

INFORMATION

For John Campbel Eldest Lawfull Son
to the Deceast Robert Campbel of
Glenlyon,

Against
The Earl of Tullibardin.

THe laid Deceast Robert Campbel of Glenlyon, Father to the said John be-
being under some Burdens, and being resolved in the year 1674 to
Sell or Wadset a part of his Estate, for Payment of his Creditors ;
And the Marquis of Athol being unwilling that any Stranger for
whom his Lordship had no kindness should make a Purchase of Lands in that
Country, his Lordship did very freely undertake to Compose and Transact
Glenlyons Debts, and to give Glenlyon himself the Benefite of all the Eases and
Abatements which he should happen to obtain from his Creditors ; and upon
Re-payment of the Sums sua Advanced, to denude himself of all Right and In-
terest he could pretend to in Glenlyon's Estate, in Favours of himself, and his
Heirs-Male allanerly, secluding all Glenlyon's other Heirs and Assignys.

In Prosecution of this Transaction, the Marquis did Purchase and Buy in
the haill preferable Debts and Diligences that were upon Glenlyon's Estate, and
obtained Considerable Eases and Abatements from Glenlyon's Creditors.

In the year 1684 There is a new Contract entered into betwixt the Mar-
quis of Athol and Glenlyon, by which the haill Sums then due to the Marquis
for himself, and as Assigney by Glenlyon's Creditors, are then stated according
to the utmost legal Extent to amount to 48000 lib. Scots or thereby ; and
for Security and Repayment whereof, Glenlyon grants a Wadset of his haill
Estate, Redeemable upon Payment of 39000 lib. Scots at two Terms
therein-specified, the last being *Whitsunday* 1690 ; and the Reversion is
conceived in Favours of the said John Campbel, Glenlyon's eldest Son, who
was then a Minor under Pupilarity ; but Glenlyon did constantly thereafter
Complain of this last Transaction, as being Exorted from him after he had been
several days in the Messengers hands, as Prisoner upon Captions raised upon
some of these Debts to which the Marquis had acquired Right as Glenlyon's
own Trustie.

This Contract contains an Obligement upon the Marquis for Transmitting his
Rights and Diligences upon Glenlyon's Estate in Favours of these who should
Advance Money to Glenlyon, for purging the Debts due to my Lord Marquis,
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and it contains an Irritancy, that in case Redemption were not used by *Glenlyon* against, or before *Whitsunday* 1690, the Reversion should Expire, and the Lands should remain Irredeemably with the Marquis, upon his payment to *Glenlyon* of 26000 *lib. scots*.

The Marquis having used a Premonition against old *Glenlyon* before *Whitsunday* 1690, and made a simulat Consignation of the said 26000 *lib. scots*; he did thereupon intend a Process before the Lords for declaring the Heretable and Irredeemable Rights of Property of all *Glenlyon's* Estate, to belong to his Lordship and his Heirs; And the same being Debated in the year 1691, *Glenlyon* as a Defence against that Process repeated a Reduction raised at his instance, founded upon the Reason of *Vis Major et metus*, *Glenlyon* being in the Messengers hands upon Captions, to which the Marquis had then Right several days before the Subscribing of that Contract, and that he was prejudged Considerably *in calculo*, and that his Estate was grossly undervalued in the Price, &c. And this Debate being taken to Interlocutor, my Lord Marquis thought fit to let the Process fall, and did never thereafter Insist to have the Debate reported.

The Marquis of *Athol* having lately Assigned and Disponed the said Contract & Order of Redemption used thereupon in Favours of the *E. Tullibardin*, & there being a wakening of the Process raised, and the same being called before my Lord *Fountainhall* in the Ouer-House, the Earl of *Tullibardin's* Procurators repeated their Libel, and Order used by them, and thereupon craved that the Heretable and Irredeemable Right and Property of all *Glenlyon's* Lands and Estate might be Declared to Pertain and belong to his Lordship, and his Heirs in all time-coming.

It was alledged for *John Campbel* now of *Glenlyon* (*Robert Campbel* his Father being lately deceased) that no such Declarator could be sustained against him, seing he was instantly content to pay all that was justly due to my Lord Marquis at the Barr, after deduction of his Intromissions, with the Rents and Casualties of *Glenlyon's* Estate, had by the Earls Father and himself, before and after the date of the said Contract, and which was all that the Earl of *Tullibardin* or his Father could in justice or equity demand or pretend. 2. Albeit there be an irritant Clause contained in the Contract, yet such irritancies being of their own nature odious, and by the common Law reprobat, as *Pañum legis commissorie*, the Pursuer could pretend to no more than re-payment of the Sums justly resting to him by the Defenders Father, and which he was very willing and ready to satisfy and pay.

