ture deliberation upon all the writs and testimonies produced, the bonds in question were partly conditional, and partly for one and the same cause, *viz.* for granting confirmations to the feuars of their feus; and that the bonds can have no effect, nor belong to this donatar, till the condition be purified, and the cause performed; and, therefore, assoilyie the defender from this present process of declarator; but prejudice always to this donatar, upon performance and purifying of the conditions of the bonds, to pursue a new action of declarator, as accords.

After which, the pursuers having made their address to the advocate, who was then sick, and came not to the Session; he seemed to be extremely stumbled at the decision, and boasted, after the yule vacance, he would come to the house and show the Lords such invincible grounds for his Majesty's interest (which he said was horridly wounded and misregarded thereby,) that would make the Lords, if not alter, at least resume and demur on what they had done. But he was not so *good as his* word, and came not abroad all that Session; but, to supply his absence, and to do something, he wrote a letter to the Lords to reconsider the cause, in regard his opinion was contrary to their Lordships: and which magisterial way of dictating to the rest of the Lords, Sir George Lockhart hectors furiously in his informations. But however, the Lords complied so far with him, as to allow them a *new* hearing: wherein the pursuers insisted much to make it appear that the counter-obligements were not correspective nor real, and which is fully represented by us formerly; yet the Lords advised it of new, and adhered to their former interlocutor.

Sir George Lockhart, in his last information in this affair, was very bold and severe against the advocate, with whom only he hath the vanity seriously to contend, looking upon him alone as his equal, though he thinks him mightily crazed and bruized by his winter's fever. In the end of it he tells the Lords, that *desultatoria illa levitas* in fixing or altering interlocutors after full deliberation, were most derogatory to and a prostitution of their honour and Majesty. The Lords would judge thir expressions petulant and reflecting, and censure them in ordinary advocates; but they stand in some awe of him.

The pursuers were so much the more damped, that by their moyen they had flattered themselves a certain victory; and the Lords' deportment was so much the more commendable, that they held justice so fixed, where they had so great temptations to waver. Vide the decision *supra*, at the *8th of December* 1671, *Mr. Arthur Gordon* against *Laird of Drum*.

Advocates' MS. No. 377, *folio* 156.

1672. *December.* SIR JO. YOUNG of Leny against ISAAC BRAND.

IN the same month of December 1672, in a competition between Sir Jo. Young of Leny and Isaac Brand, baxter in the Canongate, about twenty-eight bolls of wheat, of the growth of the lands of Grothall, once appertaining to Mr. Jo. Smith, alleged sold by the said Mr. Jo. to the said Isaac, and who obtained a decreet against William Young, tenant of these lands, upon a pretended promise made by the said William to deliver the said bolls to him: this promise the

commissaries admitted to be proven by witnesses. And which twenty-eight bolls were also acclaimed by the said Sir Jo. as having best right thereto, because he stood infeft publicly in the said lands of Grothall near a year before the time of the said pretended sale or promise of delivery, and had also obtained a decreet against the tenant before the Sheriff for payment of his said farm to him. Both parties contending that the tenant behoved to deliver the bolls to them; and particularly Isaac Brand contending the tenant must answer him whether he be found liable to Lenie or not, seeing he had him personally bound to him, and he had followed his faith, and paid the price of the bolls to Mr. Jo. Smith, at the time of the tenant's promise, which otherwise he would not have done, and the tenant must blame himself for entering in any such agreement, seeing he therein followed the faith of Mr. Jo. his master as to any hazard he could incur thereby.

The Ordinary upon the bench inclined to sustain this against the tenant; but they having craved the Lords' answer, the Lords found that tenants should not be liable in double payment of their duties in the general, and that this tenant could not be bound by his promise to the said Isaac, *esto* he had made one, if so be it should *ex eventu* appear Sir Jo. Young had a better right to the said wheat than he or Mr. Jo. Smith his author had, who was then denuded in favours of Lenie; (though it is pretended the same was not then made public, but was a mere latent and clandestine right;) and, therefore, having secured the tenant, they ordained the parties competing to dispute which of them had best right.

