rator * only, it was not the proper place for proponing any defences to stop the same; but they behoved all to be reserved to the special. REPLIED, If it were a partial exception, then he had some reason to plead it were incompetent *hoc ordine;* but for a total defence that takes away the whole libel, the same may very well be objected against the general declarator. The Lords found it might come in *hoc loco.*

Then ALLEGED, That the horning could never be taken away summarily by way of exception, unless they were in an ordinary action for reducing thereof; seeing this pretended nullity was only *nullitas facti non juris,* and so behoved to abide trial and probation; *viz.* that he lived then within that shire and regality; which trial cannot be taken here, but in a process apart. This the Lords found relevant, and therefore declared; reserving reduction of the horning as accords. *See Dury,* 19*th March* 1678, *Lamb; infra No.* 423, [11*th November* 1673, *Home* against *Craw.*]

Then it was OBJECTED, That the horning is yet null; and that by such an intrinsic nullity as verifies itself, needs no probation, and so must be received summarily in this process without any reduction: *viz.* it is not registrate within fifteen days, conform to the act of Parliament. That hornings ought to be registrate within the foresaid space, is proven by the law; that this is not so registrate, appears by ocular inspection, and needs no other trial; hence necessarily follows the conclusion that this horning is null. *Vide act* 75, *Parliament* 1579. The Lords found this nullity receivable by way of exception.

Then it was ANSWERED, The act of Parliament requires only fifteen free days, neither accounting the day of the denunciation, nor that of the registration; conform to which rule this horning is duly registrate, seeing it is registrate on the sixteenth day after the denunciation.

The Lords sustained the registration as lawful. *Vide* Hadington, 3 *December* 1611, *Lord Torphichen* contra *Earl of Mar;* see act 42, in 1555, and the many laws there cited.

Advocates' MS. No. 252, *folio* 112.

1671. *November* 10, and 14. FRANCIS HEPBURNE of Beinston *against* CONGILTON of that Ilk.

Nov. 10. Beinston having married a daughter of Congilton's, by contract of marriage Congilton was obliged to pay 5000 merks in name of tocher with his daughter. There is a pursuit raised at the instance of Beinston against this Congilton, as heir to his father, and on the other passive titles, for payment of the sum with the annualrent thereof since the term of payment, with the penalty incurred by him because of his failyie. It was DEMANDED first which of the passive titles they insisted on. They offered to prove he was heir served.

Then they ALLEGED absolvitor from annualrents, because they being only due *ex pacto* or *lege* as after denunciation upon a horning, there was none of these

* Exceptions not against the executions of the summons and the legality of the hornings, can only be objected against a general declarator of escheat.

here, there being no obligement by the quality of the right for payment of the same, nor were ever any of the parties charged for making payment of the principal.

To this it was REPLIED,—That the contract of marriage bore no obligement indeed for payment of annualrent, but they had done the equivalent, in so far as they had been in the use of payment of annualrents for this sum by the space of twenty years and more; which, by our law and the constant tract of many decisions, is sufficient to induce a necessity upon the debtor to continue in payment of annualrent so long as the principal sum remains unpaid; which he is presumed to do, that so he may obtain a continuation for a time; and by which, if he find himself lesed he has a remedy, viz. payment or consignation of the principal, *quæ sistunt cursum usurarum.* And if he had not paid me annual, then I would have lifted my sum and given it out to those who would have paid me interest for it; or if ye had not paid me willingly, then I would have denounced you, after which annualrent would have been due. (*Vide* Dury, 8*th March* 1628, *Foster and Clerk,* with the laws there cited.)

To which it was TRIPLIED,—That use of payment of annualrent for a sum otherwise not bearing annualrent, was so far sustained in our law, where it was made by the debtor's self, that the party payer had not only no repetition of the annualrents paid, as *indebite soluta ex capite condictionis indebiti,* but also it bound him (he being otherwise free,) in payment of annualrents *pro futuro;* but that payment of annualrents made by a third party shall draw on this burden and slavery upon the debtor, is a thing so remote from all human comprehension, law, and reason, that no man endowed with sense will offer to aver it. But this was their case; any annualrent paid, it was paid by the said Congilton's mother and goodame, and so *ex pietate et affectione materna.* What if they had gifted it to their daughter, should that tie the father in annualrent? What if a third party should pay annualrent for a sum which I am obliged to pay without annualrent; should that prejudge the debtor, and ensnare him in annual without his own consent or knowledge?

It was QUADRUPLIED,—That the payment made by the wife and mother must be reputed as if it had been made by Congilton's self; because, he being a simple man, and overseeing none of his own affairs, the same were wholly managed by his wife, and, therefore, the payment made by her must bind him as if it had been made by himself. For what if a servant of Congilton's had paid it, the payment would ever have been reputed to have been in name and behalf of his master; and, accordingly, discharge would be given, not to him but to his master, at least to him in his master's name; and if so, then much more must the wife's payment bind him, she being a person more near to him, and so may the more naturally oblige him.

QUINTUPLIED,—That no payment made by the wife could prejudge the husband, unless they say it was done by his warrant and order; or that she had a factory from her husband, and was *preposita negotiis;* or that *ratum habuit* by allowing the same thereafter; or that it was *ex certa ejus scientia.* And I desire to know, if a principal should pay annual for a sum in a bond for which he is not bound in annual, if that will be enough to make the cautioner (who knows nothing of the payment) liable also; seeing it is certain that neither *correi debendi* nor *credendi* can do any deed to the prejudice of their other party.

