1764. *July* 24. TASSIE *against* M'LINTOCK.

A MAN'S son was apprehended by a messenger for payment of a debt of L.50 sterling, and he was let go upon an alleged promise of the father to pay the debt; and it carried, only by the President's casting vote, that this promise was not proveable by witnesses;—*dissent.* Alemore and Auchinleck. There appears to be a little nicety to make the distinction what promises, by our law, are proveable by witnesses and what not. A mere gratuitous promise to pay a sum of money by way of donation, is clearly not proveable by witnesses; but of promises for valuable considerations some are so proveable and some are not; for example, a promise to pay money for a horse or any other moveable is certainly proveable by witnesses; but, on the other hand, a promise to pay a sum of money which a man had borrowed is certainly not proveable by witnesses; and it was decided in two cases, *Donaldson* against *Harrower*, 3d July 1668, and *Deuchar* against *Brown*, 19th January 1762, that a promise to be cautioner could not be proved by witnesses, though, in the last case, the cautionary obligation was an accessary to a bargain of sale of a web of no greater value than L.47 Scots. Where then is the distinction? It is this, in my apprehension,—that only the contracts which, among the Roman lawyers, are called consensual contracts, such as *emptio venditio, locatio conductio*, &c. can be proved by witnesses; but the contract of *mutuum*, a stipulation, or a fideijussion, or any other contract among the Romans, which required something more than naked consent, cannot with us be proved by witnesses; among which number are all the innominate contracts, *do ut des, facio ut facias*, &c.

1764. *July* 27. M'VICAR *against* ———.

[*Fac. Coll. III.* No. 144.]

A QUESTION here was concerning steelbow, whether it would be affected by the diligence of the creditors of the tenant, in prejudice of the master?—And the Lords were much divided in opinion. My Lord Coalston thought that the property of the *universitas* was in the master, but the tenant had the free administration, and could bring to market and sell particular things; and he compared it to a right which is very well known by the country people, viz. a right of liferent which a tenant leaves to his widow of his tack and stocking: in such case the widow may sell particular things, but must keep up the stocking. Lord Kaimes said it was impossible, without doing the greatest violence to the words of the contract, as well as to the general sense and opinion of the country, to find that this steelbow was the property of the tenant; for, by the tack, it was set to him in assedation as much as the lands, and, in the country, nothing was better understood than that it was the property of the master. On the other hand, several of the Judges thought that the property belonged to the tenant, because it consisted, in part, of fungibles, such as straw, which are consumed by using, and which are the worse for being kept any considerable time;

and therefore if the tack was to endure for any space it was of necessity that the tenant should have the use and disposal of these things, for otherwise there would be a moveable subject entirely locked up from commerce, as it was admitted that the master could not dispose of it. The President was of this opinion; but he thought that the last year of the tack, when the steelbow was to be restored, it was to be considered as rent, for which the master had an hypothec over all the goods upon the farm; and the fact here was, that the tenant renounced his tack, and soon after died, upon which the master took possession of the farm, and all the stocking upon it, and the creditors of the tenant confirmed themselves executors, so that the goods were *in medio* and in possession of the master; and therefore all the Lords agreed in preferring him.

1764. *August* 8. DUKE of HAMILTON, &c. *against* MR DOUGLAS.

IN Mr Douglas's service as heir to the late Duke of Douglas, there were produced by Mr Lindsay, town-clerk of Edinburgh, who was called as a witness for Mr Douglas in his service, certain letters said to be written by one Pierre La Mar, a man-midwife, to Sir John Stewart, concerning Mr Douglas's birth. The Duke of Hamilton raised a reduction of the service, and when this process was going on, he insisted in an improbation of these letters, and craved that Mr Douglas and his curators might be ordained to abide by them *sub periculo falsi:* but the Lords unanimously found that they were not obliged to abide by them in that way; and therefore they dismissed the improbation as incompetent, reserving to the Duke of Hamilton to prove these letters forged in the process of reduction. Lord Coalston thought that the improbation was competent, but that the defenders might abide by these letters *qualificate.* The President, on the other hand, thought that there could be no abiding by in that way, but the defenders must either give up the letters altogether, or abide by them *simpliciter, sub periculo falsi.* The principle of law in this case seems to be, that an improbation is truly a criminal process, though carried on in the civil court, founded upon the presumption that a person who has in his custody, and produces a forged deed, is the forger; but if the deed is produced, not by the party, but by a witness in a cause, that presumption ceases with respect to the party, and there can be no process of improbation against him, but only against the witness who produces the deed; though in the cause with the party the deed may be proved to be forged in order to take off the evidence arising from it

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1764. *December* 12. CREDITORS of THOMSON and TABOR Competing.

AN English merchant became bankrupt, having many debtors in Scotland, who owed him money by bills payable in Scotland, and by open accounts. A statute of