

1672. *June 27.* ANDREW SPALDINE of ASHINTULLY *against* ROBERT MURRAY.

ASHINTULLY being debtor to Alexander Ratray in the sum of 500 merks, to which Robert Murray was assignee, he did thereupon charge, and denounce, and take him with caption: whereupon Ashintully did give a bond of corroboration, with a clause that he should never suspend him: Upon which bond, he being charged, did suspend upon a reason of compensation, upon an assignation granted to him, prior to the assignation made to the charger and the bond of corroboration; which being a real exception, and the bond of corroboration being granted for fear of imprisonment and a public affront, the caption being executed in a public market, he ought not to be prejudged thereby of the benefit of compensation founded upon an assignation to a debt due by the charger's cedent, who was now *lapsus bonis*.

It was ANSWERED, That the compensation cannot be now received; because the suspender having granted a bond of corroboration of the terms foresaid, it was a clear passing from any right of compensation to be proponed against the assignee; especially seeing he had never intimated his assignation to the cedent before the charger got a right from him: and albeit compensation be a real exception, and, *ipso jure, tollit obligationem*; yet the law necessarily requires that it should be proponed; and, by an Act of Parliament, it is not receivable *post sententiam*.

The Lords did find the letters orderly proceeded, upon these two grounds:— That the bond of corroboration did put the suspender in the case of a delegation, where a person delegated, accepting thereof, can never compensate upon a debt due to him by the delegant:—As likewise that a debtor, albeit he get an assignation to a debt of the cedent's, yet if he do not intimate the same before the creditor be denuded by assignation, and the assignee do diligence against him, he cannot thereupon found a compensation against the assignee.

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1672. *July 2.* JAMES NORRY and CRAUFORD *against* JAMES MEIKLE.

IN an action for proving the tenor of a bond, granted by Thomas Meikle to Sir Joseph Douglas, to which Crauford had right by translation from Norry; wherein there was produced, for adminicles, a decret obtained before the bailies of Linlithgow:—

It was ALLEGED for the defender, That he having an improbation of the bond depending, and a day assigned to satisfy the production, with certification, this action for proving the tenor could not be advised; seeing *frustra*, the tenor was to be proven, if the bond should be improven as false and feigned; and all that could be done in the action for proving the tenor, was only to instruct that such a bond was seen; which did noways prove the verity thereof; but, notwithstanding, it might be improven as false and feigned.

It was REPLIED, That both the actions were consisting, and the one did not hinder the other; and therefore the cause ought to be advised, reserving the improbation as accords.

The Lords did repel the allegiance; and declared, that they would advise the action for proving of the tenor, seeing it was intented before the improbation; at least before any term was assigned: and therefore the *causa amissionis* being proven, and the tenor, by the adminicles and deposition of witnesses, the decret ought to be received for satisfying the production in the improbation; and yet would not hinder the improbation of the bond, as false and feigned, as effectually as if the principal had been produced.

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1672. July 3. HENRY BLAIR of DENHEAD *against* BLAIR of BALGILLO.

IN transferring of a suspension raised at the instance of Balgillo, *anno* 1635, at the instance of Blair of Denhead, as having right by translation, from the Laird of Collistoun, who was assignee to a bond of Balgillo's father for the sum of 2000 merks, for which he was charged at Collistoun's instance:—

It was ALLEGED for the defender, That the pursuer could have no right by translation from Collistoun the assignee; because Collistoun's assignation was never intimated; and his cedent, this pursuer's father, to whom the bond was granted *in anno* 1655, had granted a general discharge to Balgillo of all debts; which ought to include the bond in question.

To this it was REPLIED, That Collistoun, the pursuer's author, had an assignation to this bond *in anno* 1634, and did intimate the same by a charge of horning, which was suspended, and thereupon there was a most contentious dispute: and that assignation being lost, no decret was extracted; but Denhead, who was creditor in the bond, did thereafter grant a new assignation to Collistoun, which needed no new intimation; seeing the first was lawfully intimated, as said is: so that the said general discharge could not include the bond, which was before assigned and intimated as said is, and could only be interpreted of such debts as remained due to Denhead, whereof he was not denuded.

The Lords, by their interlocutor, did find that the bond in question could not be comprehended within the general discharge.

But thereafter it being ALLEGED, That it was offered to be proven, by the writers and witnesses inserted, and comuners betwixt the parties, that it was specially agreed to, that the general discharge should comprehend this bond;—witnesses being allowed to both parties for proving thereof before answer;—after advising of their depositions, whereupon many presumptions did arise that Collistoun's name was only borrowed upon trust,—the Lords did assoilye from the transferring, and found, that the discharge did take away the foresaid bond; notwithstanding it was alleged for the pursuer, That Collistoun being now dead and denuded, his assignation bearing an onerous cause, the pursuer's translation could not be taken away but *scripto vel juramento*: Which was hard.

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