It was Replied for the Pursuer, that his Declarator of the Property of *Glenlyon's* Estate ought to be sustained, notwithstanding of the foresaid Defence, because albeit Penal Irritancies be justly reprobat in Law, as odious, yet there was no Penal Irritancy in this case, but a fair Transaction, because the Marquis did not only pals from his expired Legals, but likewise restricted his Sums due to his Lordship, and gave a considerable abatement thereof, upon condition of punctual payment, and the said condition not being punctually performed, the Marquesses expired Diligences did revive and take place.

2. By the said Contract, *Glenlyon* in the event foresaid, Dispones the Lands Heretably and Irredeemably, so that the Marquis upon *Glenlyon's* failzieing to perform, had the irredeemable Right of *Glenlyon's* Estate, as well by Paction and consent, as by his expired Legal Diligences.

3. The Pursuer pretended, that the Contract was not a Contract of *Vvad-* fet,

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set, but a Contract of Sale, for a just and adequat price, with a condition, that if the price were re-payd at a punctual time, the Bargain of Sale should be resolved ; but the price not being punctually payed, the Vendition and Sale did subsist, and alledged that Venditions may be made *pure & simpliciter, vel sub conditione*, and that both the Civil Law and ours, do sustain all Bargains made for just and adequat prices, and repeated the Decision, *Beatson contra Harrower*, and the *l. 81. ff. de contrahenda emptione*, and the *l. 16. par. fin.* And the Pursuer is in a far more favourable case, because by his expired diligence, he might have posselt the Lands irredeemably, without payment of one six pence to the Defender for the Reversion thereof: And seing the Defender hath no pretence to that Estate, but by the foresaid Reversion contained in the Contract, he can never be heard to quarrel the Contract in any point.

4. That the Defenders Father having made a reference of all his pretensions to the Earls of *Arran* and *Argile*, they did make a final determination therein, &c.

To all which it was Duplyed for the Defender, that his Defence and offer to pay and purge, ought to be sustained, notwithstanding of the foresaid Replies: and they ought to be repelled, because this is a Penal irritancy, which is now craved to be declared; and that it is *Pactum legis commissoriae*, is clear and undenyable from the Contract it self, which is a clear and positive Contract of Wadset redeemable in the ordinary form; and the expiration of the Reversion is only subjoyned thereto as a Penal Irritancy: And no Lawier ever did pretend that such Penal Irritancies were not purgeable by Payment or Confignation at the Barr.

2. It is absolutely denied, that my Lord Marquess had Right to *Glenlyons* Estate by any expired Legal, the time of that Contract, the expired Diligences to which his Lordship had then Right, being acquired by him, as Trustee for *Glenlyon*, and which Trust is offered positively to be proven.

It was Duplyed to the 2d. That the former Answer is repeated and opponed, viz. that the said Contract is only a Contract of Wadset, and that the Rights & Diligences acquired by my Lord Marquiss were only acquired by him as *Glenlyon's* Trustie, & that my Lord Marquiss was Obliged to denude upon Payment of the Sums truely Payed out for acquiring the same.

It was Duplyed to the 3d. That the Contract is opponed, which is allanerly a Contract of Wadset, and all these Clauses contained in the Contract relating to the Irredeemable Disposition, are allanerly Penal, in case of not Redemption, and are purgeable, and Offered to be Purged at the Barr; And it is absolutely denied that the Price therein Condescended was either Adequat, or any ways Agreeable to the Intrinsic Value and True Worth of the Lands; *Glenlyon's* Estate with the Woods, Fishings, and Casualties thereof being at least Worth 50000 *merks* more then the Sum contained in that Contract according to the Ordinary Rate and Price of Lands having such Casualties in the Countrey, so that *Glenlyon's* Lesion by that Contract, (if the Irritancy should be sustained) is most Gros and exorbitant. 2. By the Civil Law, all such Irritancies were expresly reprobat, as is clear from *l. 3. De pactis pignorum, et lege Commissoria in pignoribus Rescindenda*, where the Rubrick of the Law is, *Constantinus ad Populum*. The Words of the Law are, *Quoniam inter alias captiones praeipue Commissoria pignorum legis crevit asperitas, placet infirmari eam et in posterum omnem ejus memoriam aboleri, Si quis igitur tali Contractu laborat, hac sanctione respiret, qua cum praeteritis praesentia quoque repellit et futura prohibet Creditores enim re amissa jubemus recuperare quod dederunt*, which Demonstrats that

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that such Irritancies were always Reprobate as Odious and unjust; and Prohibit as such; And *Craig* lib. 2. *Diag.* 6. P. 173. is most positive, and sets down as a certain Conclusion, *Patium legis Commissoria in feudis non recipi*; and Affirms that our Practice doth perfectly abhorre the same, and Cites a Practice betwixt *Hamilton of Sanquhar*, and *Chalmers*, Where the Lords expressly Rejected the same in a case Paralell with This. And my Lord *Stair* in the last Edition of his *Institutions* is most positive that such Irritancies and Provisions are always Reprobate by our Law and Custom, and Cites several Decisions for that purpose as is at length set down, Page 122. 330. 567. and 591.

