third party, *viz.* the tenant, promises to deliver it, and not Mr. Jo.; certainly, though Mr. Jo.'s bargain be probable by witnesses, yet the tenant's promise (who made not the bargain, and is none of the principal parties contractors, but *tantum incidit in negotium,)* cannot be proven so. *Vide* 19*th November* 1679, *Lindsay* and *Crighton.*

I know not if this debate got any decision; but, in defence of the Commissaries' decreet, there is in the informations a late practique cited, wherein the Lords, in a case between one *Archibald* and *Syme,* found a promise to see a wright paid for some work wrought to a third party probable by witnesses, because it had a dependance and connexion with a contract of location, whereof it appeared to be a part; and which decision seems to meet this in hand very near. *Vide, supra, No.* 329, *in February* 1672; *infra, No.* 429, *in November* 1673, *Syme* against *Inglis.* *Advocates' MS. No.* 378, *folio* 158.

1672. *December.* MARGARET CLEILLAND AND JO. BOYDE, her Husband, against JAMES CLEILLAND of Faskein.

IN the same month of December 1672, was advised the action between Margaret Cleilland and Jo. Boyde, her spouse, against Ja. Cleilland of Faskein, wherein the case was: Ja. Cleilland of Glenhove, being descended of the family of Faskein, and having no children of his own body, resolved to return his estate back to that family; and in pursuance thereof, did, in July 1666, dispone the same to this Faskein, reserving his own and his wife's liferent; whereon he was publicly infeft; and the disponer lived two years and a half after the said disposition; only it seems being troubled with a goutish humour in his feet, he was not able to go freely to kirk and market, for validating the said disposition. Whereupon Margaret Cleilland, his sister, and apparent heir, and her said spouse, intents a reduction of the said disposition, *ex capite lecti,* in so far as before the making thereof he had contracted the sickness whereof he died, and after the same did never recover, nor go to kirk and market.

ALLEGED for Faskein,—He opponed his disposition, and offered to prove several most pregnant qualifications of health in him after the same. REPLIED,—That his not going to kirk and market was a sufficient presumption of sickness: and besides offered to prove sundry presumptive qualifications of sickness. The Lords, before answer, ordained a joint probation, and witnesses to be examined *hinc inde* for both parties, for clearing in what condition the defunct was, the time of granting the said disposition, if *in statu morboso nec ne,* and if sick of the disease whereof he thereafter died; and whether he went abroad about his affairs thereafter, or went to kirk and market, and in what manner, and what other equivalent acts he did.

Probation being mutually led, the Lords found the reason of reduction and pursuer's reply proven, *viz.* that he was sick of the disease whereof he died, at and before the disposition; and that his going to kirk and market was but fictitious *et animo circumveniendi legis mentem,* seeing he went supported, and with many circumstances of infirmity: and that no equivalent acts were proven save what

were performed and transacted *intra privatos parietes*, and which any diseased man might do; and the probation whereof was mighty suspicious, depending only upon *domesticum testimonium;* and that there would be few dispositions on death-bed reduced, if such acts were sustained as sufficient to validate:—and, therefore, did reduce the disposition.

