

1678. *February 27.* LAMONT *against* BOSWEL.

By charter-party Colvil Lamont was obliged, upon freight, to carry his ship from Kirkaldy to Queensbridge, and back again; for which Henry Boswel was obliged to pay him therefor 800 merks: who being charged therefor, he suspended on this reason,—That the skipper, in his voyage to Queensbridge, being near Milstrand, and staying some days there, the suspender went ashore, sold a part of his goods at good rates, and did require the skipper to disload; which he refused; and therefore he must deduce the damage.

The skipper ANSWERED, That, by his charter-party, he was only obliged to go to Queensbridge; and, that breaking bulk at Milstrand without an entry, he might forefault the ship.

The suspender REPLIED, That this bargain, by location and conduction, being *contractus bonæ fidei*, the skipper could not refuse to set into any safe harbour in the way to Queensbridge, or to disload any parcel at sea,—which the suspender offered to receive by boat several leagues from land; and there is no hazard to sell a parcel of goods in one dominion, and the rest in another; albeit, where the cargo is direct to any dominion, bulk may not be broken there.

The Lords found, The skipper ought to have disloaded the foresaid parcel at sea; and therefore ought to deduce the damage.

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1678. *July 2.* HENRY YOUNG *against* PEARSON.

HENRY YOUNG pursues reduction of a decret-arbitral betwixt him and Pearsons, bearing a general submission, according to claims, and particularly anent the payment of the lands of Muirhaugh. The reason of reduction is upon iniquity, because the disposition of the lands of Muirhaugh bore expressly the payment of the price, and yet the arbiters decerned the pursuer to pay a sum affecting a part of the lands; which decret bears this clause,—“That, by instruments and witnesses adduced, it was proven that the pursuer promised to satisfy that burden, and that he acknowledged the same before the arbiters.” And though there was an instrument taken upon the promise, yet, by the laws of this kingdom, promises are not probable by witnesses or instruments, or by the assertion of the arbiters to justify themselves; and, therefore, the arbiters did wrongously take from the pursuer that which the law of the kingdom had given him.

It was ANSWERED, That, by the nature of a submission to arbiters, they may proceed *secundum bonum et æquum*, and are not understood to do iniquity by municipal laws, in relation to the formalities or penalties thereby introduced; and, therefore, they might justly sustain a promise, which is binding by the law of God, and action only refused against the negligence of parties who take no writ, that witnesses shall not be admitted; and, therefore, the arbiters might sustain the promise, as they might take off a penalty, or certification, or the expiring of a legal, or a clause irritant; though Judges, who must proceed according to the law of the land, could not do it.

The Lords sustained the decret-arbitral; the defender, in fortification there-