name, should operate and take no effect against him, the debt being paid in manner above expressed.

Against this it was ALLEGED by Sir George Lockhart, That the bond can never be declared extinct, but the assignation taken thereto by the cautioner must stand good, in so far as the said bond was satisfied by the sole moyen and credit of the cautioner, who borrowed the money owing in the bond from Johnstone of Hiltoune; for which a bond was again granted by Foulden, as principal, and the said Sir James, (who was cautioner in the first bond) as cautioner; and so as to him it was just alike as if he had remained cautioner in the first bond.

REPLIED,—By the payment, the first bond was wholly taken away, and though money was borrowed for paying thereof, yet it must be reputed to have been satisfied by the principal, since he continued principal in the new bond, and liable to the cautioners by an express clause of relief.

The Lord Newbayth inclined to sustain the declarator; and thought the taking the assignation to the first bond, *ad majorem cautelam*, and for better recovering of his relief, unwarrantable.

Yet Sir George contended he might, since he continued still debtor for the sum by becoming cautioner in the second bond.

Advocates' MS. No. 240, *folio* 109.

1671. *November* 10.

A CERTAIN person pursuing a woman to relieve him of some ministers' stipends paid by him for his possession of some lands set to him in tack by this woman; ALLEGED absolvitor from this, because the time she signed it, she was ***vestita viro***, and so it cannot oblige her. REPLIED,—She cannot be heard, because he offers him to prove she has homologated the said tack since her husband's decease, by accepting of the tack-duty, and granting discharges thereupon. DUPLIED,—What payment she has got must never be reputed ratihabition of the tack, because she ascribes it to another cause, *viz.* her liferent infeftment.

Advocates' MS. No. 242, *folio* 110.

1671. *November* 10. ——— *against* FRAZER of Middelty.

FRAZER of Middelty being pursued on a registrate horning to pay the annualrent of the principal sum, since the date of the denunciation, conform to the act of Parliament made in anno 1621; it was EXCEPTED that he could not be liable in annualrent, because the horning whereupon it was sought was most unwarrantable, in so far as it did not bear any previous precept of the sheriff's, who pronounced the decreet, to have been raised, at the least no charge nor execution given thereon; which ought first to have been done, conform to the 177th act *in anno* 1593, compared with the 10th act, in 1606, and to the constant practique of

the kingdom. This defence was found relevant. *Vide infra*, [*No.* 251, *Nov.* 11, 1671, *Mathy* against ———]. *Advocates' MS. No.* 243, *folio* 110.

1671. *November* 10. CHRISTOPHER LE NOIR, Frenchman, *against* JOHN BROWN, Younger and Elder.

THIS was a summons at this stranger's instance, bearing, How he having come to Scotland upon his affairs, and being kindly entertained by this John Brown, the factor, and invited sundry times to dine with him at his house; one day after dinner, the father declared by his son (who was interpreter betwixt them, Le Noir understanding no Scots, and the father having no French,) *that he would* very gladly his son should merchandise with him; and if at London he should furnish him with watches or any commodities of that kind, he should not repent it. According to which communing, young John Brown having come to London, and received from the said Le Noir, in trust, near L.200 Sterling worth of merchandise, he now pursues both the father and the son for making payment of the said sum to him; the son as having received the ware; the father as having encouraged him to trust his son, and promising he should not suffer him to be a loser; so that certainly *secutus est fidem patris*, yea the half of this would have sufficed in England, (whose customs we follow where we have none of our own,) to make the father liable: If ye be but present with a man when he takes off merchandise it will bind you; but I think this is only if you say the party is sufficient. And for farther security, he arrests in the father's hands sundry sums of money, as alleged, owing by him to his son, by virtue of his mother's contract of marriage.

ANSWERED,—The first part of the libel is wholly irrelevant, unless they say letter of advice, bill, or some other express warrant or promise, that whatever he should furnish his son should be allowed; and as for the pretended words libelled on, they are so far from inferring any obligation against the father that they deserve no answer.

The Lord Newbayth was clear to assoilyie from the summons, as irrelevant. The last part he sustained, and ordained the contract of marriage to be exhibited.

Vide infra, November 8, 1676, *Kinneir, No.* 502.

Advocates' MS. No. 245, *folio* 110.

1671. *November* 10. NICOLL *against* HUNTER.

A BOND was craved to be reduced upon this reason, That it was granted *in lecto ægritudinis*, in so far as the granter, the time of the making thereof, was affected with the pest, was enclosed upon that account, never came furth, but within some three or four days thereafter departed.

The Lords assoilyied from the reason, as not relevantly qualifying death-bed, though the bond was *probatio probata* to itself, narrating his sickness of the