

infer usury, if, with the annualrent of 300 merks, being but twelve pounds yearly, three stones of cheese were yearly delivered, over and above the annualrent: or, if it had been expressly in name of donation or gratification, it would open a door for eluding the law against usury; and, therefore, seeing it cannot be presumed to be usury or donation, it must be presumed to be in satisfaction. And, as to the renewing of the bond, it was upon caption, without any transaction or abatement.

The Lords sustained the compensation being instantly verified and liquidated by the charger's oath, and would not sustain such a preparative to be a cloak for usury.

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1676. *February 15.* AUCHTERLONY *against* The MAGISTRATES of ABERDENE.

THE Laird of Morphie having been incarcerated in the tolbooth of Aberdene, upon a debt due to the town, he produces a protection under the king's hand, upon payment of the annualrents, unto the messenger, and offered to pay the annualrents; yet the messenger put him in prison; wherein, he was arrested at the instance of Auchterlony; but thereafter, the magistrates having gotten a security for their relief, let him go. Auchterlony pursues the magistrates for his debt, as suffering the rebel to escape; who ALLEGED Absolvitor; because, he having protection under the king's hand, and offering the annualrent to the messenger, he unwarrantably incarcerated him; and therefore, they might warrantably let him go, notwithstanding of the subsequent arrestments; seeing they were accessory to the first error, and could not have been laid on, if that had not preceded.

It was ANSWERED, That the pursuer, having a caption, might have incarcerated him, being out of the tolbooth, or arrest him, being in it, without considering how he came there: and though he had had reason to have been liberated, by charges to set at liberty, as he had not, yet the magistrates were no judges, much less was the messenger judge, to the protection and offer of the annualrent; nor did he any wrong in refusing the same.

The Lords repelled the defence.

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1676. *February 16.* DOCTOR BORTHWICK *against* The EARL of CRAWFORD.

THE Earl of Crawford granted bond to Elizabeth Corstorphine and _____ Gourlay, mother and grandmother to William Borthwick, bearing the sum received in the name of the said William; and obliging the Earl to pay the same to the mother and grandmother, in liferent, and to William, after their decease, his heirs and assignees. But in the same bond, there is a precept of seaisine for infesting the grandmother and mother in fee; and seaisine given to them accordingly, without mention of William. But thereafter, the mother and grandmother dispone the annualrent to William, acknowledging that they were infest

in fee by error ; and that, by the personal obligation, William was to have been in fee ; and therefore they resign in favours of William : whereupon he is infeft, and now pursues a pointing of the ground.

It was ALLEGED for the Earl of Crawford, That there was a transaction betwixt the mother and grandmother and him, whereby they accepted lands for the sum, and entered in possession thereof. So that, if they had the right of fee, the satisfaction made to them must evacuate this right ; and the pursuer cannot quarrel the same ; because he acknowledges their right of fee, being infeft upon the resignation. And, if they had no right of fee, he hath no real right, but only the personal obligation ; which is no title for pointing of the ground.

The pursuer ANSWERED, That the mother and grandmother had, in their person, by their infeftment, a title of fee ; but which being by error and ignorance of the writer, might, upon that ground, be legally reduced ; and they ordained to denude themselves in favours of the pursuer : and they having done the same of consent, acknowledging the error, the pursuer hath acknowledged their title of fee *de facto*, but not *de jure*. So that the defender cannot quarrel the infeftment that he himself had given ; and, if the pursuer's title should not be sustained, but be put back to take a new infeftment, it would be ineffectual ; because the Earl's estate is carried away by expired apprisings.

The Lords sustained the pursuer's title for pointing of the ground.

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1676. *February 16.* The EARL of DUMFERMLING *against* The EARL of CALLENDAR.

THE late Earl of Callendar having married the Countess of Dumfermling, he became obliged, That the half of the conquest should belong to the Lady and her heirs, if there were no children to succeed thereto ; and did also renounce his *jus mariti* to her liferent lands, that she might dispose thereupon at her pleasure. This Earl of Dumfermling, as having right by progress to these provisions, did pursue the late Earl of Callendar and this Earl, then Lord Almond, to whom he had disposed his estate with the burden of his debt, at least without a cause onerous, concluding against both to denude of the half of the conquest ; and against the late Earl, to pay his intromissions with the Lady's jointure lands ; and against the Lord Almond, that the same might affect the estate. The late Earl being dead, Dumfermling insists against this Earl.

It was ALLEGED, No process against this Earl, till the late Earl's heir, or apparent heir, were called to liquidate these obligations against them ; or until the process were transferred. *2do.* That this Earl, having right by disposition, was in as good case as an heir of tailyie, against whom no process is sustained till the heir of line be discussed.

It was ANSWERED, That the conclusions against this Earl, being either upon his own obligation, to pay his uncle's debt, whereof both the said provisions were a part ; or otherwise being *declaratoriè*, that his disposition being gratuitous, the lands might be affected with anterior debts by apprising, and the same might be liquidate, there is no necessity to call any other : for, albeit, in a re-