It was ALLEGED for the defender, That he being neither nominated a tutor nor factor for the bairns, he was not bound to act for them; nor could be liable in law for omissions, which is the only ground of law whereupon tutors, curators, or factors were liable for not doing diligence; whereas he, being a creditor to the mother, was *in bona fide* to take a translation for a just and onerous cause; and was only obliged to pursue for recovery of so much as would pay his own debt; and, never having been required to make a retrocession, was not liable for the superplus.

The Lords, having seriously considered this case, as being singular, the defender neither being tutor nor factor; and, on the other part, that, by his own translation to the assignation, he was nominated a consenter for the use of the bairns, as well as the mother; so that, without his consent, nothing could be done, which did imply a clear trust; and that he having intromitted with the whole bonds, did thereby satisfy his own debt; and did never offer to the children, nor their uncle, who was joined with him, to make a retrocession, or to concur against the debtors;—therefore they did decern the defender liable: albeit he was neither tutor nor factor; but that the trust being known to himself, and he being master of the whole bonds, was liable for their damage, in suffering the debtors to become irresponsible; the case of minors being most favourable, who cannot deal for themselves, and their defunct father having relied upon the defender, his care and diligence.

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1677. *February* 8. The LORD STRANRAER *against* SIR ROBERT GORDON of EUBO.

THE Lord Stranraer having pursued Sir Robert Gordon of Eubo, as one of the three commissioners for managing his estate, for making full count thereof, according to the rental,—it was ALLEGED, That the commission was never delivered to him, nor was he required to meet with the other two; and all that he ever did being but as a friend, to assist the chamberlains, and sometimes to uplift money for my Lord's use, which he had so employed, he could not be farther liable but for his actual intromission.

It was REPLIED, That, by the defender's own missive letters, he declared that he was acquainted with the commission, and that he was willing to serve my Lord; and, having formerly intromitted before the commission, and managed the whole estate, he ought to be liable, not only for his intromission, but for diligence against the tenants; especially the commission being registrated.

The Lords, having considered the commission, that it did not bear any salary or allowance for pains; and it not being proven that he did accept thereof, being required, with other two who were joint with him; they did assoilyie from doing diligence, and found him only liable for actual intromission.

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1677. *February* 9. JOHN CALLENDER *against* DAVID COLYIER.

IN a suspension, raised at John Callender's instance, who was charged at the

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