instance of Colyier; for payment of a hundred merks, contained in a bond subscribed by him, as cautioner for John Selkirk; upon this reason,—That the bond was innovated, in so far as Selkirk, the principal, had granted a new bond to the charger for two hundred and fifty merks; which must be presumed to have been granted, not only for the first bond, but for the sum of a hundred pounds added thereto; otherwise it had mentioned that it was in corroboration as to the first bond. Likeas, upon the back of the second bond, there is a declaration, that it is in place of the first bond, and for a new security; and there being no reservation of the first bond, the law presumes that it must be in place thereof; because a greater sum *et inter easdem personas.*

It was ANSWERED for the charger, That the bond charged upon was opponed; which bearing no mention of the first bond, or that the same was retired or discharged, the law presumes that the posterior is no innovation, and cannot extinguish the old; which, by our practick, is never sustained, but where it is *in terminis directis,* as was found by two several practicks in Durie,—one *in anno* 1623, betwixt Stewart and Fleming; and another *in anno* 1624, in the case of Wishart's heirs.

The Lords did find the letters orderly proceeded, and refused to sustain the innovation, unless it were proven *scripto vel juramento.*

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1677. *February* 13. EUPHEN AUCHTERLONIE, JOHN and HENDRY AIKMANS, *against* MR WILLIAM AIKMAN.

IN a suspension and reduction, at the instance of Mr William Aikman, who was charged at the instance of Euphen Auchterlonie, his mother-in-law, and John and Hendry Aikmans, her children of a second marriage; upon a ratification, granted by him, of his father's second contract; whereby he was obliged, as apparent heir of the first marriage, to infeft the mother in liferent and the two sons in fee, conform to the provisions granted by his father; upon this reason,—that the ratification and obligement were conditional; and *intuitu* of a marriage to be solemnized betwixt the suspender and Mary Hepburn, by whom he should have gotten, in tocher, the sum of nine thousand merks; and the ratification doth bear this express condition, That in case the marriage shall not take effect, and not be solemnized and completed, in that case the ratification should be null; but so it is, that the marriage did dissolve by the death of his said spouse, within year and day, without any children of the marriage: and so he being prejudged of his tocher, in contemplation whereof he did grant this ratification, which ought to be reduced, and declared void and null.

It was ANSWERED for the charger, That the condition being, in case the marriage should not take effect,—it being solemnized and completed, that these words could import no more than if they had never been married, or the marriage consummated; whereas the suspender, and his then apparent spouse, were not only married, but did live together in family many months thereafter; and so, upon that reason, which never existed, the ratification cannot be declared null. Likeas, the ratification hath other onerous causes besides that of his future marriage; being in contemplation of a disposition made by his father, of his whole estate, with the burden of his debts.

The Lords did seriously consider this as a leading case; and found, That these

words, "*shall not take effect,*" could only be in reference to a considerable tocher then contracted; that he, being deprived thereof by the dissolution of the marriage, cannot be obliged to perform any thing that he is bound to by contract in contemplation thereof, as being *causa data causa non secuta.* But thereafter, it being offered to be proven, that the husband had gotten, by legacy, more than will satisfy *onera matrimonii,* during the time that the wife lived; the Lords found, that he should be proportionally liable to perform the ratification in favours of the goodmother and children of the second marriage.

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1677. *February* 21. The BISHOP of DUMBLANE *against* FRANCIS KINLOCH of GILMERTOUN.

THE Bishop of Dumblane, being allowed to be of new heard, did of new insist against the declarator at Gilmertoun's instance, upon this reason;—That not only there could be no declarator upon the king's renunciation and grant of redemption *in anno* 1650, for the reasons then adduced, founded upon the Bishops of Dumblane their constant possession, since the year 1621 that the same was mortified until the year 1638; as likewise during the suppression of bishops, by the Dean of the Chapel Royal; and sinsyne, by the Bishops of Dumblane, notwithstanding of any declaration or redemption granted by the king; but likewise, it was added, that he ought to be assoilyied from the declarator of redemption at Gilmertoun's instance, because any right the pursuer pretended to the said annualrent was, as flowing from the Earl of Buccleugh, who had, by a gift under the Privy Seal, only *in anno* 1610, right to all reversions of the Lordship of Hailles, whereof Markle was a part, upon the forefaulture of the Earl of Bothwell; whereas the mortification made by the king, *in anno* 1621, of the said annualrent in controversy, was founded upon another and prior right, whereby the same fell in the king's hands,—*viz.* a gift granted under the Privy Seal, of the said reversion, *in anno* 1600, to Gilbert Gordon of Sheirns; who, by virtue thereof, having used an order of redemption of the annualrent against Lady Anna Maitland, who had the fee of the said wadset made to Master Thomas Craig by the Earl of Bothwell, from her father; and against Dame Jean Flemine, her mother, and John Earl of Castles, her husband; as likewise, against John Lord Thirlestane, son to Chancellor Maitland, for his interest; he did thereupon obtain a decreet of declarator of redemption, and, in obedience thereof, all the said persons having right in the wadset, and annualrent, did renounce the same in favours of the said Mr Gilbert and the Laird of Lochinvar; who did heritably and irredeemably possess the same until the year 1620, at which time they did dispone and resign the same in favours of John Murray of Lochmabane, who thereupon obtained a charter under the Great Seal, and was infeft: which John Murray of Lochmabane having resigned the same in favours of the king *in anno* 1621, the king, by a gift under the Great Seal, did mortify the same to the Chapel Royal; whereby the Bishops of Dumblane, as deans of the Chapel Royal, did continually possess the said annualrent, in manner foresaid, until the intenting of this declarator: and, therefore, the foresaid Bishop, who was not obliged to know the whole progress of the writs of mortification, but having of late found out so clear a progress of rights, which not only were prior to Buccleugh's