to cause them, at the event of a long depending plea, to pay over again; and the *Tenants* were assoilyied in the case of *The Creditors of North Berwick.*

The Lords thought it severe to decern the tenants for so many years, (though in strict law they might do it;) and therefore only found them liable from the date of the last charge given them. *Vol. I. Page* 821.

1698. *February* 9. PATON of KINALDY *against* DR URQUHART.

PATON of Kinaldy, having married Dr Urquhart's daughter, in the contract of marriage there is 3000 merks of tocher stipulated. The lady being dead, and leaving a son behind her, Kinaldy charges the Doctor for the tocher. He SUSPENDS on thir reasons, That, though it be made payable by the contract after year and day, yet he promised that, *quoad* 2000 merks of it, his father-in-law should liferent it, and the payment should be suspended during his life; *2do.* The charger, Kinaldy, was obliged to infeft the son of the marriage in the lands, which he had done only by a base infeftment, without showing he is infeft himself; and had reserved his own liferent, which was noways provided for by the contract of marriage; *3tio.* He craved compensation for the expense of Kinaldie's wife's in-lying of her child, and for her burial.

ANSWERED to the *first*, Any promise emitted by him was when minor, having curators, and so null; as also, it was expressly *contra fidem tabularum nuptialium*, and so *contra bonos mores*, and reprobated by law; as appears, *tit. D. et C. de Pact. Dotal. et de Fundo Dotal.* And Voet, in his Practical Observations, tells, that *clandestina pacta* cannot derogate from the faith of public and solemn contracts of marriage; and we have oft decided conform, as on the 16*th of July* 1672, *Duff* against *Fowler*, &c. To the *second*, An obligement to infeft in fee is contradistinguished from the liferent; and there can be nothing more unreasonable than for a father to divest himself both of the fee and liferent of his lands to his infant son. To the *third*, It was against his will that they drew away his wife; *et qui, invito, negotium gerit, is non repetit impensas.*

The Lords repelled the *first* and *second* reasons of suspension, in respect of the answers made thereto; and referred to the Ordinary in the cause to try if the father was infeft himself, and to adjust the grounds of compensation and the account of expenses betwixt them; though, in strict law, it was refusable, because a compensation not instantly verified. *Vol. I. Page* 821.

1698. *February* 10. FARQUHARSON of BALLATRACH, and other PARISHIONERS of GLENTANNER, *against* ALEXANDER GILLANDERS.

ARNISTON reported Farquharson of Ballatrach, and other Parishioners of Glentanner, against Alexander Gillanders, for rebuilding the church of Glentanner, and paying the damage, as he who occasioned the burning of the same, in so far as he would have his father, a common ordinary person, to be buried

within that church; and in December 1696, in the evening, gathered eight or ten to remove the desks, and dig his grave; some of whom brought a lighted coal or peat alongst with them for lighting the candles, and left the said fired coal on some of the timber-seats, whereby, after their removal, the whole church was burnt down to ashes.

ALLEGED,—*Incendium* is indeed presumed to arise *ex culpa inhabitantium* in dwelling houses; but here there can be no fault qualified against Gillanders, unless they prove he was the person who brought in the peat, and carelessly laid it on a timber-desk, and forgot to bring it away with him, or to lay it on the earthen floor. And the church has a sexton or beadle to whom the care of the church is particularly intrusted; and he being present, they cannot answer for his neglect. And Gillanders cannot be reached unless his accession were proven, *nam præsumptio indeterminatæ personæ non sufficit ad condemnationem; l.* 11, *D. de Peric. et Commod. Rei Vendit. l.* 6, *sect. ult. Nautæ, Caupon. Stabular. l.* 6, *sect. ult. D. Furti Adversus Nautas; l. unic. C. ut Nullus de Vicariis; Novell.* 134, *cap.* 4.

ANSWERED,—Though there is not here a *dolus*, or *lata culpa*, which would expose him to criminal punishment, yet there may be such a negligence as may subject him to damages *quoad civilem effectum*, though he was in *acto licito*, if he did not adhibit all that diligence which a prudent *paterfamilias* would have done *in re sua:* as appears by the 75th Act, 1426, which speaks of *misgovernance;* so it cannot be called a mere *casus fortuitus qui omni culpa vacat.*

The Lords allowed a conjunct probation of all the circumstances of the fact from which either guilt or innocence may be inferred.

See *Dr Sibbald's pursuit* against *The Lady Rosyth*, marked *supra*, 13*th February* 1685, on the same account. *Vol. I. Page* 822.

1698. *February* 10. ROBERT CRAW and WILLIAM SHEILLS *against* CAPTAIN BROWN of BLACKBURN.

THE Lords having ordained that point to be heard, in the improbation pursued by Robert Craw and William Sheills, against Captain Brown of Blackburn, How far a decreet of proving the tenor of a writ ought to satisfy the production in a pursuit of improbation of the same writ;—the Lords advised it this day.

It was CONTENDED for the pursuer of the improbation, That a tenor made up no more but the naked existence of the writ lost, which noways hinders but it might have been originally false; which falsehood can never be tried out, if a decreet of tenor be as sufficient as if the principal writ were lying in the field; for we are deprived of all the means of improbation both direct and indirect: For, 1*mo.*---If the writer and witnesses be alive, how can they depone anent their subscription unless they see it. If they be dead, it can never be redargued *comparatione literarum;* and, therefore, besides the existence, it is necessary, for our security, that the verity of the writ be also astructed, and evidences adduced for the same; otherwise a forger has no more to do but, after he has fabricated a false writ, to show it to sundry honest persons, and, after they have read it, he may destroy it, and then, by their oaths, make up its tenor; and which is no imaginary chimerical fear, seeing the case has several times occurred, as my