1678. *February* 27. LAMONT *against* BOSWEL.

BY charter-party Colvil Lamont was obliged, upon freight, to carry his ship from Kirkaldy to Queensbridge, and back again; for which Henry Boswel was obliged to pay him therefor 800 merks: who being charged therefor, he suspended on this reason,—That the skipper, in his voyage to Queensbridge, being near Milstrand, and staying some days there, the suspender went ashore, sold a part of his goods at good rates, and did require the skipper to disload; which he refused; and therefore he must deduce the damage.

The skipper ANSWERED, That, by his charter-party, he was only obliged to go to Queensbridge; and, that breaking bulk at Milstrand without an entry, he might forefault the ship.

The suspender REPLIED, That this bargain, by location and conduction, being *contractus bonæ fidei*, the skipper could not refuse to set into any safe harbour in the way to Queensbridge, or to disload any parcel at sea,—which the suspender offered to receive by boat several leagues from land; and there is no hazard to sell a parcel of goods in one dominion, and the rest in another; albeit, where the cargo is direct to any dominion, bulk may not be broken there.

The Lords found, The skipper ought to have disloaded the foresaid parcel at sea; and therefore ought to deduce the damage.

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1678. *July* 2. HENRY YOUNG *against* PEARSON.

HENRY Young pursues reduction of a decreet-arbitral betwixt him and Pearsons, bearing a general submission, according to claims, and particularly anent the payment of the lands of Muirhaugh. The reason of reduction is upon iniquity, because the disposition of the lands of Muirhaugh bore expressly the payment of the price, and yet the arbiters decerned the pursuer to pay a sum affecting a part of the lands; which decreet bears this clause,—"That, by instruments and witnesses adduced, it was proven that the pursuer promised to satisfy that burden, and that he acknowledged the same before the arbiters." And though there was an instrument taken upon the promise, yet, by the laws of this kingdom, promises are not probable by witnesses or instruments, or by the assertion of the arbiters to justify themselves; and, therefore, the arbiters did wrongously take from the pursuer that which the law of the kingdom had given him.

It was ANSWERED, That, by the nature of a submission to arbiters, they may proceed *secundum bonum et æquum*, and are not understood to do iniquity by municipal laws, in relation to the formalities or penalties thereby introduced; and, therefore, they might justly sustain a promise, which is binding by the law of God, and action only refused against the negligence of parties who take no writ, that witnesses shall not be admitted; and, therefore, the arbiters might sustain the promise, as they might take off a penalty, or certification, or the expiring of a legal, or a clause irritant; though Judges, who must proceed according to the law of the land, could not do it.

The Lords sustained the decreet-arbitral; the defender, in fortification there-

of, proving, by the arbiters' oaths, that they did examine the witnesses in the instrument bearing the promise, upon oath, and that they did prove the promise, or that the party did acknowledge the same before the arbiters.

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1678. *July 2.* ALEXANDER YOUNG, Supplicant.

ALEXANDER Young gave in a bill of suspension, bearing, That he had a protection from the King, upon payment of annualrents; and that he offered the annualrent to the messenger, and yet he put him in prison by caption: and offered yet the annualrent, and craved liberty.

The Lords refused the bill, in respect that the protection being conditional, he paying his annualrents, that condition not being fulfilled before incarceration, the protection had no effect; neither was the messenger a competent judge to cognosce upon annualrents, or receive the same; nor did this party produce a discharge of the last term's annualrent; and, therefore, the Lords would not suspend the principal sum, upon consignation of the annualrent, without other reasons against the principal sum.

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1678. *July* 4. CAPTAIN HUME *against* ANNA LIVINGSTON.

CAPTAIN Hume, having confirmed himself executor to his mother, and confirmed a necklace of pearl, pursues Anna Livingston, and John Acheson her husband, for delivery thereof.

The defender ALLEGED, Absolvitor; because, in moveables, property is presumed from possession; and none are put further to instruct their author's right or their own. *Ita est*, the defender hath possessed this necklace for nine or ten years.

It was answered for the pursuer, That, albeit possession infer a right of property in moveables, yet that is but presumptive, and admits of contrary probation by the possessor's oath; or otherwise, by condescending how the proprietor ceased to possess, either by stealing, straying, or by the death of the proprietor; as, in this case, the pursuer, being a soldier abroad, offers to prove that this necklace was in his mother's possession in the time of his mother's sickness whereof she died, and so could not be transmitted by any but by an executor confirmed to her. And, albeit the pursuer, being absent when his mother died, suffered his sister, who was with her mother when she died, to keep this necklace till she died; at which time the defender, being her relation, and with her, got the necklace in her hands; but neither his sister nor the defender could have any right thereto.

It was REPLIED, That the defender's sister got this necklace in gift from her mother, and did wear the same in her mother's life; and, therefore, seeing the sister might have gifted the same, the defender is obliged to instruct no farther than possession: and yet, *ex abundante*, she is content to depone she got the same from the pursuer's sister; which is sufficient to fortify the presumption of