THE LORDS repelled the defence of *res judicata*, in respect of the answer. Thereafter this affair ended in a submission. No 376.

Fol. Dic. v. 2. *p.* 207. *Harcarse*, (DECREETS.) *No* 411. *p.* 110.

1692. *December* 27. KINLOCHS *against* CHARLES OLIPHANT, the Clerk. No 377.

THE LORDS found Charles's decreet-absolvitor of the nature of those exceptions that are called *impeditivæ litis ingressus*, and that the said decreet should be first reduced, ere they can quarrel the disposition; but found, if there was any new ground of law insisted on against the disposition, that was not *deductum in judicium* in that decreet-absolvitor, that they might be yet heard on it; seeing competent and omitted did not hold in reductions, nor could be obtruded against pursuers, but only against defenders; for a man may first quarrel a right *ex capite exhibitionis*, and if he succumb, he may raise a reduction of it on the act of Parl. 1621; and he may pursue first as donatar, and then as adjudger; and competent and omitted will not exclude him in either cases, whether the reasons be *in facto* or *in jure*: So they allowed the reporter to hear Kinlochs, the pursuers, on any new grounds not alleged in the former absolvitor.

Fol. Dic. v. 2. *p.* 207. *Fountainhall, v.* 1. *p.* 539.

1700. *January* 2. PETER ARCHIBALD *against* JAMES WILSON.

No 378.
Found in conformity to Strachan against Drysdale, No 369. p. 12225.

ANSTRUTHER reported Peter Archibald against James Wilson, merchant in Edinburgh. Patrick charges the said James for L. 200 contained in his bond. He suspends on this reason, that he must have compensation for the aliment of the said Patrick's daughter, who staid three years in his house. *Answered*, The case was *res judicata*, seeing he had an absolvitor from the aliment before the Sheriff. *Replied*, I have raised reduction of that decreet, which proceeded on a wrong ground; whereby his wife, in his absence, offered to prove there was express paction for an aliment, in the probation whereof she succumbed, whereas there was no need of putting it upon that foot; for whether paction or not, you are liable, for *debitor non præsumitur donare*, and I liquidate it instantly by referring the alimenting and time of it to your oath, and the modification of it to the Lords. *Duplied*, If the process was mismanaged by burdening themselves to prove an unnecessary allegeance of paction; and, upon their succumbing, I being assoilzied, *sibi imputent*, but the decreet must stand.

THE LORDS thought competent and omitted did not militate against a pursuer, but he might still insist *super alio medio* than that which was formerly deduced *in judicium*; and being a decreet of an inferior court, they reponed

No 378. him against it, and allowed the Ordinary to try the manner of her alimenting, whether she was also kept by them in cloaths, and at schools, or only at bed and board, or if she was used as a servant, and what was her age, to the effect they might have better meiths how much to modify yearly, the time being proved by his oath. Stair, part 4. tit. 40.

Fol. Dic. v. 2. *p.* 209. *Fountainhall, v.* 2. *p.* 77.

1706. *June* 26.

CHARLES ANDERSON, Son to ——— ANDERSON of Midhouse, and JEAN ANDERSON his Sister, *against* JAMES GORDON Merchant in Elgin.

No 379.

JAMES GORDON, merchant in Elgin, being charged by virtue of a decreet, obtained before the Commissary of Murray, at the instance of Charles Anderson, factor for Jean Anderson his sister, for the sum of 100 merks, and two bolls of victual, promised by James Gordon to Grant of Arrindully, in name of the said Jean, for her passing from a promise of marriage made by him to her; he suspended upon this reason, that the Commissary committed iniquity by admitting, 1*mo*, The foresaid promise to be proved by witnesses, although our law doth not allow their testimonies as probative of such a *nuda emissio verborum*, even as to sums below L. 100; March 25. 1629, Russel *contra* Paterson, *voce* PROOF; February 13. 1664, Cheyn *contra* Keith, IBIDEM. It imports nothing that nuncupative legacies and bargains of victual under L. 100 are probable by witnesses; for that is indulged *favore ultimæ voluntatis, et commercii*; because the former are generally more listened to than other naked promises; and in bargains of victual, or the like, *interventus rei*, the giving and receiving fixes the minds of witnesses. 2*do*, The Commissary committed iniquity by admitting Grant of Arrindully, to whom the promise was made for Jean Anderson's behoof, as a witness for proving thereof, although he was in effect a party; and could not probably purge himself of partial counsel, when the matter could never be brought to a process without his information.

Answered for the charger, 1*mo*, This was not simply a promise, but a mutual bargain and agreement, which is probable by witnesses; so that the decisions adduced by the suspender, relating to simple promises, do not meet the case. That betwixt Cheyn and Keith proceeds upon a specialty, that the person, to whom the promise was said to have been made, lived ten years with the promiser without requiring implement; and the promise being seventeen or eighteen years old was offered to be proved by the testimony of witnesses, whereas here the agreement was recent. The witnesses, again, in the decreet, were received without objection, which *per se* exeems the same from a review upon that ground; February 9. 1672, Wood *contra* Robison, No 370. p. 12225. 2*do*, Arrindully was a most habile witness, being in effect a communer, and no