telling the special way how it vaked, and by whose death; or a gift of recognition, and not express the specific deed by which that delinquency or casualty was incurred; or a presentation to a kirk, or a gift of an office, without telling *verum modum vacationis;* or a general wadset of lands; and another shall afterwards take a second gift of escheat, ward, non-entry, marriage, recognition; or a second presentation or gift of a place; or a special hypothec; and they bear the particular deed, *et verum modum vacationis:* in a competition, the second would be fair to be preferred to the first. *See Act* 23*d, Parliament* 1567; *Codex Fabrianus tit. de Sacrosanctis Ecclesiis, definit.* 1, 4, *et* 82. *Speciale pignus magis afficit rem quam generale,* says Gothofred in *notis ad leg. penult. D. In quibus causis pignus vel hypotheca remittitur:* which is applicable to the haill foresaid causes; as also to two comprisings or two assignations, that the special is preferable to the general. *Vide infra, February,* 1677, *No.* 550, § 3, *Arbuthnot.* See Durie, 20*th Nov.* 1628, *Watson and Stewart.* *Advocates' MS. No.* 238, *folio* 109.

1671. *November* 7. Anent APPRISING.

WHEN that imaginary ceremony of searching for moveables upon the ground of the lands, before the messenger can legally proceed to denounce them to be apprised, is used, an offer of cows or other cattle, to the value of the sum, will not impede the denunciation or apprising, nor the proving of the said offer will not be a ground whereon the comprising can be thereafter branled, as has been often decided; and that for three reasons; 1*mo,* It is *aliud pro alio quam solutionem debitori facere non licet creditore invito.* 2*do,* An offer of payment to the messenger *non relevat,* because he has no power to receive it, and therefore it should be made to the party. 3*tio,* They should take their beasts themselves, dispose upon them, make penny of them, and so satisfy their credit. Yea in Cromartie's case, in 1664, the Lords found an offer of silver plate to the value of the sum owing, was not relevant to impede a comprising of lands, because it was not *argentum signatum;* and it is species and illiquid, and so cannot compense or pay. This agrees with *lex Quintus Mutius,* 27. *D. de Auro argento et mundo legatis.*

Advocates' MS. No. 239, *folio* 109.

1671. *November* 8. SIR JOHN WILKY of Foulden *against* SIR JAMES CARMICHELL and OTHERS.

SIR JOHN WILKY of Foulden, pursues a declarator against Sir James Carmichell, Mr. Wm. Cheisley, William Brown, agent to the boroughs, and others, to hear and see it found and declared, That a bond granted by the said Sir John, as principal, and Sir James Carmichell, as cautioner, was void, null, and extinct, in so far as the same was satisfied and paid with the principal's own monies; and consequently, that the assignation taken by the said Sir James, in Mr. Wm. Cheisley's name, should operate and take no effect against him, the debt being paid in manner above expressed.

Against this it was ALLEGED by Sir George Lockhart, That the bond can never be declared extinct, but the assignation taken thereto by the cautioner must stand good, in so far as the said bond was satisfied by the sole moyen and credit of the cautioner, who borrowed the money owing in the bond from Johnstone of Hiltoune; for which a bond was again granted by Foulden, as principal, and the said Sir James, (who was cautioner in the first bond) as cautioner; and so as to him it was just alike as if he had remained cautioner in the first bond.

REPLIED,—By the payment, the first bond was wholly taken away, and though money was borrowed for paying thereof, yet it must be reputed to have been satisfied by the principal, since he continued principal in the new bond, and liable to the cautioners by an express clause of relief.

The Lord Newbayth inclined to sustain the declarator; and thought the taking the assignation to the first bond, *ad majorem cautelam,* and for better recovering of his relief, unwarrantable.

Yet Sir George contended he might, since he continued still debtor for the sum by becoming cautioner in the second bond.

Advocates' MS. No. 240, *folio* 109.

1671. *November* 10.

A CERTAIN person pursuing a woman to relieve him of some ministers' stipends paid by him for his possession of some lands set to him in tack by this woman; ALLEGED absolvitor from this, because the time she signed it, she was *vestita viro,* and so it cannot oblige her. REPLIED,—She cannot be heard, because he offers him to prove she has homologated the said tack since her husband's decease, by accepting of the tack-duty, and granting discharges thereupon. DUPLIED,—What payment she has got must never be reputed ratihabition of the tack, because she ascribes it to another cause, *viz.* her liferent infeftment.

Advocates' MS. No. 242, *folio* 110.

1671. *November* 10. ——— *against* FRAZER of Middelty.

FRAZER of Middelty being pursued on a registrate horning to pay the annualrent of the principal sum, since the date of the denunciation, conform to the act of Parliament made in anno 1621; it was EXCEPTED that he could not be liable in annualrent, because the horning whereupon it was sought was most unwarrantable, in so far as it did not bear any previous precept of the sheriff's, who pronounced the decreet, to have been raised, at the least no charge nor execution given thereon; which ought first to have been done, conform to the 177th act *in anno* 1593, compared with the 10th act, in 1606, and to the constant practique of