

that effect ; but as to that member, they found the allegiance relevant to be proved by M'Intosh's oath, that he was carried to, or kept at Glenlee by his own consent ; yet so, as that if any threats or menaces were used against him there, it should be relevant separately ; neither would they oblige the sons to be caution for what the father should be found liable upon the decree of spuilzie.

No. 13.

Stair, v. 2. p. 20.

1672: June 28. MURRAY against SPALDING of Assintilly.

Andrew Spalding being debtor by bond to Alexander Rattray in the sum of 500 merks, he to make compensation thereof, took assignation to the sum of £.100 Scots due by the said Alexander Rattray, who to evite the compensation, assigned the said sum of 500 merks to Robert Murray his good-brother to his own behoof, at least without any onerous cause ; whereupon Robert Murray did apprehend Assintilly with caption in a public market unexpectedly, and obtained from him a bond of corroboration of the first bond of 500 merks, bearing £.500 of penalty, and obliging him never to suspend. Assintilly being now charged upon the bond of corroboration, suspends on this reason, that the bond of corroboration did not import his homologation of the first bond, or any transaction thereanent, because it was an act necessary that he could not shun ; and though it was no violence, or illegal force, yet it was a legal compulsion nowise inferring his approbation, and there was nothing gotten down upon the uncertainty of any plea that might be thereanent ; so that if Assintilly had made payment, or to hinder the apprising of his lands, had offered moveable goods to be poinded, he might notwithstanding suspend, or reduce the principal bond, if he had just reason, and recover the money and goods as *indebite solutum* ; so, much more may he in this case, having an unquestionable reason of compensation against the first bond upon his assignation, which, though it was not intimated, yet it is sufficient against Murray's creditors' assignee, though his assignation be intimated, because his assignation is to the behoof of the cedent, or the sum due for it is yet in his hand ; and it is a fraudulent deed betwixt two good brethren, in prejudice of the debt assigned to Assintilly, done by collusion to exclude compensation, Rattray the cedent being at that time bankrupt or insolvent. It was answered, That the bond of corroboration was opposed, which, if it do not import a passing from compensation, it imports nothing, but puts the party in worse condition than before it was granted, for then he had his debtor in his hands by caption who now is liberated ; and therefore it must necessarily exclude suspension, even though the principal bond might be reduced ; and the bond of corroboration falls in consequence, if the reason was upon payment, or any intrinsic reason ; but compensation, which is extrinsic, and may be made use of by way of exception or action, is certainly past from by the corroboration, especially it passes from all suspension, and obliges never to suspend, and even repetition of payment could not be obtained, unless protestation had been

No. 14:
A bond of corroboration given by a person under caption for the debt found to be unchallengeable.

No. 14. used, that it should be without prejudice to reduce or repeat; and if the compensation had been expressly passed from, there could have been no question, and the passing from suspension is a general comprehending it.

The Lords repelled the reason of compensation, in regard of the bond of corroboration, excluding suspension, albeit the compensation itself had been unquestionably relevant, and that the suspender had intimated his charge to his creditor before he had assigned the debt to this charger, or before the intimation thereof, but suspended the penalty of £.500 in the bond of corroboration.

Stair, v. 2. p. 92.

* * See a similar case, Thomson against Moubray, 2d December, 1675, No. 164. p. 12370. *voce* PROOF.

No. 15. 1674. *January 24.* MURRAY against JAFFREY.

Reverentia maritalis, joined with *luctus et mæror*, was not found relevant, the deed having been granted by the wife, while her husband was upon death-bed.

Gosford. Stair.

* * This case is No. 82. p. 6525. *voce* IMPLIED DISCHARGE.

1674. *February 19.* BARCLAY against BARCLAY.

No. 16.
Deeds elicited in *privato carcere*.

The Laird of Towie disposes his estate to his only daughter, which was provided before to heirs-male; but his uncle the tutor of Towie having first granted a disposition to that daughter, and thereafter to others; there was a gift of recognition taken in favours of the daughter Elizabeth Barclay, both upon the disposition made to her by her father, and by the tutor, whereupon infeftments were taken without confirmation. It was alleged for the Lord Barclay's son, (to whom the tutor hath now disposed) that the tutor's disposition could not infer recognition, because it was extorted *vi et metu*, in so far as the tutor being a weak and old man of 80 years, was kept prisoner in a close room, under lock and key, or under a guard in the house of Towie, till this disposition was subscribed, and none of his friends permitted to come to him, whereupon he hath a reduction raised, and repeats the same by way of defence. It was replied, That in fortification of the King and donatar's right, it was offered to be proved, that the tutor while he was at the house of Towie, was at full freedom, and went out and in at his pleasure, without any guard, and cheerfully subscribed the disposition.