this case, where the conjunct person was only related by affinity, that *talis qualis probatio* was sufficient; but where the condescendence did bear, giving to the disponer money when he was in prison and in distress, which she confessed was after the disposition, they refused to sustain the same as a part of the onerous cause, and reduced *pro tanto*.

Page 354.

1673. *July* 9. NICOLL HARDIE *against* THOMAS WILSON.

IN a removing from a brewery, within Edinburgh, pursued at the said Nicoll's instance, against Thomas Wilson, who had obliged himself, by a minute, to remove himself at Whitsunday, notwithstanding of a comprising and infeftment;—It was ALLEGED, That the minute, wherein he was obliged, was conditional,—the pursuer paying a part of the sums of money contained in the comprising, which was not yet satisfied; and albeit he were now ready to satisfy the same, yet it being within the term, he could not be decerned to remove until Martinmas next.

It was REPLIED, That he being warned fourteen days before the term upon payment of that sum, which was the condition in the bond, he ought presently to remove.

The Lords found, that the condition, not being offered to be performed before the term, the defender was not obliged to remove until a new warning; but, in respect of his consent, they decerned him to remove at Martinmas next, he being paid.

Page 359.

1673. *July* 19. The LAIRD of UDNEY *against* AYTOUN and PLENDERGAST.

IN a summons, to make arrested goods forthcoming, at Udney's instance, against the Laird of Aytoun, who was debtor to Plendergast for the price of some lands disponed to him by Plendergast, against whom the Laird of Udney had obtained decreet for a great sum of money:—

It was ALLEGED for Aytoun, That he could not be decerned to make forthcoming, because he was conjunct-cautioner, with Plendergast, for the Lord Mordington, and they were mutually bound to relieve others; and he being distressed, ought to be relieved, or otherways might detain whatsoever sum is due by Plendergast, by way of compensation.

It was REPLIED, That the pursuer having used arrestment long before any distress, he did thereby affect the sums arrested, and his right acquired thereby cannot be taken away by any subsequent distress; seeing, if he had pursued to make forthcoming before the distress, Aytoun could never have defended himself upon a naked obligement of relief.

The Lords did find the allegeance relevant to assoilyie the defender from making forthcoming the sums arrested, seeing he was actually distressed during the dependence, and that the dependence was drawn back to the obligement of

relief, which was prior to the arrestment; and so had no occasion to decide in the case, as if there had been no distress. But it is conceived, that unless it were instructed, that the whole bonds wherein they were conjunct-cautioners were satisfied, so that Aytoun could seek no relief, that he could not be decerned to make forthcoming, unless they offered sufficient caution to warrant him against all distress; and even hardly upon that offer, because it is more easy to retain than to pursue upon warrandice.

Page 363.

1673. *July* 22. JAMES CARSTAIRS *against* CHRISTIAN, JENNET, and GRIZELL CARSTAIRS, his Sisters.

IN a reduction of a decreet-arbitral, at the instance of the said James, whereby he was decerned to pay the sum of twelve thousand merks to his sisters, upon a reason of fraud and circumvention, in so far as he was induced to submit to the arbitrators, by concealing and keeping up of a disposition made to his father, of some lands and acres, which, by the said decreet, was conveyed to him, and for which he was decerned to pay the said sum; whereas if he had known of that right, it was so clear and absolute, that he needed not to have submitted to have paid any thing for his right to that land:—

It was ANSWERED, That it was offered to be proved by the arbitrators and communers, that his father's disposition was made known to him the time of the submission, and was read in all their presence.

It was REPLIED, That his private knowledge was not probable by witnesses, but by his own oath; and that the arbitrators, being concerned to maintain their own decreet, could not be witnesses.

The Lords did sustain the answer to be proven by witnesses and by the arbitrators and communers, seeing the reason of fraud libelled, was craved to be proven by witnesses, to take away a decreet; and, therefore, *a fortiori*, the allegeance of private knowledge was probable that same way, and before the same witnesses.

Page 364.

1673. *July* 22. The LAIRD of PITTARRO *against* GLENBERVIE.

PITTARRO having charged Glenbervie to infeft him in the teinds of the lands of Drumlethie, he did SUSPEND, upon this reason:—That the said teinds were a part of the parsonage, and so his office to infeft was imprestable. But the same was only inserted by the notary *ex stilo*; whereas, in the disposition of the lands and teinds, he did assign him to four or five nineteen years' tacks, [and] to a bond of the Lord Arbuthnot's, to obtain the same renewed after expiring.

It was ANSWERED, That the disposition for lands and teinds, being of the like price for both, as to the chalder of victual, and the obligement to infeft being clear and positive for both, without distinction, and the assignation to the tacks to run being only in farther corroboration, the same was not equivalent to an