an obligation to pay a sum, in case the duties were levied, would the Act take away that obligation without ever mentioning it? If the town of Glasgow has an immunity at Dumbarton, the town of Dumbarton must have an immunity at Glasgow.

PRESIDENT. This is an ungracious plea on the part of the town of Glasgow; yet I doubt how far this Court can apply the remedy. Over Acts of Parliament we have not the Prætorian power,—*adjuvare, supplere, corrigere*. The words of the Act are express. The case of *Roystoun* is not in point: for there was a private Act of Parliament upon a false narrative. The heir of entail was found to have right to the value of the subject, because the debts of the entailer were fictitious. Yet still the Court could not have stopped the execution of the Act of Parliament, because it proceeded upon a false narrative. A *personal* exception operates not against a *public* law. I doubt whether the town of Dumbarton may not insist that the contract is not binding on the one side more than the other.

BARJARG. Numerous inconveniences would arise were Courts of law to explain away the unequivocal words of an Act of Parliament. The original of this right was founded on a decreet-arbitral; so also may its modification be adjusted. This would be a wise measure in both parties.

On the 19th November 1771, "In regard that the Act imposes the duty on all ships, the Lords found that the Court can give no relief in *this* action; and therefore assoilyied."

Act. A. Lockhart. *Alt.* H. Dundas.

Reporter, Auchinleck.

1771. *November* 19. WILLIAM GARDNER and JOHN CAMPBELL *against* ROBERT AGNEW of Sheuchan.

DEBTOR AND CREDITOR.

Is a creditor bound, *de jure*, to assign his ground of debt to a co-obligant, who, without having been called upon before the term of payment, and, in particular and unusual circumstances, tendered him payment of his bond; and is such creditor, for having refused to assign, liable in damages to the co-obligant?

[*Faculty Collection, V.* 325; *Dictionary*, 3385.]

GARDENSTON. Upon the principles of the suspenders, a creditor would have action of damages against his debtor who did not pay between terms. It is not clear that there was any obligation to assign. It is plain that the old man Sheuchan was here required to do a thing at once which the judge would not have granted unless *causa cognita*.

MONBODDO. It is, no doubt, the law, that, at any time after the term of

payment the debtor is bound to pay. This may be often difficult, and some consideration may be had of that difficulty; but, on the other hand, there is no difficulty. A creditor may at all times grant the assignation here demanded. It is fixed in practice that a creditor must assign.

PITFOUR. The reason of suspension is well founded as to one-third. I do not know any law that says that money must be offered or demanded at a term: that may be the case in wadsets, not in common personal bonds. Such demand between terms may be a matter of incivility; but of that the law takes no cognisance. Here the creditor is *de jure* liable in damages: what those damages are is another matter hereafter to be examined.

COALSTON. If the suspenders prevail in their demand of damages, they will be lucky; if the charger is cut out of his debt he will be unlucky. It is, no doubt, indiscreet in a debtor to offer payment of his debt between terms, yet in some cases this may be necessary, as in the case of a cautioner when the principal debtor is *vergens ad inopiam;* but I doubt how far Sheuchan should forfeit his debt, merely because he did not assign the bond. This point of the obligation to assign is not so fixed as to make a country gentleman forfeit his bond for doubting of it.

JUSTICE-CLERK. Lord Gardenston has anticipated my opinion in judicial form. Parties being present, the Court will, *ex equitate*, order assignation. If, from the face of the bond, it had appeared that Donald was the principal debtor, the creditor would have been more to blame. If payment had been made in Court, the assignation might have been required; but there are many things which a Court of law will order to be done, of which the creditor himself cannot judge. There is no reason for awarding damages when a creditor does not assign *causa non cognita.*

KAIMES. The creditor did wrong in refusing the assignation; but then this wrong was innocently done. Were the subject in controversy a man's all, the argument for the suspenders would be the same. Still this is a nice case of damages; but I observe that the offer of payment was in bank-notes. The acceptance of them is *voluntatis*, not *necessitatis.* Why should damage fall upon the creditor, when, if the co-debtors had taken a bond of relief from Donald, there would have been no damage: This would be to make the creditor liable to the debtor for the debtor's omission.

PRESIDENT. I would repel the reasons of suspension. The law has laid down no rule as to terms of payment. A creditor cannot effectually demand instant payment: he must first registrate the bond, and then charge; *quia incivile est cum sacco venire.* Something of the same kind must prevail in the case of the debtor: some time must be allowed to a creditor for securing his money from thieves, or other dangers. It is unjust and unequitable to force immediate acceptance of money. In the case of the *Creditors of Buchan* it was found that no legal demand lay for an assignment. Every man that takes his debt is only obliged to discharge. Assignation is from equity; so also are assignations of collateral securities still upon principles of equity. Hence also it was formerly doubted whether a cautioner can force assignation because he has relief. Here the proper method was to have brought an action for assignation. It was the fault of the suspenders that they needed assignation, by reason of their neglect to take bond of relief.

PITFOUR. The case of *Buchan* was as to assignation among creditors, in order to adjust their own preferences. The question did not arise from the obligation itself.

COALSTON. If a debtor refuses payment between terms, he is only liable in annualrent and penalty, not in damages: the right of the debtor can never be stronger than the right of the creditor. If a creditor can be obliged to receive, he can only be liable in the expense bestowed in obliging him to receive.

ELLIOCK. Sheuchan could not see that Donald was the principal debtor; he might only have been cautioner, and then the assignation would have been unjust.

AUCHINLECK. A creditor may be compelled to assign; but the question here is,—Is he to forfeit his debt because he hesitates upon a point of law? The Court *here* is divided in opinion: Shall we punish a country gentleman for doubting?

On the 19th November 1771, "The Lords repelled the reasons of suspension." 5th December 1771, adhered.

Act. Ilay Campbell. *Alt.* A. Wight.

Reporter, Auchinleck.

1771. *November* 20. JAMES SINCLAIR *against* ROBERT ANDERSON and OTHERS.

FIAR.

Where an heritable subject was destined, in a marriage-contract, to the husband and wife in conjunct fee and liferent, and to the heirs of the marriage; whom failing, to the heirs of the wife:—The fee found to be in the wife, though the provision was not gratuitous, but reciprocal, and though nothing else was given in the name of tocher.

[*Fac. Coll.*, *V.* 328; *Dictionary*, 4,241.]

MONBODDO. The fee was in the wife. There was a land estate in her *in dubio*: it is not to be presumed that she meant to convey it to her husband. Circumstances may create a different presumption, as in the case of *Watson*, 1766. *Here* both the first and the last terminations are to the friends of the wife.

PITFOUR. Both the criteria occur here,—the termination and the original property of the subject. The decisions are not irreconcilable, although the subject proceeds from the wife. The husband is fiar if a sum of money *nomine dotis*, expressly or by implication, the husband being *dominus dotis*. *Here* there is another *dos*; all the father-in-law's goods and gear are given to the husband as a *dos*.

JUSTICE-CLERK. I cannot rest my judgment upon that; for, in effect, there were no such *goods* and *gear*. There is no more than a clause of style.