engage: there is more taken off than 200 merks; the cautioner is pursued. He ALLEGES *absolvitor;* because he had trusted him far above 200 merks; and his being cautioner for him was only conditional; and, the condition not observed, he was altogether free. ANSWERED,—*Utile per inutile non vitiatur;* he was not craving him to be liable *quoad excessum,* but only *ad concurrentem quantitatem.* REPLIED,—*Stipulatio* was *individua;* and, not being then accepted, it was *in totum inutilis*: § 5, *Institut. de inutilibus Stipulationibus.* DUPLIED,—Vinnius there confesses that was but a subtle nicety, and contrary to *Lex* 83, § 3, *D. de Obligationibus.*

The Lords found *(referente* D. Pitmedden,) the cautioner was obliged for 200 merks, and presumed the merchant's acceptation of it at that time by his present declaration of his mind now, (because of the exuberance of faith *in re mercatoria).* Yet see *Lex 52 D. Locati,* cited by Vinnius, *ubi supra,* who distinguishes *inter contractus onerosos et lucrativos:* but I see not the reason of it.

Advocates' MS. No. 694, *folio* 313.

1677. *December* 20. JAMES BAYNE *against* HALL.

JAMES Bayne, the wright, having undertaken the rebuilding of one of those burnt tenements near the Netherboll, upon this condition, That he should possess it aye and while he were reimbursed; he summarily pursues the relict, called Hall, to give him the keys, though she stood infeft in the ground of the tenement, *viz.* before it was burnt.

The Lords found she was not bound to remove summarily; but behoved to be warned, though the superficies was extinct. See this case more fully deduced in another law manuscript. *Advocates' MS. No.* 695, *folio* 313.

1677. *December* 20. ROBERT BRUCE *against* ANNA DOUGLAS, Relict of Sibbald of Kair.

IN the action pursued by Robert Bruce against Anna Douglas, relict of Sibbald of Kair, where he pursues, as executor-dative *ad omissa,* her as executor-principal, as intromitting with the goods omitted by her and confirmed by him: she cannot object against the grounds of the debt, but must do it by way of reduction of the decreet-dative, unless the executor be confirmed *qua* creditor; and then they have interest to object, why their super-intromission cannot be questioned, unless, you will say, they are more than paid. Yet they are vitious intromitters, even as to that superplus, for they want a title; since they should have eiked it to the principal testament, and not have suffered another to have taken a dative *ad omissa.*

In this cause there was occasion to propone, on the Act of Parliament in 1670, that the bond was prescribed *quoad modum probandi,* being holograph; *item,* on the axiom *quod debitor non præsumitur donare.* See the informations.

Advocates' MS. No. 696, *folio* 313.