No 46.
A bond bearing for borrowed money, and renouncing all exceptions in the contrary, sustained, though it was granted for the cure of a disease, and the debtor offered to prove, that it was not effectually cured, but broke out, after granting the bond, worse than ever, through the creditor's negligence.

1708. *December* 24. Dr Robert Trotter *against* Captain John Telfer.

Dr Trotter having charged Captain Telfer for payment of a bond of L. 10 Sterling, he suspended, upon this reason, that the bond was granted for the cure of a malady the suspender laboured under, which was ineffectual by the Doctor's negligence, in not overseeing the dispenser of the medicaments, and by misapplication in the quantity of these medicaments.

Answered for the charger; 1*mo*, If physicians should be called in question for their pretended misapplications, every unfortunate accident upon a patient's health would be a pretence for repetition of physicians fees, which is as absurd as to repeat a lawyer's fees when the cause is determined against his client. 2*do*, The bond charged on bearing for borrowed money, and renouncing all exceptions in the contrary, and being delivered after performing of the cure, the suspender could not recur to allege upon any pretended misapplications, &c. whatever he might have done before.

Replied for the suspender; 1*mo*, It is true physicians are seldom quarrelled for their misapplications and faults, the grave buries many of these, and many physicians have that regard to their own, and their patient's credit, as not to bring questions of this kind before any judicature; but, it is as true, physicians are tied to the laws, and the great trust these have of mens lives, requires more diligence than in other offices, *L.* 18. *Pr. L.* 44. *D. Ad L. Aquiliam.* The case of an advocate is not the same, who may not be to blame when the Judge determines against his client; and yet, if he were grossly negligent, there is no reason for his getting an honorary. 2*do*, It doth not alter the case, that the bond was granted after the cure was thought to be performed, when it was not, since *ignorantia facti nocet nemini.*

The Lords repelled the reason of suspension.

Fol. Dic. v. 1. *p.* 430. *Forbes, p.* 291.

No 47.
A forfeiture having been rescinded, a bond previously granted, was found to impute *pro tanto*, in satisfaction of the claims for which the obligant, in virtue of the act rescissory, might have been accountable.

1723. *December* 7.
Earl of Delorain *against* The Dutchess of Buccleugh.

In the year 1688, the Dutchess of Buccleugh being at that time possessed, by a gift from the Crown, of the Duke of Monmouth's personal estate, in consideration of this, and that her son, the Earl of Delorain, was not otherwise provided, she granted him a bond of provision of L. 26,000 Sterling. The Duke's forfeiture, amongst others, being rescinded by the general act rescissory in the year 1690, the Earl of Delorain, upon that medium, insisted in a process against her Grace, to account to him for the Duke of Monmouth's personal estate, having right thereto as executor decerned to the Duke his father. The

Dutchess did not oppose the action, only craved, that the bond for L. 20,000 Sterling, granted and paid by her to her son, the pursuer, might be imputed *pro tanto* in satisfaction of his claim; and it was *pleaded* for her, That it never was intended my Lord Delorain should have both the bond and his father's personal estate; the bond was granted when my Lady Dutchess had no fund to answer it, other than this personal estate, having no power to charge it upon the entailed estate; and therefore, as the bond was plainly given in contemplation of the Dutchess having this subject, it being taken from her, the bond must fall to the ground as *sine causa*. It was *answered*, There is a great difference betwixt the cause of granting a bond, expressed in it, to make it effectual, and those by-views or motives which possibly may influence the granter, and even determine him to make the provision greater or lesser.——THE LORDS found the bond of provision, by the Dutchess to the Earl of Delorain, must impute at least *pro tanto*, in satisfaction of the claims for which the Dutchess, in virtue of the act rescissory, might be accountable to the Earl as executor to his father. No 47.

Fol. Dic. v. 1. *p.* 428.

1724. *February* 5.

JOHN WATSON in Barmuir *against* JAMES FEDE in Fultoun.

No 48.
A supersedere was granted to a debtor by his creditor, upon the belief that the other creditors would concur. It was found to be not binding; the whole creditors not having concurred; but it was declared, that the granter of it could not be the first user of diligence against the debtor.

FEDE having suspended a charge at Watson's instance, upon this ground, that the charger had signed a *supersedere* to him, of which the term was not elapsed; it was *answered* for Watson, That he had subscribed the *supersedere*, upon the faith that all the suspender's creditors were to do the same, which appeared, from the narrative of the writ, to have been the design; and since not above a fourth part of the creditors had signed, the charger could not be bound; for it was not to be thought that he could have tied up himself from doing diligence, and left the other creditors at freedom.

THE LORDS found, that the *supersedere* was intended to be signed by the whole persons narrated in the beginning thereof, and found it not binding on those who had signed, in respect a small number only, and not the whole, had signed.

Upon a reclaiming bill for the suspender, representing, that though the greatest number of his creditors had not signed, yet none of these had done any manner of diligence since the date of the *supersedere*,

THE LORDS adhered to their former interlocutor, with this quality, that the charger could not be the first user of personal diligence against the suspender.

Lord Reporter, *Forglen.* For the Charger, *Arch. Stewart, jun.* Alt. *Ja. Boswell.* Clerk, *Mackenzie.*

Fol. Dic. v. 3. *p.* 300. *Edgar, p.* 21.