The Lords found the payment not relevantly qualified, unless the pursuers would say it was made by warrant either tacit or express of the debtor, or that *scivit et tacuit ac non contradixit*, or that the wife had a factory.

After which it was ALLEGED that a warrant behoved to be presumed; and for the wife, she had a natural factory where the husband was incapable. And though there might have been some doubt if they had founded only on two or three years' payment, yet there could be none here, where there was so long, so deliberate, and continued a tract of payment by the space of twenty years and upwards. His accepting of discharges, and putting them up in his charter-kist, and keeping them there, was an evident ratihabition. *Item*, his son, whom they now pursue, he paid some annualrents. ANSWERED,—None of these are sufficient so much as to colour or shadow the payment, as done in any measure by a warrant. As for the son's payment, *first*, it was but *unicus actus*, and so says but little. *2do*, He was minor at the time. *3tio*, His father was then in life; and therefore, no such act done then can prejudge him now. REPLIED,—It cannot be called *unicus actus*, because they conjoin the payment made by him with the payments of other years made by his mother and grandame. *2do*, *Non relevat* to say he was minor; except ye will say he revoked it *intra quadriennium utile*. To the *third*, though his father was in life, yet he was his apparent heir, and was *utilis negotiorum gestor* for his father. The Lords required they should condescend farther and say either command, factory, ratihabition, or knowledge.

Then they ALLEGED,—That in 1665, the pursuer having required his money from Congilton, in regard he had then use for money, Congilton not being able to command it, he deals with Sir Robert Hepburn of Keith, who was owing him the like sum, to lend Beinston what money he stood in need of; who accordingly does so, but takes a bond off Beinston, bearing annualrent. Now their defence is compensation, in so far as, If ye liberate Congilton of annualrent for the tocher, then ye must also free Beinston of the annual of the said sum at Keith's hand. ANSWERED,—The ground of compensation is most irrelevant, it nowise being *ad idem*; for what Sir Robert then gave was not *datio in solutum* but truly *mutuum*, and so he might provide himself with what manner of security he pleased. *Et sic non versatur circa idem subjectum; nec est inter easdem personas.*

Then they offered to prove by Congilton's oath, that he promised to pay annualrent for this sum. This was found relevant.

When they insisted for the penalty, it was ALLEGED,—That he was minor, and was never interpelled to pay the same till of late; and so not being *in mora*, he could not be liable in any penalty. My Lord Newbayth, conform to some practiques of that tenor, refused to decern for any penalty if they insisted for any annualrent, but offered to modify as much of the penalty as would satisfy the annualrents of the sum; but refused to decern for both.

Advocates' MS. No. 247, *folio* 111.

*Nov.*14.—THE debate at No. 247, betwixt Beinston and Congilton being reported this day, the Lords found the use of payment of annualrent made by Congilton's mother and lady, sufficient to enforce the necessity of payment upon this Congilton, heir to his father, as if the same had been due by paction; in regard it consisted in the knowledge of sundry of the Lords that Congilton, after a fall, was *frappé*

and unfit for any affairs, and that his mother managed all with his consent; and that he accepted the discharges, and that the same are in the charter kist; and that it was *utiliter gestum*, since Beinston would have comprised if they had not paid annualrent. *Item*, the payer was mother to both, viz. both Congilton and the Lady Beinston; and so, presumed to have a like affection and care for both. On thir considerations the Lords decerned both for principal and annualrents.

Advocates' MS. No. 253, folio 112.

1671. *November* 14. ANDREW MARTIN *against* MR. JAMES KENNEDY.

THIS was a suspension of a decreet obtained before the Bailies of Edinburgh, on thir two reasons, *first*, Because the said Andrew, pursuing as factor for an Englishman, no factory was produced, and so, he having no title, the decreet was intrinsically null; *second*, Kennedy at that time was Sheriff-clerk of Aberdeen, and so not liable to the Bailies' jurisdiction.

It was ANSWERED to the *first*, They opponed the decreet wherein he is holden as confest. To the *second*, He cannot be heard to decline the jurisdiction of the town; because they offer them to prove he resided forty days before the decreet pronounced, within the town, or after it; and so by the constant practique, he must be answerable thereto.

This was found relevant, and admitted to probation.

Advocates' MS. No. 254, folio 112.

1671. *November* 14. ARCHIBALD HYSLOP, Bookbinder, *against* MONTGOMERY of Mackbiehill.

THIS is a charge upon a bond of 200 merks; which was suspended upon this reason, That though the bond bore borrowed money, yet he offered him to prove by the charger's oath, that the true cause of granting this bond was not money received, but allenarly for prentice-fee, to be paid by the defender for his son, whom he had bound to the charger. Which being granted, then the charge behoved to be suspended *simpliciter*, and the bond declared void and null; because he offered him to prove that the boy lived not half a year after his entry, and so there can be no prentice-fee due, and the bond falls *in non causam*. It is *causa data causa non secuta*; it now remains with the charger, *sine omni causa*.

ANSWERED,—That whatever would be, where the prentice-fee is due by an indenture, which has mutual obligements on both master and prentice; on the master to teach his calling, on the prentice to serve dutifully; yet it is far otherwise where there is a bond granted for borrowed money: in which case he obliges himself *in omnem casum* for the money, and undergoes the hazard, whatever it may be; unless he be able to make it appear, that *per eum et ejus culpa*