1673. *July.* ANENT OBLIGATIONS.

IT was questioned between two parties, Where there is an obligement *specifice* conceived to deliver a bond or other paper, if the party obliged will be liberated by offering a decreet proving the tenor of that paper; and if such pactions can be fulfilled *per æquipollens*, where the specific performance is imprestable, as here by the loss of the paper; and if the said tenor proven is a full and equivalent implement.

The Lords doubted much to receive it. Yet, *argumento* of the 37th act in the Parliament 1555, we may rationally think this is a maxim of our law, *contractus qui non potest impleri in forma specifica, potest suppleri per æquipollens:* and that very act refers us to the common law, which holds the same, *arg. l.* 3, *C. de Institutionibus et substit.* See also 18th February 1609, *Abercorne.*

Advocates' MS. No. 410, *folio* 222.

1673. *July.* ANENT ARRESTMENTS.

IT was questioned amongst the Advocates, how money could be arrested in a minor's or pupil's hands, especially if he wanted tutors or curators; and when he had them, in whose hands the same was to be laid on. Sir George Lockhart thought, if he was a pupil, it behoved to be in the tutor's hands allenarly, especially where he was *intra infantiam, id est septennium, per l.* 18, *C. de Jure deliberandi;* because tutors act and administrate as principals, *et gerunt personam pupilli,* whereas, after pupilarity, the minor becomes principal, and the curators only consent; and therefore, after fourteen, it behoved to be in the minor's hands: but in both cases, in the pursuit to make forthcoming, the tutors and curators ought to be called: yet that the curators might be cited by a general citation at the market-cross where the minor resides; but where he wanted tutors or curators, then the bill of arrestment behoved not to pass in the ordinary form, but upon special knowledge of the Lords, that they may either authorise him or dispense with the same.

It was also doubted, how we could arrest in the hands of him who was out of the country; and if he had factors or commissioners established, if it would be legal enough to arrest in their hands. But I think it safest that the bill pass upon special notice of the Lords, and bear that the party is out of the country; and the Lords will grant letters of supplement for doing of the same. *Vide supra, No.* 310, 24*th January* 1672.

Advocates' MS. No. 411, *folio* 222.

1673. *July.* JAMES GIBSONE *against* the HIGH CONSTABLE.

ONE James Gibsone, a baxter in Plaisance, having been fined for a pretended riot in eightscore pounds in the Constable Court, during the sitting of the Parlia-

ment in August 1672; he suspended the same upon thir reasons. 1*mo*, That being constable of that bounds, he was *in excercitio officii et actus maxime liciti;* and being opposed by a drunken wife, to put in a poor person, who was dying, into a house, he put her by, and she fell over, and that this was all the riot. 2*do*, Upon the sense of his innocence, he had obtained a discharge of the said decreet and fine from Mr John Hay and Mr Alexander Seaton of Pitmedden, the two constable-deputes; and opponed the same.

REPLIED,—That the High Constable Court seemed to be sovereign the time of Parliament, and it was *res mali exempli* to have their decreets canvassed or questioned by the Lords. However, to the first, they opponed the decreet. As to the second, the discharge was null, because granted by those who had no power, seeing after they had pronounced sentence they were *functi officio;* and by the commission of deputation they had no right to the fines or emoluments of courts, likeas the deputes in other courts had not the amerciaments, but they belonged to their constituents; and here my Lord Erroll had since their discharge assigned this same very fine to James Hay, clerk to that court.

DUPLIED,—*Per l.* 37, *D. de R. Juris*,—*Qui condemnare potest, potest etiam absolvere;* and this upon the matter was an absolvitor more than a discharge; that they had no other salary but the fines, and so might dispose upon them; that my Lord Erroll's assignation was truly posterior to the discharge, but is antedated; and that judges might discharge thir obventions as appertaining to themselves, was clearly decided by the Lords, as Dury remarks, on the *26th of November* 1633, *Lindsay.*

Only it was not decided here, because the matter being referred to my Lord Craigie, he called for the probation which was the ground of the decreet, and when he heard nothing proven, he with indignation rejected it. And, really, there was much cause of complaint given to the citizens of the town against that court, not only for being so summary and illegal, but also for their exorbitancy and oppression in their fines. And though the town has ever contraverted this privilege with the High Constable, so that he never possessed any jurisdiction within Edinburgh, peaceably and pleasantly, yet he gained a greater step that session 1672 than ever he could arrive at before, by judging Johnston, the fiddler, and sentencing him to death for killing of his wife; whereas, in so long a tract of time as the ages since he laid claim to that privilege, he could never afford one instance save of one. I believe it was one Reid, a painter, for killing one Allan Walwood, servant to my Lord Cranstonriddell, whom, for slaughter, they had sentenced to die about the year 1640, but he obtained a remission.—See it in the Criminal Register.

Advocates' MS. No. 412, *folio* 222.

1673. *July.* JO. FORK *against* WILLIAM FYFFE.

JO. FORK, writer in Paislay, having pursued William Fyffe there, before the Commissary of Glasgow, for calumniating him, in having called him a mensworn man, and to get him punished by fining, and to restore him to his good name: of this cause Fyffe raised an advocation; at the calling whereof, he insisted on this reason, that the Commissary had committed iniquity in repelling an unanswerable defence, viz. that he behoved to be assoilyied from that action of scandal, be-