The justness of which decision was much questioned by many judicious persons, upon thir grounds; that it was proven, and notourly known to all that country where the defunct lived, that the time of the subscribing of the said disposition, he was as sound in memory and judgment as ever he had been, and was in the same condition of health he had been in by the space of seven years of before, viz. only troubled with the gout in his feet, by which he was unable either to go or ride, unless it had been to walk out to his yards or wood, about half a mile from his house, and come back again, and which he did frequently after the said disposition; and that he continued in the very same *liege poustie* by the space of a year and a half after the said disposition, and never contracted the fever whereof he died, till about a fourteen days before he died; and that, abstracting from that infirmity in his legs, he was in most perfect health till that fortnight; that an indisposition in that organ cannot in reason be looked upon as a sickness, after which parties cannot make a rational settlement of their fortunes; and it seems hard, and against the sense of that old law in *R. Majestatem*, that such an infirmity, which is not *impedimentum rebus agendis*, should make one be reputed *æger et in lecto*, seeing he can perform all deeds that lame persons can. That this were to lay a most dangerous foundation of quarrelling the most part of the rights in Scotland, and unsecuring the whole lieges, if people, blind, lame, or goutish, so that they cannot walk without help, though otherwise of undoubted health, could not dispose upon their effects: And how many persons would be found to fall under the compass thereof! That he lived two years and a half after it: that no acts of health can be condescended upon as exercised by him for seven years before, which he did not with the same vigour after the disposition constantly till a fortnight before his death: that all that time there was a constant and uniform tenor of health observable in him; that he ate, drank, slept, and rose early, like a whole man, overlooked his husbandry, counted with his tenants, sold his woods, transacted debts, agreed neighbours at variance; conversed with and entertained the gentlemen about and strangers when they came to see him, was merry with them, and was the last of the company who wearied, he making them drink sometimes to excess, and he not touched, so robust a constitution had he; walked up and down his house with them unsupported, conveyed them to their horses through his close; went and played at the pennystone, and lifted it himself, played four games, and then went to the change-house, and all unsupported; that he went out to the adjacent croft, and gave Faskin seasine *propriis manibus;* that being a cadet of that family, and having no issue, he made a most just election to devolve it unto that channel whence it issued; and *esto* he had been furious as Tuditeinus was when he made his testament, though this infirmity of the gout hath nothing common with it, yet the Lords should imitate the centumviri, who sustained his said testament, because they found nothing of madness in it, *magis quid scriptum esset in tabulis quam quis eas scripsisset considerandum existimantes*, as Valerius Maximus excellently expresses it, *lib.* 7. *memorabilium, cap.* 8*vo.;* that it was proven he went to Cumbernald kirk, and

bought ribbons and tobacco from a chopman there; and though he was carried to the church, yet he walked more than ten pair of boots freely of himself; and that Craig the doctor, who seems only to depone the contrary, is suspect, and received only *cum nota*. All which could not but amount to prove the disponer to have been in perfect health, both of body and intellectuals, (excepting the gout in his feet) the time he granted the same, and long after: and to stretch the law of death-bed to such deeds as this, which fully satisfies the intent of the law, will open a gap for subverting the security of the lieges. Notwithstanding of all which the Lords reduced *ut supra*. The incentives were Faskin, who had got the disposition, was popish, and this Boyde, who had married the heir, was a minister. Likewise the Lords had the cases of *Balmerino* and *Couper*, *Pargillis* and *Pargillis*, and *Sir Robert Richardson* against *Sir Jo. Sinclar*, marked by Dury, 30th July 1635, before their eyes. *Vide supra* [*20th Feb.* 1670,] *Balmerino's case; item Pargillis: vide infra in December* 1677, *Lockhart*, [*No.* 677.]

Faskin and his procurators made a great clamour at the decision, and represented things so to several of the Lords, that it was thought if the president had but suffered it to pass to a vote again he would have been assoilyied; sundry of the Lords who had not pondered the consequence of the preparative, now forethinking what they had done; which repentance had this effect, that after the pursuers had extracted their decreet, they forced them (which was scarce legal) to consign it in Colinton's hand, and he was recommended to settle them: and the pursuers, notwithstanding of their decreet, were glad to transact it, and give Faskein some part of the estate.

And the truth is, the interlocutor seems to be founded on very strict law, without any allay of equity. *Advocates' MS. No.* 379, *folio* 159.

1672. *December.* The MAGISTRATES of INVERNES *against* JOHN FORBES of CULLODIN, WILLIAM ROBERTSONE of INCHES, and OTHERS.

IN the same month of December, 1672, was advised the debate betwixt the Magistrates of the town of Invernes, and John Forbes of Cullodin, Mr. William Robertsone of Inches, and the other heritors and feuars of the mills of Invernes; betwixt whom there were two actions depending. The first was this. *In anno* 1671, the procurator-fiscal of Invernes obtained a decreet against the feuars of their town's mill, belonging to Cullodin, Inches, and other feuars, before the Dean of Guild of Invernes, whereby the Dean of Guild, after trial taken of the measures, viz. firlot, peck, and lippy, used at the said mill for receiving their multure and knaveship, he found the same false and unjust, and greater than the Lithgow measure used in the town, and established by law and act of Parliament through the hail kingdom, and therefore fined the millers each in L.100. Of this decreet, the feuars, their masters, raised suspension and reduction on thir grounds: 1*mo*, That the said decreet was null, as given *a non suo judice*, the Dean of Guild being judge only to measures between burgesses within burgh, and not to measures without burgh used in the mills feued by them. 2*do*, It is most unjust, because the 114th act, Parliament 11, James VI. (which is the only act