1671. *February* 22. Anent the MASTER'S HYPOTHEC.

Talking of the privilege of hypothec the master of ground has in his tenant's corns and other goods ay and while he be paid of his rent. Sir George Lockhart thought it altogether exorbitant and dissentaneous to natural equity, to extend this privilege so far as the master shall have repetition against a poinder arrester, or one who hath *bona fide* without fraud or guile bought the corns or goods in public market, the master having done no diligence himself; for if so, then there should be no free commerce nor traffic in moveables, which were very inconvenient. *See* Papon, *Lib.* 10, *Tit.* 3, *de Louage arresto* 4*to*. *Vide D.* 29*th March*, 1639, *Hay* against *Elliot*, and the cases there; *item*, 15*th January*, 1625, *Stewart*; *infra*, *November*, 1673, *Numero* 427.

*Advocates' MS. No.* 146, *folio* 91.

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1671. *February* 23. The TUTORS of GOVANE *against* Her MOTHER.

THIS Govane's goodsire and father having been merchants in Glasgow, and her father dying and leaving her, his only child, behind him in her nonage, heretrix of a considerable fortune, what in land, what in money, the goodsire, (of whose acquiring the whole means was,) being on life, became administrator of the law to his grand-child, and in his testament did nominate several persons in whom he much relied as her tutors, being persons also sib to the pupil, who, *ex superabundanti*, took a dative and found caution. The lass being now out of her infancy, viz. past seven years of age, the tutors by an action against the mother, (who yet continues a widow,) crave the person of the pupil may be exhibited to them, to the effect they may have the custody of her, conform to the constant law and practice of this kingdom, which presumes tutors will be more careful of the education of pupils, and not so indulgent, by which many are sadly corrupted, as the mother will be.

The Lords, because they discovered an inclination in my Lord President towards the tutors, they therefore in a bang combined in behalf of the mother, only because it was represented to them that the President was a friend to the tutors, and carried it over his belly that the child should continue with the mother.

*Vide* 14*th July*, 1627, *Noble*; 4*th July*, 1629, *Langshaw* against *Muire* and the cases there.

*Advocates' MS. No.* 147, *folio* 91.

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1671. *February* 23. ——— *against* The VISCOUNT of OXENFURD.

THE late Viscount of Oxenfurd grants a bond to Mrs. Mary Macgill his daughter, of 10,000 merks, which he obliges him, his heirs, and executors, to con-

tent and pay to her at her perfect age of fifteen years; the cause of it is love and favour, and for her maintenance. This bond she assigned, and dies before she attains to the age of fifteen. Her brother, now Viscount, being pursued to pay the sum, it is excepted that the bond pursued upon is null, in so far as the existency of the debt depended upon a condition which failyied, viz. her attaining the age of fifteen years, so that before that time *nec cessit nec venit dies*, and it being *dies incertus* it must be held for a condition. ANSWERED,—That the adjecting the term of fifteen years is only *causa differendæ solutionis*, but noways to suspend her right to the sum till it should appear whether that condition existed, yea or no.

The Lords found the bond conditional and null, because it never existed. See something like this in the information, *Sir William Stewart* contra *his brother Garntully*, (see *Nos.* 9, 420, and 492,) about the bond given to their sister payable at her marriage, and who died unmarried. *Vide l.* 213. *D. de V. significatione; item totum T. D. Q. dies ususfructus legati cedit.*

*Advocates' MS. No.* 148, *folio* 92.

See *25th February*, 1681, *Gordonston*.

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1671. *February* 23. PROOF by WITNESSES.

IN an action for making up the tenor of a lost contract of marriage, for adminicling the wife's liferent provision in that contract, there was produced a charter and seasine relative to a contract of marriage of such a date: this was found sufficient for instructing the contract in that part; but when they came to make up to the provisions in favours of the bairns of the marriage, they had no other way but by offering to prove by the writer and witnesses in the contract that they were such as they did condescend upon, which being but a small competency, and noways unsuitable to the father's quality, this manner of making up behoved to be received. Against which it was ALLEGED,—That this were a most dangerous preparative to make up a writ by witnesses, though they be the witnesses insert, where there are no adminicles in writ that can be adduced for making it appear that ever there was any such writ. REPLIED,—That they have adduced adminicles in writ for making appear there was such a contract, and that by it the wife was provided in such a jointure; and all contracts having clauses of provision in favours of the bairns, which provisions are offered to be proven *per testes instrumentarios*, ye cannot divide the contract so as to stand *pro parte* and fall *pro altera parte*, especially they being noway exorbitant.

The Lords found it might be made up by the witnesses insert.

*Advocates' MS. No.* 149, *folio* 92.