

tradesmen for repairing the church, to be examined anent what was then communed to be given to Dalswinton for his proportion, in respect he was at the greatest charge in repairing it. Some of the Lords inclined to think that Kilbean could not transfer or alienate his room in the church to Garnsalloch, but that it passed only *cum territorio*, and with the lands; but this was not decided. See Dirleton's Doubts and Questions, *voce* Prescription, Where *loca publica præscribi possunt*.
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1699. *November 23.* JOHN TOD *against* ROBERT WIGHTMAN.

ANSTRUTHER reported John Tod in Reidaiikers against Robert Wightman, merchant in Musselburgh. The said John, being a tenant in a grass-roum to the Earl of Traquaire, sold yearly his wool and cheese to the said Robert; and there was a current trade and commerce betwixt them for 24 years, *viz.* from 1674. He now pursues him for payment of all the goods he had delivered during that space. Wightman ALLEGED, on the 83d Act 1579, That all above three years before the date of the summons is prescribed *quoad modum probandi* by witnesses, and can only be proven *scripto vel juramento*. ANSWERED,—It has been a current account from the date of their first correspondence, and so could not prescribe; as has been always decided in merchants' and tradesmen's accounts; and particularly 13th *November* 1677, *Wilson against Ferguson*. REPLIED,—That takes place in petty accounts, where things are sold in small and by retail; but not where bargains are made in gross and by the bulk; and here the subject of their yearly traffic would amount to L.1000 Scots and more *per annum*; and can it be imagined that all that was trusted through such a long tract of time as 24 years? And to allow the pursuer to prove delivery of the goods by his servants, for all that space, were to ruin the defender, who cannot prove his partial payments. Likeas, the pursuer behoved to pay his rent yearly; and out of what else could that be done but the product of the ground he sold to the defender? And at this rate a merchant, buying bear or other victual, might be pursued for 20 years back, and the delivery proved by servants who bought it in. Likeas, this defender produced a letter, whereby he desired the pursuer to advance him L.50 sterling to account, and if he was not debtor in so much, he would repay it; which imported that all these bygones could not be owing. Likeas, in a former process betwixt them, the defender's oath of calumny being craved, he had deponed the balance betwixt them was very small.

Some of the Lords inclined to think that the currency of accounts, so as to interrupt prescription, could not be extended to such furnishings as this: But the Lords, on the separate grounds of the pursuer's letter, and the defender's oath, did sustain the defence of prescription for all years above the three last.
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1699. *November 28.* ANNA HAMILTON *against* LORD TORPHICHEN.

ANNA Hamilton, relict of Sandilands of Hilderston, having adjudged 10,000

merks owing by the Lord Torphichen to her husband, on an heritable security, she pursues for payment. It was ALLEGED for Torphichen, He must have compensation; because Hilderston was owing sundry sums by bonds, and he stood cautioner for him, and was forced to pay the debt. ANSWERED,---No compensation but *inter debita ejusdem speciei*; but here, moveable personal bonds and tickets are obtruded to compensate and extinguish an heritable right whereupon infestment has passed. REPLIED,---Compensation being *debiti et crediti contributio*, it clearly took place here; for, though seasine had followed upon the heritable bond, yet it bore also a personal obligation to pay, beside the feudal security of the *annuus reditus*; and which, being a liquid obligation, may be clearly compensated and taken away by other personal debts.

The Lords at first made a distinction betwixt the grounds of compensation extant and contracted before the taking the heritable bond and completing it by infestment, and the debts contracted subsequent; and seemed to incline that all before the date of the seasine might be good grounds of compensation: though it was urged that the granting an heritable bond was a tacit passing from using these anterior grounds as compensations; just as the granting a blank bond was a renouncing of compensation. But the Lords thought this only a presumption; *quæ cedit veritati*, and could not hinder the proponing and applying the compensation now. The difficulty lay as to the debts contracted after infestment was taken, if they could compensate and extinguish an heritable right. And it was urged by some of the Lords that it could not: because, the investiture being now feudal, it were to unhinge the security of the lieges, if personal debts contracted after could meet a singular successor, and extinguish his right by compensation, no more than his author's back-bond militates against him after it is once made real by infestment. Others said, this was no more than what occurred when one acquired an apprising or an adjudication; for they might be elided by any deed of their author's without a formal registrate annunciation, whether it was a simple discharge or an intromission with the rents, and that even found probable by witnesses, *4th February 1671, Wishart contra Arthur*; and they had nothing to rely on but the recurring on their warrandice. But the Lords, considering this action of the Lady Hilderston's being for payment of the principal sum, it occurred to some, what hindered but any debts, whether prior or posterior to the seasine, should compensate the pursuit on the personal obligation to pay? and ordained the parties to be farther heard thereupon.

There were decisions cited for both parties: For Torphichen, *14th February 1633, Keith contra Herriot*, marked by Dury; and *8th July 1680, Rankin contra Arnot*, in Stair. And, for the Lady, were quoted *2d January 1667, Oliphant contra Hamilton, per argumentum à contrario sensu*; and Sir George Mackenzie's Observations on the Act of Parliament 1617, anent Registration of Seasines, where he affirms that infestments of annualrent cannot be extinguished by compensation.

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1699. November 29. JAMES ROSS against ALEXANDER DRUMMOND of EASTFIELD.

JAMES ROSS, as assignee by Skein to a bond of 1200 merks, granted by the