

it is dubious, be very excusable, especially in *rusticis ubi certant de damno vitando*, then much more must *defectus juris* be such; but, *ita est*, there is no style, no practice, nor precedent known, for confirming tacks, and saving them from the danger of forfeiture, if they be not valid rights, secure from these after-claps of themselves. And if any such thing seem convenient to be introduced now, the same cannot reach such who have acted *bona fide*, according to the custom and law now known; and it needs *constitutione Imperatoria*: and the l. 10. D. *de Jure Fiscii*, would be considered, *quod in dubiis questionibus non errat qui contra fiscum responderit*; and that of Plinius to Trajan, in *panegyrico*, *Causa fiscii nunquam mala est nisi sub principe bono*.

See a very learned triply to all this in the informations beside me.

Advocates' MS. No. 406, folio 219.

1674. *January 28th*.—IN the debate largely marked *supra*, General Dalzell against the Tenants of Caldwell, *num. 406*, [June, 1673,] the Lords having advised it, they found, tacks set to a competent and adequate avail, as thir questioned were, good and sufficient to defend against a forfeiture; but not where the duty was unanswerable, elusory, imaginary, or within the true avail; and this decision was grounded on the 18th and 19th acts of Parliament in 1449.

Vide infra, No. 446. [Earl of Aboyne, February, 1674.]—See 27th January, 1680, thir same parties.

Advocates' MS. No. 437, folio 231.

1671 and 1674. The EARL OF LOUTHIAN, and the MINISTERS OF THE PRESBYTERY OF JEDBURGH, against the TOWN OF EDINBURGH.

1671, *November 4*.—THE Lady Yester, in *anno 1645*, enters into a contract with the Provost and Bailies of Edinburgh for the time, by which she lends to them 5000 merks; the interest whereof is granted to the town during her lifetime; and after the same, she destines and mortifies the said sum to the poor of the parishes of Jedburgh, Oxnam, Hoprigg, and Sprouston; and other pious uses mentioned in the said contract. For the payment of the sum there is a requisition made; which not being obeyed, there is a summons raised at the instance of the Earl of Louthian, as now heritor of the forsaid parishes, by being come in the place of the Lord Jedburgh, and so patron of this sum; with consent and concurrence of the ministers, elders, and deacons of the said parishes; against the good town, for making payment of the forsaid sum, that it may be employed conform to the destination contained in the contract.

It was ALLEGED by the town, *Imo*, No process; because all that they produce to instruct that they are debtors in the said sum, is allenary a copy or attested double, under Robert Adamson and David Peter their hands, being two under-servants in the Town-Clerk's chamber; which double, unless the principal contract were produced, can never make faith against the defenders, nor bind this debt upon them. *2do*, They offered to prove the sum was paid to the Earl of Louthian. *3tio*, Offer to prove the haill bygone annualrents are paid to the pursuers, or others having their warrant.

To thir it was REPLIED by the pursuers, *Imo*, The attested double must make faith, because it is a just double of the principal contract, attested by the defenders their own clerks and servants in the chamber; and craved the Town-Clerk and his servants their oaths of calumny, if they had just reason to deny that they had the principal in their own custody, or knew where the same was. The Lords ordained them accordingly to give their oaths of calumny. To the *2d*, it was replied, payment to the Earl of Louthian *non relevat*; because, by the contract of mortification, the said sum was ordained to be paid to the heritor, ministers, elders, and deacons of the forsaid parishes, at least to the major part of them, conjunctly. The Lords ordained the town, before answer, to have letters for summoning the Earl of Louthian to compear and depone upon the allegiance of payment. As to the *3d*, it was found relevant.

In this manner was *litis-contestation* made in the cause; and, conform to the act thereon extracted, Mr James Rocheid, George Cheyne, and Alexander Gaye compeared, and by their oaths of calumny, denied that either they have, or ever saw, the principal contract, or that they know this to be the just double of it. The Earl was summoned personally to compear and depone upon the payment, and was holden as confessed for not compearing. As for the allegiance anent the payment of the annualrent, the term was circumduced against the town, under the pretence that, *in termino*, they had produced nothing to verify the same. Against which they must be reponed, because they will refer it to the pursuers' own oaths.

Then a bill was given in by the pursuers, desiring the cause may be advised. The Lords declare they will advise it. The town protests they may be heard at the advising. Conform whereto, the parties' procurators being called in at the time of the advising, the libel, defences, and whole state of the process, being resumed by the clerk, it was

ALLEGED by Sir R. Sinclair, for the pursuers, That the town having proponed a peremptor of payment to the Earl of Louthian, they can never hereafter be heard to quarrel their title, or the justness of the debt, or to allege that the attested double, produced without the original contract, can make no faith to bind this debt upon them; seeing this is more than a tacit acknowledgment or homologation of the debt.

