

like case, marked both by Lord Stair and Dirleton, 11th December 1674, *Home and Elphingston* against *Murray*, betwixt an assignee and an arrester.

Others of the tenants deponed, That, since the citation, Blair of Kilfauns had exacted their rents from them, and made them to pay it in to him.

The Lords found this was not *bona fide* payment, and refused to allow it; but, if the Laird would compear, and allege he had a locality and aliment out of the estate, wherewith the escheat was burdened, they would deduce and allow it out of the first end thereof.

Some of them deponed, they owed half a salmon for their share of a coble-net and liberty of fishing in the water of Tay.

The Lords thought this could be no otherwise cleared than by discerning them once in two years to pay a salmon; and, seeing they could not deliver *ipsa corpora* for bygones, therefore they modified a merk for the price of the salmon, in regard one of them deponed, that that was the price exacted; though a conventional price with one makes no rule to the rest. Those who deponed on bolls of victual, the fiars of the year were appointed to be produced for regulating that. But the threaves of straw having no certain price, one threave this year being of more value than two another year, a diligence was granted for liquidating them, if they insisted thereon.

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1707. February 20. BROWN against The TOWN of EDINBURGH.

THE TOWN of Edinburgh having fined one Brown, for keeping and setting of chairs and sedans for hire, whereas they had given the sole privilege thereof to one Mrs Hay and Thomas Dunnet her husband; Brown suspended on this reason, That such a gift, being a monopoly, was contrary to law, and ought not to be allowed; and it were singular, if the Town of Edinburgh could assume that power which the Queen and Parliament did not. And, by the same rule, they might authorise two or three gardeners to sell kail and leeks, or other pot-herbs, and discharge all others; and so in other trades and species of goods: which is absurd.

ANSWERED,—The Town has been in use to gratify decayed burgesses with such gifts as thir; and she was ready to serve as cheap as any other.

The Lords thought the preparative bad; and therefore sustained the reason of suspension, and assoilyed him from the fine.

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1706-7. February 28. WILLIAM MORRISON of PRESTONGRANGE against MR HUGH CRAIG, Minister at Gallowshells.

MR Hugh Craig having granted bond to Dame Jane Morrison, the said Prestongrange's sister, and relict of Sir John Nisbet of Dirleton, for 1843 merks; she, in November 1695, being on deathbed, called for Mr James Kirkton, minister of Edinburgh, his wife, and delivered her Mr Craig's bond in thir terms:— That, on Mr Craig's paying 100 merks to one Gemmil, a kirk-beadle, she should then burn his bond. The Lady dying, Prestongrange, as her executor, pursues

Mrs Kirkton for exhibition of Mr Craig's bond ; and she having deponed on the conditions foresaid, on which it was consigned in her hands, and that, before she got it perfected, the citation prevented her,—the Lords appointed the bond to be put in the clerk's hands. And Prestongrange seeking to have it delivered up to him, Mr Hugh repeated a declarator of extinction of his bond, on this ground, That the Lady Dirleton, creditor in the bond, never intended to have exacted it : for, when he signed it, and the two witnesses were subscribing it, she pulled it away ; so there is only the name of one of them at it, without so much as the word witness adjected thereto. *2do*, The reason why it was put in Mrs Kirkton's hands was, because Mr Hugh was then in the north, preaching, by order of the General Assembly ; whereas, if he had been in town, she would certainly have given it back to himself ; in which case it would have been clearly *legatum liberationis* : so she was no more but a depositary and hand to convey it. *3tio*, Prestongrange can have no right to it, because he obstructed all access to his sister during the time of her sickness ; notwithstanding she testified her inclination to settle her business, and called for one Nisbet, a writer, for that effect ; and so he ought to lose the benefit, *tanquam indignus*, by the title of the Roman law, *Si quis aliquem testari prohibuerit*.

ANSWERED,---The nullity of the bond ought to be repelled, seeing the bond is holograph ; and the want of witnesses can be supplied and made up by his oath. And, as to the *second*,---His bond cannot be taken from him by Mrs Kirkton's single testimony, seeing there is nothing antecedent to prove the deposition in her hands : besides, to annul writ by witnesses, is contrary to law, and *pessimi exempli* ; and, at best, it can only be sustained as a nuncupative legacy, which can subsist no further than £100 Scots. And to the *third*,---Access was never denied, except when they came to disturb her when she was upon rest.

The Lords, considering the circumstances and specialties of this case, and inclining more to equity than strict law, found the bond extinct, and ordained it to be given up to be cancelled ; and assoilyied him therefrom ; he paying the 100 merks to Gemmil the beadle, with which he was burdened.

Some of the Lords, though they were convinced that it was the lady's intention to restore him his bond, yet they thought it a dangerous preparative to take away bonds by single testimonies. But others thought there was a concourse and chain of specialties here, that could hardly occur in any other case, which put it beyond the danger of drawing any bad consequence from it.

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1707. *March 8.* THOMAS LOGIE *against* LILIAS and MARGARET WHITEHEAD.

THOMAS Logie, merchant in Edinburgh, against Whiteheads, as heirs-portioners, for payment of a debt contained in their predecessor's commission and charter-party. The Lords finding he had made a private transaction with Hamilton, husband to one of the two heirs, and yet insisted to make the other liable *in solidum*, on pretence that her sister was discussed by a decret, and her heirs insolvent, and no estate could be condescended on :

The Lords found so much fraudulent indirect dealing and contrivances, that they imprisoned the said Thomas Logie, and fined him in £100 Scots, and or-