAMES NASMITH *against* SIR ALEXANDER COCKBURN of LANGTON'S CREDITORS.

MR James Nasmith of Dawick, advocate, gives in a petition, representing that he, being a considerable creditor to Sir Alexander Cockburn of Langton, had raised a process of sale of that estate; but George Lockhart of Carnwath, another creditor, having also raised a sale, the petitioner then lay by: but Langton having transacted with Carnwath, his process ceased; so that the petitioner has now wakened his summons, and is ready to insist and prove the rental, which Langton, with much industry, has darkened; and this, being the joint interest of all the creditors, ought to be carried on upon the common expense, and not on the private charges of one single creditor; therefore craving that a sum of money, suitable to that exigency, may be advanced to him by the factor, for which he is willing to hold count.

The Lords considered, Though this used to be granted in all roups, yet here they remembered that there had been sundry modifications given already for carrying on this sale, and therefore it was hard to burden either the debtor or the creditors with new advances till they saw how the former was expended, or if it was yet extant in Carnwath's hands, ungiven out; and, if his sale expired, whether he, or his creditors, should be at the loss of that expense now terminated by his transaction; therefore they ordered that to be first tried.

*Vol. II. Page 138.*

1702. *January 27.* ALEXANDER WEIR *against* JAMES SIMPSON.

ALEXANDER Weir, as procurator-fiscal for the manufactories, having seized on some prohibited stuffs, conform to the late Act of Parliament, in the house of James Simpson, merchant in Edinburgh, he pursues a declarator to have them confiscated and burnt, as falling under the prohibition. Simpson, the defender, craved his oath of calumny, if he had reason to pursue that libel. Weir CONTENTED,---That, in thir popular actions, he was not obliged to swear *de calum-*