To this it was ANSWERED, by Sir G. Lockhart, *Imo*, That the payment proponed by them was a separate and distinct defence from that of the want of a title, and a defence which they intended only to recur to if the Lords should sustain their title as sufficient; and, accordingly, the Lords' interlocutor thereupon was only before answer. *2do*, It was only *ex supposito*; *esto* the town were ever debtors in that sum, which we noways grant, we offer to prove it is paid. *3tio*, It is an uncontroverted rule in law, *quod reus potest petere contraria*; he may propone contradictory, inconsistent exceptions; that, in case he succumb in one, at least he may prevail in another.*

* *Imo tantum diversa*, l. 5. l. 8. and 9. *ibique Gothofredus, D. de Exceptionibus*; l. 43. *ibique P. Faber, D. de R. Juris*; he cannot propone incompatible exceptions; yet see *Glossam, in fine, ad l. 14. C. de Fide Instrumentorum, et Glossam ad l. 39. p. 7. ad verbum Ex stipulatu, D. de Evictionibus, et Perez ad Tit. C. de Exception. numero 28. Dumnum ad regulam 20. Juris canonici: vide supra num. 115. et infra num. 352. et 449. 438.*

The Lords found, we might object against the validity of their title, though we had proponed payment, seeing it was *separatim*.

Then it was ALLEGED for the town, that the present magistrates were so great friends to all donations for pious uses, in this age so barren of all good works, that if any of them had the least conviction or knowledge that ever there were such a debt lying upon the town, or that the same were yet resting and unpaid, that they would not have the confidence to seek to be liberated therefrom. It is true, a mortification *ad pios usus* is *causa favorabilis*: it has many prerogatives in law; but no lawyer ever gave it that privilege to be due, where it is not sufficiently instructed. It is a great iniquity to defraud the poor, and to evacuate the will of the pious lady, it is true; but your Lordships must advert that in shunning Charybdis ye fall not on Scylla; that out of a headstrong zeal to make this mortification effectual, ye pass not a preparative of infinite more moment and danger to the lieges. What incorporation, yea, what private person, shall judge themselves secure, if it shall be in the power of two notaries, (who, of a long time, have been the opprobry of law; of whom Azo rightly said, *Ob imperitiam et nequitiam notariorum corrueit mundus*; and whom your Lordships, upon very wise and very grave considerations, have retrenched so, that their acts, except in some very few and inconsiderable cases, do not bind without the parties' subscription,) to draw on them what debt or sums of money they please to attest to be contained in such and such bonds, which they have collationed and copied? If your Lordships' under-clerks should attest a renunciation of your rights ye have upon Morhame, or North Berwick, or the mills of the Water of Leith, and this were adduced against you; I humbly desire to know, if this ye would hold as sufficient, without production of the principal renunciation granted by yourselves? It is, therefore, *certissimi juris*, that attested copies can make no faith; else all the debt the town has contracted since they were a town, and much more than they could bear, might be accumulated and made up against them. And as for this double adduced, it must be altogether rejected; unless they can say, that the said two under-servants had an act of council, or other warrant from the then magistrates, for their doing the same, or that the principal contract is yet extant; and nothing can bind a debt upon the town except either a principal subscribed writ, or an act of their council. And if thir pursuers lost their double of the said contract, they would either have made their address to the town for getting a new double under the clerk's hand, or would have craved it by an exhibition. Yea, if they were in a proving of the tenor, this copy would be but a very mean and sober article or adminicle for instructing the same; and therefore, since they are not able to produce the principal contract, the town can never be reputed debtors therein; or, if they were, there be many pregnant and unanswerable presumptions for its having been paid, which we use not here as a defence apart, but as qualifications to enforce why this double should not sustain.

To all this it was REPLIED, That they confessed a writ attested by two ordinary notaries, was not effectual to wreath a debt on the neck of any except the authentic were produced; but we were in a more concluding case, which had these singularities, viz. that the said Lady Yester's mortification was a thing notour to the hail country; and so, it being fixed that it once was, the town must shew where they satisfied it. Next, the persons who attest this double are more famous, and so more credit is to be given to them than to common notaries; and, which is most

of all, they are the town's own servants and under-clerks, and so we less suspect to have done anything to their prejudice.

