The Lords inclined to repel the allegeance, and find the goods poinded, though *bona fide* used and alienated, might *quoad* their value be repeated. But this were to make it a very hask privilege. See Sir George Lockhart's thoughts against it *supra*, February, 1671, No. 146, and the citations from Dury there.*

For the other defender I alleged *absolvitor;* because I offered to prove by witnesses, that the tenant had, at the time when he sold these goods, at least betwixt Yule and Candlemas, as much corns (for *utensilia* and stocking is not enough) as would pay his master that year's farm. But in proving thereof, special notice would be taken, that witnesses be used who know what was his yearly duty he paid to the master, and the precise quantity of the corns he had in his barn or barn-yard, (for his growing corns will not be accounted as sufficient, since they must pass in account for another year,) and be interrogated particularly thereon; and if either this be omitted, or the witnesses ignorant thereof, the exception at the advising will be found not proven by the Lords.

Advocates' MS. No. 427, folio 228.

1673. *November.* ANENT LIFERENTRIXES.

ABOUT this time it was queried, If a woman, liferentrix provided to so many bolls or chalders of victual, or infeft in an annuity or annualrent furth of lands for her liferent use, will be liable proportionally, and *pro rata* of what she possesses, to the public burdens, with the fiar.† Either it is declared she shall have right to such an annuity free of all incumbrances, or that her jointure be worth so many chalders of victual, or it is due merely by a personal obligement to pay as well infeft as not infeft; and in either of thir three cases it is thought she will have right to her full liferent, without allowance of any defalcation for burdens: but if her liferent right be constituted by infeftment, and she in possession, she will in that case be liable for her proportion of the public burdens. I said, in this second member of the distinction, that she must be in possession, else it is thought she will not be obliged to acknowledge these *debita ex fundo provenientia, et quæ rem afficiunt et sequuntur*. And thus inclines the act 3. made on the 10th of December, 1646; and it is affirmed, the Lords have so decided, first between the Lady Rossyth and her son, and then between the Lady Cassills and the Earl of Roxburgh.—*Vide* l. 27. p. 3. D. *de Usufructu. Vide jurisconsultissimum Joannem Vandum*, lib. 2. quæs. 22. See act 20, in 1663, and some observations, *alibi*, anent tercers undergoing public burdens. See 23d February, 1681, Lady Aberlady.

And, really, it cannot be thought rational, that the fiar shall bear the burdens imposed *intuitu* of land, whereof he is not in possession, but debarred by liferenters. Natural equity provides, *ut eum sequantur incommoda qui habet commoda;* they who reap the emolument ought not to grudge *onus ei annexum*, l. 10. D. *de Regulis Juris*. What if the heir have little or no profit? sure it is hard to require brick

* See M'Kenzie's Observes on the Act 1621, p. 104. Dury, 3d February, 1624, Hayes *contra* Keith, *in fine*.

† If she be infeft, some determine she is liable; otherwise, is not. *Onus temporariæ indictionis ad fructuarium pertinet*, l. 28. D. *de Usu et Usufructu Legato*. See February, 1680, Absents from the Host, p. 27, Mr De Ferriere cited.

of him without furnishing straw, unless express paction be in the contrary. See the Lady Rossyth's case.

Advocates' MS. No. 428. *folio* 228.

1673. *November.* JAMES SYME *against* INGLIS of Murdeston.

JAMES SYME, tenementar in Hamilton, charges Inglis of Murdeston on a bond for 200 merks. He suspends; offering to prove, by the charger's oath, that the true cause of the granting of the bond was not borrowed money, but for the price of a horse: which being granted, then offered to prove by witnesses, that the said horse was scabbed, and insufficient, and not worth the money, and that he offered him back.

ANSWERED,—The reason was not relevant to be proven by witnesses, contrary to the brocard of law, That writ cannot be taken away but by a contrary writ or oath of party. *Idem eodem modo dissolvi quo colligatur, naturale est;* l. 35. D. *de Regulis Juris.* Dury, 15th July, 1624, Nisbet *against* Short; *supra, numero* 329, in February, 1672. 2*do, Esto* the horse had been insufficient, *sibi imputet,* his eye being his merchant; unless he will make it relevant, and offer him to prove, that the seller, now charger, promised to warrant and uphold the horse, or knew its imperfections and fraudulently concealed them, or that they were so latent as they could not be perceived save after some time's trial. 3*tio,* He must say, that how soon he discovered the imperfection, he instantly intimated the same to the seller, and offered him back. And all which, to take away his bond, may be proven allenarly *scripto vel juramento.*

REPLIED,—That the bond was no other way here to be taken away but by the charger's oath, who once deponing and confessing the condition and cause onerous of the bond to have been for the price of a horse, that reduced the case to the nature of a bargain, the terms whereof no lawyer controverts but are probable by witnesses:—*Vide supra,* in December, 1672, No. 378. *in calce.* And he needed not prove the charger promised to uphold it, because *nemo ex suo dolo lucrari debet, actionem ve consequi,* l. —. D. *de Regulis Juris; et contractus emptionis et venditionis* is *bonæ fidei,* in which trust is most exuberantly relucent; and the *edictum ædilitium* has introduced, upon most rational considerations, the redhibitorian action, in case of latent vitiosity.—See my observes *alibi* on that edict, and a decision on the 1st of July, 1657, Fleeming and Reid.

The Lords found, the bond might be taken away in the manner offered in the reason: and that the charger acknowledging once it was for the price of a mare, then witnesses might be led as to terms, communing, agreement, and the insufficiency of the thing sold.

Which was thought somewhat lax, exposing all bonds granted for any other cause than borrowed money, (which bonds are very frequent in buying wares from a merchant, &c.) to be cavilled on and exposed to the tentation of the integrity of witnesses, if the goods given for the bond were sufficient; and draw the most tedious, troublesome, and uncertain inquiry into their goodness or badness, after many years.

If the Lords had ordained witnesses to be examined before answer *ex officio,* the hazard had not been so great, for that cannot be drawn into a preparative and ex-