Neither can the Practice alledged by the Pursuer be Respected, because in that case the Lords find that the sum Payed for the Tenement was the full and adequate Value, which cannot be pretended as said is; *Glenlyon's* Estate as is above represented being known to be Worth 50000 *merks* more than the Price, at which the Pursuer contends to have the same; and the Defender repeats the Decisions betwixt *Cleghorn* and *Ferguson*, July 8. 1636. *Nairn* and *Napier* July 19. 1625, *Pringle* contra *Ker* February 7. 1628. *Barclay* contra *Stevenson* March 18. 1629, all Recorded by my Lord *Dury*, and which Quadrats in terminis with the Case in hand.

Neither doth the Citation from the Civil Law contribute any thing for the Pursuers pretences, because albeit the *Pignus* was not Redeemed within the time appointed, the Haver thereof was Obligated to Sell the same at a publick Rouse before he could pretend to make use thereof, and he was Comptable to the Proprietar for the Superplus of the Price, and it is absolutely denyed that the Sum offered by the Pursuer is any ways adequate to the Value of the Lands.

And whereas, it is Pretended that the Defender hath no Interest to Quarrel this Transaction, &c.

It is Answered, 1. He is expressly called as a Defender. 2. My Lord *Marquis's* Back-bond bears expressly, That he was to make the Transaction, for the standing and preservation of *Glenlyon's* Family, whereof the Defender is the only Representative. 3. *Nihil deest* to the Pursuer, when he gets his own Money, and consequently, he can never be heard, to quarrel the Defenders opposing his Fathers Estates, being carried away at such an undervalue, especially, seeing the Reversion is expressly conceived in his own favours. 4. *Glenlyon* doth not at all quarrel the Debts justly resting to the *Lo. Marquis*, or to which he did acquire Right, but is content instantly to pay the same, in the terms of my *Lo. Marquis's* own Back-bond; But in so far as the Sums in the Contract are stated to amount to more than my *Lo. Marquis* truly payed out, the same might have been quarrelled, by the Defenders own Father, as being stated against him, *per errorem calculi*, and which the Pursuer in Justice cannot be heard to contravert.

And as to the alledged Agreement with the Earls of *Arran* and *Argyle*, It is Answered, That there is no such Determination produced, nor any Submission under the Defenders Fathers hand, by which the Determination was referred to these two Noble men; Neither did ever the Defenders Father acquiesce therein, but on the contrair, did absolutely refuse to comply with, or homologate the same, and the Reversion being conceived, in favours of the Defender himself, it was not in his Fathers power to discharge, or renounce the same, and no instance can be given in our Law, or the civil Law, where ever any such irritancy was sustained against a Minor, where his Lesion was so gross
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and exorbitant, that he would thereby be leised in at least, the third part of his Estate.

It is farther represented to the Lo. as a convincing demonstration, that this Contract was no voluntar deed of the Defenders Father, but only extorted from him *metu carceris*, and when he was in the Messengers hands as a fore-said, albeit the Comprysings to which my Lo. Marquis had Right, were all acquired, when he was *Glenlyons* trusty, as said is, yet by this Contract, the *Marquis*, upon payment of the whole Sums acclaimed by himself, was to denude in favours of *Glenlyons* Son; yet *Glenlyons* Lands of *Kilmorich*, extending to 1000 Merks of yearly Rent, besides great Casualties, are not all obliged to be Renounced, or Disponed by the *Marquis*; So that albeit the Defenders Father had made punctual payment of the whole Sums acclaimed, by the *Marquis*, at the precise Term contained in the Contract, there was no oblidge upon the *Marquis*, to have denuded himself of these Comprisings, in so far, as concerned the saids Lands of *Kilmorich*, which is a convincing Demonstration, that the deceast *Glenlyons* Subscription was impetrat, and elicite from him *metu carceris* allanerly, and that the same was never any voluntar Transaction.

In Respect whereof, the Defender ought to be Affoilzied from this Declarator, and the Pursuer ordained to denude in the Defenders favours, upon Re-payment of the Sums, truely advanced by the *Marquis*, conforme to his own Back-bond, and which the Defender is content instantly to pay, after the Deduction of my Lo. *Marquis* Intromissions with the Rents of his said Estate, and price of his Woods, sold, and cut down by his Order.