To this was DUPLIED, That the singularities adduced inferred no disparity; and, notwithstanding thereof, this deed could make no more faith than if it had been done by two common notaries; because they denied the notoriety of the said dotation, as also allege, that notaries must necessarily be as famous persons as they. And whatever faith clerks, or their servants, may have, as to any acts that are relative to or depending anyway on processes, (which be *actus officii*;) yet as to the attestation of writs, (that being altogether extraneous and eccentric,) they can be in no other rank but that of common notaries, and so, by their own concessions, should make no faith.*

The Lords *in presentia* found, the attested double produced, notwithstanding all the singularities alleged, was not a sufficient title for instructing the debt; but, if they would raise an exhibition against the present magistrates' clerks, or others whom they could imagine to have the said principal contract, they would sustain the same; and, if they succumbed in the exhibition, they would indulge them the favour to convert this their action for payment into an action for proving the tenor of the said contract, and to propone a tenor by way of reply. They also reponed Louthian to his oath, he paying the expenses (*viz.* L.5 sterling) they were at in summoning him and extracting the act.

Advocates' MS. No. 236, folio 107.

1674. *January 28th.*—AT the same time, the Lords falling to advise the action pursued by the Poor of Jedburgh against the town of Edinburgh,—see the full debate *supra*, the 4th of November, 1671, No. 236,—where the Lords allowed the pursuers to propone a reply of the tenor of that contract between the town of Edinburgh and the Lady Yester, and to prove it by way of reply: whereupon they having led many witnesses, and their oaths being advised, the Lords found the tenor of it sufficiently made up and proven, and, therefore, decerned the town in payment of the sum, reserving their relief as accords against the Earl of Louthian; which they did, the said contract being *notorium*, consisting in the knowledge of some of the Lords, and many other persons living.

What made it severe was, that it seems of dangerous preparative to allow the making up the tenors of personal bonds for sums of money, where the universal custom is to give back the principal bond upon payment, and cancel it without having any discharge; which bonds may be again made up at this rate: especially considering there are no adminicles in writ to astruct it, as horning, arrestments, or other the like diligences or writs narrating it; nor is the *casus omissionis* proven, which necessarily ought to be done in all tenors. See Dury, 19th July, 1636, Lords Fren-draught and Bamf, where the Lords were very shy to admit the making up of a back-bond; yet they sustain it, only there be some difference: *Imo*, There were adminicles in that case; *2do*, It was referred to the party's oath. See *Craig Feud.* p. 140, and the laws there cited. But, what took off all inequity and harshness of this sentence was, that the pursuers found at last the principal contract, which stopped the mouth of clamour.

* See *De actibus causæ et judicii.* Stair's Decisions, 16th July, 1661, Lieut.-Colonel Osburne.

I heard Sir George Lockhart brisk to the King's Advocate, who was defending what the Lords had done in this case.

Advocates' MS. No. 438, folio 231.

1674. *January.* Captain JOHN HOME of Plendergaist *against* HOME of Linthill.

UPON a bill given in by Captain John Home of Plendergaist *against* Home of Linthill, the Lords ordained Linthill summarily to depone anent the receipt of 2000 merks from one Home lately dead, without giving any receipt or discharge of it. Which was inveighed at, as what rendered all summonses needless, where I am to prove a thing by the party's oath; for that privileged way of tabling matters was hitherto only known and practised against agents or members of the session: yet with the Emperor Antonius, *Licet non facile aliquid est mutandum de solemnibus, tam enubi æquitas poscit subveniendum est*, l. 7. D. *de In Integrum Restitutionibus*. But at this time the humours of people were so disposed to cavil, by an over-boiling passion and thirst after a redress of grievances, (the story whereof, see *alibi*,) that scarce anything could escape censure.

Advocates' MS. No. 439, folio 231.

1674. *February.* MAYNE *against* HAMILTON of Baderston.

IN the suspension, Hamilton of Baderston *against* Mayne, one of the reasons being, that the sum charged for was arrested in his hand at the instance of a third party,—which was not offered to be proven by the messenger's copy, as it ought to be, but by the charger's oath of knowledge that the said sum was arrested in his hands by, &c.—it was contended, it was not so probable, but only *scripto*; no more than such judicial and legal instruments could be proven by witnesses: *argum. legis*, act 95, Parliament 1579, where the tenor of letters of horning, and their executions, are ordained allenary, for the future, to be proven by writ.

Advocates' MS. No. 440, folio 231.

1674. *February.* The DUKE and DUCHESS of HAMILTON *against* GAWIN LOUDON.

IN an action pursued by the Duke and Duchess of Hamilton *against* Mr Gawin Loudon, as representing his father, who was one of the chamberlains of that estate, and had not made faithful count and reckoning; it was objected against the Duke's