Which interlocutor, as it was most just in itself, so it is most agreeable to the constant strain of former decisions, whereby the Lords have oft found, though tenants have given bond for their duties, either to their master, or to a third party, his creditors, at their master's order, and their master chance either to be denuded of the property, or a third party by arrestment or otherwise, to these duties, such bonds could not be obligatory against the tenants granters; which they granted allenarly *intuitu* of the duties they were owing, which being evicted *aliunde*, undoubtedly the bonds *ob cessantem causam* must also cease and fail.

In the debate betwixt the parties, it was OBJECTED, that Isaac Brand's decreet was intrinsically null, and the commissaries had committed iniquity in finding the tenant's promise probable by witnesses. ANSWERED, that it is true promises *et nuda pacta, quæ in nuda emissione verborum consistunt*, and so can only be interpreted according to the meaning of the parties who made them, are only probable *scripto vel juramento*, seeing they may be affected with qualities and conditions *quæ sub sensus non cadunt*, and so whereof witnesses may be ignorant; but here they were not in that case, but in the case of a *pactum ex incontinenti adjectum emptionis contractui*, and so was *pars contractus et sapiebat ejus naturam*, being accessory thereto, and as the bargain of sale is probable by witnesses, so is this promise depending thereon, and being a complex transaction, and consisting *in acto cadente sub sensum*, which might be very well known to witnesses and who have deponed already thereon, and against which there was then no reclamation, and so is competent and omitted. REPLIED, it is confessed, where a bargain is made between two, one sells and promises to deliver the victual, the other promises to pay the price; there, because the promise of delivery is in consequence of the bargain, it may be proven by witnesses: but here Mr. Jo. Smith sells the victual; a

third party, *viz.* the tenant, promises to deliver it, and not Mr. Jo.; certainly, though Mr. Jo.'s bargain be probable by witnesses, yet the tenant's promise (who made not the bargain, and is none of the principal parties contractors, but *tantum incidit in negotium,)* cannot be proven so. *Vide* 19*th November* 1679, *Lindsay* and *Crighton.*

I know not if this debate got any decision; but, in defence of the Commissaries' decreet, there is in the informations a late practique cited, wherein the Lords, in a case between one *Archibald* and *Syme,* found a promise to see a wright paid for some work wrought to a third party probable by witnesses, because it had a dependance and connexion with a contract of location, whereof it appeared to be a part; and which decision seems to meet this in hand very near. *Vide, supra, No.* 329, *in February* 1672; *infra, No.* 429, *in November* 1673, *Syme* against *Inglis.* *Advocates' MS. No.* 378, *folio* 158.

1672. *December.* MARGARET CLEILLAND AND JO. BOYDE, her Husband, against JAMES CLEILLAND of Faskein.

IN the same month of December 1672, was advised the action between Margaret Cleilland and Jo. Boyde, her spouse, against Ja. Cleilland of Faskein, wherein the case was: Ja. Cleilland of Glenhove, being descended of the family of Faskein, and having no children of his own body, resolved to return his estate back to that family; and in pursuance thereof, did, in July 1666, dispone the same to this Faskein, reserving his own and his wife's liferent; whereon he was publicly infeft; and the disponer lived two years and a half after the said disposition; only it seems being troubled with a goutish humour in his feet, he was not able to go freely to kirk and market, for validating the said disposition. Whereupon Margaret Cleilland, his sister, and apparent heir, and her said spouse, intents a reduction of the said disposition, *ex capite lecti,* in so far as before the making thereof he had contracted the sickness whereof he died, and after the same did never recover, nor go to kirk and market.

ALLEGED for Faskein,—He opponed his disposition, and offered to prove several most pregnant qualifications of health in him after the same. REPLIED,—That his not going to kirk and market was a sufficient presumption of sickness: and besides offered to prove sundry presumptive qualifications of sickness. The Lords, before answer, ordained a joint probation, and witnesses to be examined *hinc inde* for both parties, for clearing in what condition the defunct was, the time of granting the said disposition, if *in statu morboso nec ne,* and if sick of the disease whereof he thereafter died; and whether he went abroad about his affairs thereafter, or went to kirk and market, and in what manner, and what other equivalent acts he did.

Probation being mutually led, the Lords found the reason of reduction and pursuer's reply proven, *viz.* that he was sick of the disease whereof he died, at and before the disposition; and that his going to kirk and market was but fictitious *et animo circumveniendi legis mentem,* seeing he went supported, and with many circumstances of infirmity: and that no equivalent acts were proven save what