1670. *January* 7. JEAN KER *against* DOWNIE.

No 62.
A house let, allowed to be given up within 48 hours.
See No 67. *infra.*

JEAN KER having set a house in Edinburgh to Downie for L. 9 : 10s. Sterling, she obtains decreet against him therefor. He suspends on this reason, that within 48 hours after he took the house, he did by instrument give it over, which is the ordinary custom of burghs, where there is no writ, to quit the bargain within a short space, unless some offer intervene, *medio tempore*, by which the party is damnified.—The charger *answered*, That this house having been taken but 14 days before the term, there is neither law nor custom to allowing either party to give over or resile, there being no competent time to set again; for albeit houses sometimes are given over when they are taken, and quit before warning time, when the ordinary occasion of setting to others may occur, yet that cannot be drawn to this case; and the instrument of over-giving was only done by Downie's wife, who showed no warrant.—The suspender *answered*, That there was no difference whether the house was taken before warning time or after, seeing the law gives *locum pœnitentiæ*, or some small time, which must take place in either case; 2*dly*, Albeit the charger had not been obliged to accept the over-giving, yet *de facto*, she has accepted it, because it is offered to be proved, that she set the house to another, and took earnest thereupon, which did import that she quit the first bargain, seeing at once she could not set it to two; 3*dly*, Albeit offer was made of the keys at the term, yet it is offered to be proved, that the house was not void, but that the former tenant's goods remained therein.

THE LORDS repelled the first reason of suspension, upon the over-giving; but found that member relevant, that the house being given over, the same was set to another, and earnest taken thereupon; but found that point, that the tenant's goods, who possessed formerly, were not removed, not relevant, in respect of the custom in Edinburgh, not to remove peremptorily at the term.

Stair, v. 1. *p.* 658.

1676. *January* 12. CAMPBELL *against* DOUGLAS.

No 63.
Locus pœnitentiæ competent in a bargain agreed to be reduced into writ, before the writ was subscribed.

ROBERT CAMPBELL and Robert Douglas having bought the rests of debts due to a soap-work at Leith, the assignation was taken in Robert Douglas's name, and he granted back-bond, 'declaring the half to belong to Robert Campbell;' but thereafter they made a bargain, 'That Robert Campbell should have 500 'merks of free profit to quit his interest;' but within a few days after, Robert Douglas resiled from the bargain, whereupon Campbell pursues him before the Bailies of Edinburgh; in which process Douglas deponed, That there was a bargain as is libelled, but that it was to be redacted in writ, and that before the contract was perfected he did resile. The Bailies having found, That this

part of the oath of redacting the bargain into writ, was no competent quality, but an exception, Douglas raised reduction upon iniquity; and as it was then represented to the Lords, That such a bargain needed no writ, seeing the assignation was in Douglas's name only, and Campbell, upon payment of the money, was only to give back the back-bond, and that Douglas was to give precepts for a part of the money, which was not Campbell's fault that it was not done; therefore the LORDS remitted the cause, and the Bailies decerned. Douglas now suspends, and repeats the reason of iniquity, and *alleges*, That albeit a bargain, by its nature, require no writ, yet if the parties expressly commune and agree to perfect the bargain by writ, till the writ be subscribed, *est locus pœnitentiæ*, and either party may resile; and this being a part of the bargain, was a most proper and intrinsic quality, and the supender ought not to have been put to prove it; but his oath being the only mean of probation, did sufficiently pove it. No 63.

THE LORDS having considered the oath, as it is repeated in the Bailies' decreet now produced, bearing, 'That the bargain should have been perfected in writ,' they found, That though writ is not necessary to perfect an agreement; yet if parties expressly commune and agree to perfect it in writ, there is place for either party to resile till the writ be subscribed; and that this being a part of the bargain, was intrinsic and competent by Douglas's qualified oath: But in respect the oath did only bear, 'That the bargain should have been perfected 'in writ,' which might have been Douglas's conjecture, They ordained Douglas to be re-examined, whether it was expressly communed and agreed by the parties that this bargain should be perfected in writ. See QUALIFIED OATH.

Fol. Dic. v. 1. *p.* 564. *Stair, v.* 2. *p.* 396.

1681. *June* 16. CATHCART *against* HOLLAND.

No 64.
Locus pœnitentiæ, before the vendition of a ship was put into writing, not sustained, because a ship is a moveable which requires no writing.

ELIAS CATHCART pursues Ralph Holland for payment of the price of the eighth part a ship sold to him. The defender *alleged* absolvitor, because there was *locus pœnitentiæ*, seeing the bargain was never perfected in writ; 2*do*, The defender was never put in possession of the ship.—It was *answered*, That a ship being moveable, requires no writ to the sale thereof, for jewels, though much more valued, pass without writ; and as to the possession, though it were not yet delivered, it cannot dissolve the sale; but there needs no delivery, seeing the defender was already a part owner, and so was in possession; and the other partner's share accresced to him by the bargain, without necessity of any other delivery.

THE LORDS found the vendition of the ship required no writ, and that there is no *locus pœnitentiæ*, unless it had been agreed by the parties that there should be a written vendition; and found, that there was no necessity of tradition, the buyer being already in possession as a part owner.

Fol. Dic. v. 1. *p.* 564. *Stair, v.* 2. *p.* 876.