Sir Alexander Anstruther of New Wark, clerk to the bills. Sir Alexander having some lands lying about Ruglen, he, by a minute, sells a part of them to the said Daniel; and afterwards offering the rest to the Duchess of Hamilton, she did not incline to bargain for any of them, except she got the whole; and Sir Alexander having signified this by a line to the said Daniel, he returns an answer in thir terms:---"I shall be sorry if your bargain with me shall obstruct your selling the rest; if her Grace be ambitious of that little bargain, she shall be welcome to it for some consideration." Sir Alexander, thinking himself free, enters into a second minute with the Duchess, whereby he dispones the whole to her Grace, even including that parcel formerly sold to Mr Campbell; who, getting notice of it, registrates his minute, and charges Sir Alexander to fulfil and implement it. He suspends, on this reason, That, by the foresaid clause in his letter, he had passed from the minute, and quitted the bargain; so he was *in bona fide* to enter into a new one with the Duchess, whose procurators likewise compeared, and founded on the posterior agreement with her.

ANSWERED,---The sense of the clause was altogether mistaken; for though he designed a compliment to the Duchess, yet he never designed to free Sir Alexander: but he fulfilling his minute, by an extended disposition, whereon he might perfect his right by infeftment, then he would make both his word and writ good, by offering to quit the bargain to the Duchess, for such a valuable sum as they could best agree; otherwise he would keep the lands to himself: and civil expressions in letters are not to be strained to obligations; as was found 10*th July* 1672, *Shaw* against *Bruce.*

REPLIED,---The words, in their natural and grammatical sense, can admit no other construction but a plain abandoning and derelinquishing of the bargain; and letters may be as obligatory as any other writs; *et verba sunt interpretanda contra proferentem,* and not to be called *verba officiosa,* and mere civilities. And law determines, that, as *emptio venditio* is *contractus consensualis,* so *contrario consensu dissolvitur*; *l. 35, D. de Reg. Jur. sec.* 4. *Institut. quib. mod. toll. obligat. Si Titius Seco vendiderit fundum Tusculanum centum aureis, pretio necdum soluto nec fundo tradito, placet inter eos a venditione discedere, tunc invicem liberantur;* which seems exactly to be Sir Alexander's case with Mr Campbell, especially being for liberation, *cujus causa semper est favorabilis.*

The Lords, by a plurality, found the letter was not an overgiving of the bargain, and so did not put Sir Alexander *in bona fide* to enter into a new minute with the Duchess; but that he must fulfil and perfect the first; which being done, Mr Campbell may offer it to the Duchess; and if his demand of a consideration be high, that will be subject to a modification *arbitrio boni viri.*

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1706. *January* 31. POOR JAMES YOUNG *against* THOMSONS and OTHERS.

JOHN Thomson, in Cockeny, being debtor to the said James Young, in 600 merks by bond, and Young being overburdened with debt, the said sum is arrested by his creditors; and Thomson, on decreets of forthcoming against him, is forced to pay; and Young having gone as a soldier to Flanders, and at last returning, Thomson thought it more secure for him to get Young's discharge, than to rely on his several partial payments made on distresses to his creditors;

and so pursues him to count and reckon; and, on production of his instructions, obtains a decreet against him, ordaining him to grant a discharge of the debt as fully paid; and, he having raised a reduction of the said discharge, after a litigious debate, Thomson's heirs are assoilyied. But Young thinking his affair mismanaged, he raises a new process against them, for payment of the 600 merks as yet resting; and they opponing not only their discharge, but likewise their decreet, he offered to prove, by their oaths, that the said discharge was extorted from him, by casting him unwarrantably in prison; and they not consenting to his liberation, (he wanting wherewith to procure a suspension and charge to set at liberty,) he was concussed to give the said discharge ere he could obtain his liberty.

REPLIED,---That, after a decreet *in foro*, no such allegeance could be now received, especially so summarily, without a reduction.

But the Lords, considering his poverty, did not put him to the tedious and expensive way of reducing, but thought any writ might be taken away by the party's oath on the head of *vis et metus*. But suspecting it to be calumnious, they first ordained Young to give his oath of calumny, if he had reason to say the debt was yet owing; and then referred to the Ordinary to examine the defenders on the reason of concussion and force, as he should find cause.

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1706. *February* 5. The MAGISTRATES of INVERARY *against* WILLIAM THANE of BLACKHALL.

The Magistrates of the Town of Inverary, and William Thane of Blackhall, raise mutual declarators of molestation, as to their possession of a muir adjacent to them both, in which the town claimed an exclusive property, and he only craved a servitude of pasturage and commonty. And a conjunct probation being allowed and advised, the Lords found the Town of Inverary had proven immemorial peaceable possession; and that Mr Thane's witnesses had, at the furthest, only proven thirty-five years'; and the Town had proven frequent interruptions: and therefore decerned in favour of the Town's right, and assoilyied them from the other's declarator, and modified 100 merks of expenses, to be paid by him to the Town, as *temere litigans* and calumnious. Against this interlocutor he reclaimed by a bill, representing that his witnesses would have proven forty years' possession, but the probation being on a commission, they were examined at the said burgh, where the town-clerk and others dashed and concussed his witnesses, so that they had not the freedom witnesses ought to be in; and therefore craved a reëxamination, either before the Lords themselves, or at Aberdeen by the sheriff, as both indifferent in the place and person. And for the interruptions proven, they were not in the terms of law, neither by way of summons nor instrument registrate; *et aliquid non omnino fieri, et non legitimo et habili modo fieri, æquiparantur in jure*; whereas there is nothing here but the petulant and momentary interruptions of herd-boys driving off their neighbours' goods; which is no more than if a stranger going by had hounded them off. And, *in anno* 1619, his predecessors threw down a dyke the Town were building there.