

1703. January 19. SIR GEORGE WEIR of Blackwood *against* JAMES RUSSEL.

JAMES RUSSEL having bought the lands of Gartness from Sir George Weir of Blackwood, in part payment he assigns him to a bond for 3500 Scots due by John Corse merchant in Glasgow, from whom Blackwood takes a bond of corroboration payable at the Whitsunday following; but ere that came, Corse breaks; whereupon Sir George intends a pursuit against Russel, to make the money effectual to him, upon this ground, that he asserted Corse's sufficiency, and promised the money should be punctually paid at the Whitsunday, to which term he desired Blackwood to forbear it, in regard he had engaged to Corse by promise that the exaction of the bond should be superceded till then, and he plighted his credit and faith for it; and so he trusting Mr Russel, the loss must fall on him, and not on Blackwood. *Answered*, Blackwood did not rely on his assertion, but informing himself of John Corse's condition, heard that he was in the reputation of a very rich man; and he might have had other bonds, and yet chose to prefer this; and even absolute warrandice in an assignation does not import the warranting the debtor's solvency, but only *quod debitum subest*, as was found 24th November 1671, Barclay against Liddel, *voce* WARRANDICE, conform to the Roman law, L. 4. D. De Hæredit. et Act. Vendit. THE LORDS found the promise to warrant him, if he forbore till Whitsunday, relevant; but the great debate was *de modo probandi*. Blackwood contended that it was more than a promise, or *nuda emissio verborum*; which indeed can only be proven *scripto vel juramento*; but was *pactum incontinenter adjectum*, and so *pars contractus*; and as emption vendition may be proven by witnesses present, so may this like any other bargain. THE LORDS found it only probable by Mr Russel's oath, seeing he had not adhibited writ, as he might have done; but allowed him to adduce the witnesses to the communing to confront with him at his deponing. It has been sometimes pleaded, where the value of the promise was within L. 100 Scots, that witnesses might be admitted to prove it; but even in that case it has been denied, 3d July 1688, Donaldson against Harrower, Div. 1. § 9, *h. t.*; and 9th February 1672, Wood against Robertson, No 370. p. 1225.

*Fol. Dic. v. 2. p. 219. Fountainhall, v. 2. p. 174.*

1703. November 20. HISLOP *against* SMART.

A MESSENGER, who suffered a prisoner to escape, *alleging* a posterior paction with the party, whereby he was bound to apprehend and incarcerate the prisoner, which he had now done, and in which case the party was to pass from any action against him for letting the prisoner escape; the LORDS found this paction

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A promise of the cedent of a bond to warrant payment, was found probable only by his oath.

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