

No. 3. 1735, July 24. DR LEARMONT *against* WATSON of Saughton.

THE Lords adhered to the interlocutor sustaining Saughton's defence of compensation by the expenses on the mother Lady Cockburn's funeral.

No. 4. 1738, July 28. CLERK *against* FERGUSON.

THE Lords adhered to their former interlocutor, finding that the debt due by John to James Murray, as it stood in Glendorch's person, (N. B. He had affected it on the act 1621, as creditor to William Murray the father.) was not compensable by the debt due by William Murray to John. The Lords were much divided, the President and several others being against the interlocutor, which seemed strange to me.

No. 5. 1740, July 24. LEITH of Leithhall *against* GORDON of Law.

THE Lords allowed the proof even by witnesses before answer, in order to rear up this retired bill as a debt. I own I thought it a most dangerous preparative in the law of Scotland,—and Arniston was of the same opinion.\*—13th February 1739.

*Vide supra*, 13th February 1739, where it seems I have mistaken Arniston's opinion, or in the hurry misplaced these words, for he not only had been for the proof before answer, but now thought that without any proof at all Law's defence was good, and that this was not in the case of a *chyrographum redditum*. But all the Lords who spoke, particularly the President, differed from him. However it carried upon the question to sustain the defence.—*Renit.* Justice-Clerk, Drummore, Dun, *et me*, and Strichen and Murkle did not vote. We all thought, (except Arniston) that the bill was plainly a *chyrographum redditum creditori*, given up by Law to Leithhall the acceptor, and by him to Leith, the drawer,—that no proof by witnesses ought to be admitted where writing ought, and uses to be adhibited, and that it was plain from the proof, that in this case Law himself knew what was the law, and thought at the time that he should have had a document in writing of his giving up the bill. I also thought the proof too weak and uncertain to elide the presumption of law,—that it was chiefly of conversations with Leithhall before giving up the bill how matters stood betwixt him and Law, and even of that he gave different accounts to different persons,—that there was no sufficient proof but value might have been given Law for it on the 23d January, when the bill was given up, and no proof whatever after that till Law's death on the 7th July, except the alone oath of the relict, which was not sufficient to create a debt even against her husband or son. On the 24th refused a bill without answers.

No. 6. 1739, Jan. 2. MAXWELL *against* CREDITORS of M'CULLOCH.

AT advising, it appeared that one of the bonds due by Sir William Maxwell to Sir Godfrey of L.2000 in 1683, was originally payable to Sir Godfrey himself, that another bond of L.1200 was taken, payable not to Sir Godfrey, but to one of his creditors, Andrew Houstoun, and only became due to Sir Godfrey upon Andrew Houstoun's operating his payment out of another debt in 1692, after all the debts due by Sir Godfrey

\* Lord Elchies appears afterwards to have scored out the word "same," and added after the word opinion the words "of the interlocutor."

to Sir William Maxwell were in Sir William's person, so that as the compensation on this debt could operate no farther back than 1692, there was no great question that this debt might be applied to compensate the debt last acquired by Sir William,—but all the question was anent the L.2000 debt due to Sir Godfrey in 1683, before Sir William acquired any of Sir Godfrey's debts,—as to which, both the President and I, and some others, thought it behoved to apply in extinction of the first debt acquired by Sir William, according to the rule laid down by Lord Stair, and indeed the reason of the thing. But it carried by a good majority, that Sir William had the election to apply it to any debt he pleased, so as to save the collateral security that he had in the escheat for several of his debts. 14th November 1738.—2d January 1739, The Lords adhered as to the general point.—*Quod vide (infra.)*

The Lords found, that as to the three debts, the recompensation as then sustained must stand; but as to Martin's debt, that the creditors are not bound by that decret, unless Sir William Maxwell instruct the payment of that debt; and as to the balance, they adhered to the former general interlocutor of 14th November; and indeed were of opinion, that compensation does not by our law operate *ipso jure* but from the time of proponing, though it stop the course of interest, and is competent against assignees, &c. (President *et me, multum renit.*) But we seemed to agree that Sir William Maxwell could not recompense upon debts acquired after Sir Godfrey M'Culloch's bankruptcy; but as that point was not at all argued in the answers, we remitted that point to the Ordinary.—2d January 1739.

No. 7. 1742, Feb. 26. EARL OF STRATHMORE *against* EARL OF ABOYNE.

THE question was, Whether an heir can propone compensation on a moveable debt that does not devolve to him, or even an executor can propone it without confirming? Both President and Arniston thought that it was against law, but Arniston admitted that such was our practice;—and upon the question, it carried to adhere to the Ordinary's interlocutor sustaining compensation.

No. 8. 1742, Dec. 7. CREDITORS OF KINSTERIE *against* ROSS.

1st, WE sustained the objection to the decreets of constitution and adjudication, that the assignations or translations by Richard, Isobel, and Lilius, were not on stamped paper. 2d, Repelled the objection, that the bond of relief was not produced in the process of constitution, and repelled the objection that Mr James Winchester was not designed in the bond of relief by Kinsterie, in respect of the settled account among the four obligants, the other three bonds of relief and articles of depositions, all of the same date, and relative to this bond, and duly signed,—and repelled the objection, that that account was no finished transaction. 3tio, Found that Kilravock elder could apply any debts due to him by Kinsterie to compensate the debts due by him to Kinsterie, so as to save this debt secured by inhibition, and that he might also retain the debts for security and relief of his engagements for Kinsterie, and that it is competent to young Kilravock to plead the same, notwithstanding the decret in absence against the heir of Kinsterie. But remitted to the Ordinary to hear them as to the debts due by young Kilravock to Kinsterie.