

merks owing by the Lord Torphichen to her husband, on an heritable security, she pursues for payment. It was ALLEGED for Torphichen, He must have compensation; because Hilderston was owing sundry sums by bonds, and he stood cautioner for him, and was forced to pay the debt. ANSWERED,---No compensation but *inter debita ejusdem speciei*; but here, moveable personal bonds and tickets are obtruded to compensate and extinguish an heritable right whereupon infestment has passed. REPLIED,---Compensation being *debiti et crediti contributio*, it clearly took place here; for, though seasine had followed upon the heritable bond, yet it bore also a personal obligation to pay, beside the feudal security of the *annuus reditus*; and which, being a liquid obligation, may be clearly compensated and taken away by other personal debts.

The Lords at first made a distinction betwixt the grounds of compensation extant and contracted before the taking the heritable bond and completing it by infestment, and the debts contracted subsequent; and seemed to incline that all before the date of the seasine might be good grounds of compensation: though it was urged that the granting an heritable bond was a tacit passing from using these anterior grounds as compensations; just as the granting a blank bond was a renouncing of compensation. But the Lords thought this only a presumption; *quæ cedit veritati*, and could not hinder the proponing and applying the compensation now. The difficulty lay as to the debts contracted after infestment was taken, if they could compensate and extinguish an heritable right. And it was urged by some of the Lords that it could not: because, the investiture being now feudal, it were to unhinge the security of the lieges, if personal debts contracted after could meet a singular successor, and extinguish his right by compensation, no more than his author's back-bond militates against him after it is once made real by infestment. Others said, this was no more than what occurred when one acquired an apprising or an adjudication; for they might be elided by any deed of their author's without a formal registrar annunciation, whether it was a simple discharge or an intromission with the rents, and that even found probable by witnesses, *4th February 1671, Wishart contra Arthur*; and they had nothing to rely on but the recurring on their warrandice. But the Lords, considering this action of the Lady Hilderston's being for payment of the principal sum, it occurred to some, what hindered but any debts, whether prior or posterior to the seasine, should compensate the pursuit on the personal obligation to pay? and ordained the parties to be farther heard thereupon.

There were decisions cited for both parties: For Torphichen, *14th February 1633, Keith contra Herriot*, marked by Dury; and *8th July 1680, Rankin contra Arnot*, in Stair. And, for the Lady, were quoted *2d January 1667, Oliphant contra Hamilton, per argumentum à contrario sensu*; and Sir George Mackenzie's Observations on the Act of Parliament 1617, anent Registration of Seasines, where he affirms that infestments of annualrent cannot be extinguished by compensation. *Vol. II. Page 69.*

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1699. November 29. JAMES ROSS against ALEXANDER DRUMMOND of EASTFIELD.

JAMES ROSS, as assignee by Skein to a bond of 1200 merks, granted by the

deceased Samuel Drummond of Carloury, and Mr Alexander Drummond of Eastfield, his brother, charges the said Mr Alexander for payment. Who ALLEGES absolvitor; because Skein having afterwards lent Carloury 300 merks more, he got a new bond from him for the whole £1000 Scots, including the former 1200 merks; whereupon the prior bond of 1200 merks, wherein I was bound, became extinct, and was retired, and found in the hands of one Layng, Carloury's agent, and from whom it was *viis et modis* gotten up; and therefore, being *instrumentum apud debitorem repertum, præsunitur solutum*.

ANSWERED,---Though there was a posterior bond given for the £1000, comprehending the 1200 merks formerly lent, yet that was accepted in contemplation it bore the said Mr Alexander to be also bound as conjunct debtor with his brother Carloury; but, after trial, his name was found to be added by forgery; and so, the creditor discovering the cheat, he recurred to the old bond of 1200 merks, the second being null *ob causam datam causâ non secutâ*; and it is enough he is cheated out of the 300 merks of superplus, and its annualrents, by the two brothers, though he lose not the whole. And Layng was writer for Skein, the creditor, as well as for Carloury; and so its being once in his hands infers no presumption of its having been retired by the debtor.

The Lords repelled Mr Alexander's reasons, and found him liable on the first bond.

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1699. November 29. STEVENSON, PITCAIRN, OLIPHANT, &c. against Dr SINCLAIR, &c.

DOCTOR Sinclair, President of the College of Physicians, and some associates, having deprived Doctors Stevenson, Pitcairn, Oliphant, and some others, from being members of that society, for contumacy and other grounds, they give in a bill of suspension against the sentence; and likewise apply to the Lords by petition, representing that the trysting their deprivation at this time was most iniquous and fraudulent; being contrived of purpose to exclude them from having a vote in the election of the preses for the year ensuing, which diet for election was just approaching; and therefore craved the cause might be instantly discussed, that they might not be debarred from the privilege of voting as members of the College. Whereunto the other physicians answering, That they could not be compelled to answer on the suspenders' desire, till the cause came in by the course, especially seeing there were mutual declarators raised, the event whereof would determine their privileges and power;

The Lords found the chargers could not be forced to discuss summarily except they pleased; and therefore refused either to stop or prorogate the diet of the election, or to allow them to sit and vote *medio tempore*; and declined to interpose till the point of right came to be debated.

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1699. December 2. ANDERSON, Notary, fined.

MR Anderson, the notary who made James Chalmers's testament now reduced,