was only adjected *in modum pœnæ*, or as *damnum et interesse* succeeding *loco rei*, and so was still purgeable, *l.* 91, § 3, *D. de Verb. Obligat.* *2do*, The charger's instrument, requiring the goods on the 1st of January, was preposterous and null, and so could not constitute the defender *in mora*, because the 1st day of January being the day appointed for their delivery, that whole day was introduced in favour of the debtor in this alternative obligation, *per* § 2. *Institut. eod. tit.*

This being reported by Harcus, the Lords found it sufficient to assoilyie and exoner the suspender, that he offered the goods before the out-running of the six days of the charge, it being *modica mora;* unless he could prove some real and material damage through not getting them on the precise day.

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1685. *February 3 and 5.* COLQUHOUN of LUSS *against* ARCHIBALD STIRLING of CARDEN.

THE Lords advised the two points debated in Colquhon of Luss's reduction *ex capite lecti*, against Archibald Stirling of Carden, of a bond of 20,000 merks which the last Laird of Luss gave his Lady, who, after his death, married Carden. The defences against it were :—1*mo*, That the deed was valid, for, after subscribing it, he went both to kirk and market, though the performing any one of the two is sufficient to purge and take off deathbed. *2do*, *Esto* it were on deathbed, it depended upon an onerous cause, being granted to her in remuneration of her consent to the sale and alienation of the lands of Lochend to Sir Robert Sinclair, advocate, whereof she was first heretrix, and, the time of the sale, liferentrix; and that the said price went toward the payment of Luss's own debt.

ANSWERED to the *first*,—His attempt in going to kirk and market could not satisfy the law; because it was in coach, only from James Dean's house, at the foot of the Canongate, to the Abbey-church; and this going being done with design to validate the Act, he should have walked on foot; but it was *ultimus naturæ conatus*, and he could not go otherwise, and he stumbled in the very short way to the coach, and his Lady and he were in each other's hands; yea, she held him. Though this was but suitable to his quality, to go in coach, and to lead his Lady; yet, at such a time as this, these compliments ought to be omitted and dispensed with. As to the *second*, This bond does not bear it as granted for that cause; and, *esto* it were, she had got an additional jointure besides, which was remuneration enough. And there was 60,000 merks of proper debt affecting Lochend, which exhausted the price *pro tanto.*

The Lords, on the 23d of February, found the deathbed proven; not that they decided the point in general, that every going in coach should imply supportation and deathbed; for one may have the gout in the feet, and no other distemper. See Gomez. *ad regulam Cancellariæ apostolicæ de Infirmis Resignantibus.* But in Luss's particular circumstances, as they were proven, they found he was supported. They forbore advising the 2d point, till they caused some of their number essay an agreement. But that taking no effect, on the

5th of February they advised the other; and found she was sufficiently remunerated *aliunde* for this her consent; and that it was not proven that the said remuneration was either the design or cause of that bond given by Luss to Sir Archibald Stuart of Blackhall, for the Lady's behoof; and therefore reduced it *in totum*.

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1685. *February* 11. DANIEL NICOLSON *against* GILBERT FIFE.

DANIEL Nicolson, writer in Edinburgh, against Gilbert Fife, merchant, and late bailie there, is reported by Harcus. The case was: Major Robert Johnston and Gilbert Fife having made a vendition and excambion of their shares in two frigates; and the privateer, of which Fife promised to give Johnston a 16th part, having gone to sea, and brought in a rich prize, Johnston pursued him before the Commissaries of Edinburgh, for his share of the said prize, and refers the agreement to his oath. Fife depones, That he had offered him a 16th part of that ship before it went out, but he refused it. The Commissaries found this quality of the refusing extrinsic, and therefore decerned. Fife suspending this, he ALLEGED,—It was never a completed bargain; and that Johnston would never have owned nor claimed the said frigate, had she not brought up that prize; and, having been at no expense on the out-reik, *dolus proprius nemini debet prodesse.*

The Lords found, in respect the promise was made by Gilbert Fife in favours of Johnston, that, except Daniel Nicolson, who is now Johnston's assignee, will instruct, *scripto vel juramento*, that Johnston did require Fife to make him a right to that part of the ship before it went out, he had no right to any share of the prize brought in; and therefore suspended the letters *simpliciter*. For they thought it hard that Gilbert Fife should be bound, when there was no document nor vestige whereupon Major Johnston's acceptation of the bargain could be fixed upon him; so that, if a prize had not come up, he might have refused to accept from George Fife the 16th part of that frigate; unless it could be proven to have been *unicus contextus* of a complex bargain.

Then the Lords, by a deliverance, on a bill of the 21st of February, ordained Fife to depone if Johnston out-reiked the frigate, or if he ever desired to do it, whereby he intimated that he looked upon it as his.

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1685. *February* 12. The EARL of TWEEDDALE *against* The EARL of LAUDERDALE and SIR WILLIAM SHARP.

THE Earl of Tweeddale gives in a petition against the Earl of Lauderdale and Sir William Sharp, craving Sir William may be ordained to produce his tack of the late Duke of Lauderdale's estate, by sight whereof, it would appear that