*nia*, no more than the King's Advocate is; especially where he produces the thing itself before the judge, and, by ocular inspection, it is confiscable, as wanting the seal appointed for English goods.

ANSWERED,—Parties are not obliged to give their oath *de calumnia* on the major part of the summons, because that is, *injure*, founded on the Acts of Parliament or principles of law; but, as to the subsumption arising from the fact libelled, every pursuer is bound to give his oath of calumny, if required, according to the 125th Act 1429; *illud juretur quod lis sibi justa videtur;* and he may allege that his case falls not under the prohibition of the Act of Parliament; for it might have been brought into his house, and left there to trepan him, though none of his.

REPLIED,—If defences be proponed, then the pursuer will be bound to give his oath of calumny thereon; such as, if he has reason to deny that thir stuffs were sealed according to law, though now they be worn off; but, in general, to give an oath of calumny, is both ensnaring and discouraging to such pursuits.

The Lords found no specialty; but that he was bound to give his oath of calumny, if he had just reason, and believed that he had cause to pursue this libel. This does not import that a party is obliged to give his oath *de calumnia juris* as to the legality or relevancy of his allegations *in jure*, (which belongs to the judge's determination,) but only on the fact resulting from the point of law, whereon the subsumption of his libel stands. *Vol. II. Page* 140.

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1702. *January* 29. NICHOLAS DUNBAR and SIR CHARLES HAY of PARK *against* MACDOUALL of FREUGH.

NICHOLAS Dunbar, daughter to Mochrum, and relict of Baillie of Dunraggat, and Sir Charles Hay of Park, her assignee, pursue Macdouall of Freugh on the passive titles, on this ground, That his father is burden-taker for her husband, in their contract of marriage, to procure her infeft in her jointure-lands therein mentioned, in respect her husband was then minor, and Freugh was one of his curators; and therefore, her husband's estate being now evicted by creditors, and she not infeft, that he may be liable.

ALLEGED,—This contract consists of two sheets of paper; and though Freugh signs the last sheet at the bottom, yet he has not sidescribed the margin at the juncture of the two sheets; and therefore, his father's obligement to see her infeft being in the first sheet, it cannot be obligatory; especially considering that there is nothing in all the second sheet that looks as burden-taker, but allenarly his pure consent as a curator; so there may be suspicion that the first sheet has been loosed, written over again, and altered.

ANSWERED,—The statute law of this kingdom speaks of nothing but subscribing; and sidescribing is only introduced by custom, which was not so universal and uniform at the time this contract was made; and our decisions do not require it, as appears, *June* 28, 1673, *Arnot* against *Scot*; and 14*th January* 1674, *Ogilvie* against *the Earl of Findlater*, where a cautioner was found bound, though he had not subscribed the juncture at the margins.

REPLIED,---The disparity is obvious; for the last sheet bore a clause of relief by the principal to him, which necessarily inferred his being cautioner; whereas, here, the clauses in the last sheet give neither light nor clearing as to those in the first.

The Lords doubted much what to make of it; but, remembering there are commonly two doubles of contracts matrimonial, they granted Freugh a diligence for recovery of the other principal, to the effect they might see if there was any discrepancy betwixt them, from comparing them together.

At last, the Lords, on sundry specialties convincing them that there was no alteration in the first sheet, repelled the nullity of not sidescribing in this case.

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1702. *February 5.* SIR WILLIAM STUART of CASTLEMILK *against* The DUKE and DUCHESS of HAMILTON.

SIR William Stuart of Castlemilk pursues for maills and duties of the lands of Coats, formerly belonging to Minto.

ALLEGED, For the Duke and Duchess of Hamilton,—Absolvitor, because there was a communing which came to a final agreement. Sir William was to dispone these lands to the Duke and Duchess on certain conditions of paying a price and alimenting the former heritor, which was accordingly done.

ANSWERED,—This being a bargain of lands, it required writ to its solemnity and perfection, till which was adhibited there was *locus pœnitentiæ*; and he now resiles. And for any performance made, it was not to Castlemilk, but to Stuart of Minto, and was not in contemplation or prosecution of this bargain; but the Duchess had been in use to aliment Minto before that, and so can never be ascribed to the bargain. And communings were ever ambulatory till they were fixed in writ; as has been found by a tract of decisions, *5th December* 1628, *Oliphant* against *Monorgan; 29th January* 1630, *Laurie* against *Keir; 16th July* 1636, *Keith* against *Tenants; 15th July* 1637, *Skene*; and *28th January* 1663, *Montgomery* against *Brown*; and sicklike in 1685: in all which cases place was found for resiling.

REPLIED,—That is true where there is not *rei interventus*, and something done in implement of the bargain; for then *res non est amplius integra*, and so *cessat locus pœnitentiæ*; as was found *1st December* 1674, *Gordon* against *Pitsligo*.

DUPLIED,—Pitsligo's case was only a simple promise to enter a vassal gratis, which differs far from emption, vendition, and other mutual contracts, where each party is to perform something *hinc inde*; and though one has performed their part, yet that does not tie the other to observance till writ has intervened; only they must restore what they have got.

The Lords finding the bargain was referred to Castlemilk's oath, they ordained him to depone anent the terms, before they should determine the relevancy, whether there was such a *rei interventus* here as hindered him from resiling though there was no writ upon it.

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