enter burgesses, otherwise to go to prison, and have their shops shut up; and they, to prevent distress and save their credit, having granted bond for £5 sterling each of them, as their composition for their burgess tickets; and being charged thereupon, they raised suspension and reduction on thir reasons, 1*mo*, That the bonds were extorted by force, fear, and concussion; in so far as he threatened them with summary imprisonment if they did not comply with his demand; and this proceeding from a magistrate, who could effectually put his threats in execution when he pleased, being clothed with authority, it was sufficient to incuss and strike dread and terror into such poor ignorant merchants as they were. *2do*, The Dean of Guild's claim was most unjust and unreasonable; seeing the tradesmen of Leith have immemorially exerced their employments without entering burgesses of Edinburgh, or paying any dues for the same, especially seeing they have no benefit by such a useless compliment.

ANSWERED,—Overly threats can never afford just ground of reduction; for, *l.* 22 *D. Quod metus causa* supposes only actual imprisonment to be *metus qui cadere potest in constantem virum, et minæ solæ non sufficiunt.* And Stair, *lib.* 4, *tit.* 40, *num.* 26, seems to require actual restraint to found this action. *2do*, It was *vis licita (esto* it were true;) for, Leith being a part of the royalty of Edinburgh, it is under the cognizance and jurisdiction of the Magistrates thereof: and the Deans of Guild have been in use to call unfree traders, and either cause them enter, or else fine them; it being only the town's port and burgh of barony, and Edinburgh their superiors.

The Lords, before answer, allowed a conjunct probation; the pursuer to prove, That it has been the use and custom for the Dean of Guild of Edinburgh to call the inhabitants and artificers in Leith before his court, to enter burgess, and pay for the same; and, in case of refusal, to imprison summarily: and the defenders to prove, They have been in use and exercise of their respective crafts and employments without being obliged to enter burgesses and pay composition for the same.

There was a separate point alleged against the Coupers, That they were not only wrights for making barrels, but likewise traded in wines; whereas, it was uncontroverted that none could use merchandise without being first admitted burgess.

But, this point not being fully heard, the Lords reserved the consideration of it till it were further debated. *Vol. II. Page* 581.

1710. *July* 4. JAMES SMITH *against* SEMPLE of FULWOOD.

SMITH and Semple. Mr James Home, merchant in Edinburgh, being debtor to Mr Alexander Drummond, writer to the signet, in £578 by bond; and one Ninian Brown, in Caldstream, being also a considerable creditor to him, and designing to adjudge; Mr Drummond, for saving expenses, assigns his debt to Brown, that it might be included in one adjudication. But, that it might not be in Brown's power to dispose of his sum without his consent, he expressly clogs his assignation with this quality, that it should not be leisome to the said Ninian Brown to dispone or transfer his sum to any person whatsoever, without his consent; and how soon the decreet of adjudication was obtained, Brown

obliged himself to deliver back to Mr Drummond his bond, with a disposition and retrocession to his share of it; and should not be affected with Brown's debts. Notwithstanding this restrictive quality, yet Brown assigned his adjudication totally, even as to Drummond's part, to Captain Baillie, and he to Mannerhall; who distressing Home's heirs, and obtaining decreet against them; for relieving them from a present distress, Semple of Fullwood grants a bond of corroboration of Home's prior bonds contained in Brown's adjudication, and consequently of Drummond's debt amongst the rest. And Fullwood, being charged on his bond, made payment to Mannerhall; but afterwards being convened by James Smith, Bailie of Tranent, as having right, by progress, to Drummond's debt, he ALLEGED, He had made *bona fide* payment to Mannerhall, who had a decreet against Home's heirs; and thereupon he became *adpromissor* for them by a corroborative security, and knew nothing of the restrictive qualities in Drummond's assignation to Brown; neither was he bound to inquire into the matter any farther than to see a clear decreet against Home's heirs, making not the least mention of any such restriction in Drummond's right to Brown. And, *esto* Drummond had taken a back-bond from Brown, declaring the assignation was but in trust, and obliging to denude, that would never have put Fullwood *in mala fide* to pay to Mannerhall, in whose person he saw a simple absolute right without the least quality ingrossed; and he was not bound to speir further back: like one granting a corroboration of a former right may warrantably pay without dipping into the qualities of the original right, which may be conveyed through several hands.

ANSWERED,—Though you Fulwood was not bound in the first debt, but only came in as accessory to them, yet you was obliged, before you made payment, to have examined the transmission, and seen the several steps of the progress; which, if you had called for, you would have found Brown's right from Drummond expressly clogged and burdened with two restrictive qualities: 1*mo*, That the assignation was in trust, and *ad particularem effectum* only, to deduce a diligence of adjudication thereon, and denude. And the *second* was, not to assign Drummond's debt to any without his own consent; and you was bound to have seen them, and so the payment can never be *bona fide:* and for this was cited a decision in Newton, 10*th March* 1683, *Drummond* against *Riddoch.* And the case of a separate backbond differs *toto cælo* from this in hand; for there singular successors and strangers were not bound to know any such transaction, but here the very right is affected with it; and it is incorporated *in græmio* of the assignation; and you cannot misken it, nor pretend ignorance. It is true, as payment is most favourable, though labouring under defects and mistakes, and double payment odious; yet here he ought to have inquired into the qualities of his author's rights, which having neglected, he must be still liable.

The Lords found it was not *bona fide* payment. But, it not being clear if all the sums in the adjudication were paid by Fullwood, or only a part, the Lords thought, in the last case, that indefinite payment of a part would be *primo loco* ascribed to Brown's part; so there would be yet room for paying Drummond's debt *pro tanto,* in so far as Fullwood had yet in his hands. Fullwood likewise reclaimed against a former decreet preferring Smith, on thir two grounds: 1*mo*, That it was extracted disconform to the minutes. 2*do*, That Advocates were made compearing for him, whom he never employed.

As to the *first,* the Lords recommended to my Lord Grange, reporter, to try the matter, and punish the extractor, if guilty. And, as to the *second,* the dis-

claiming compearance either by the party or advocates, so as to loose decreets *in foro*, was of the highest importance, and most dangerous to the security of the lieges; and therefore was not decided at this time. See the 11*th December* 1678, *Grant* against *Mackenzie*. *Vol. II. Page* 582.

1710. *July 5.* SIR WILLIAM LAURIE of MAXWELTOUN *against* JOHN GIBSON of GLENCROSH.

LAURIE of Maxweltoun against Gibson. Sir William Laurie of Maxweltoun pursues John Gibson of Glencrosh on an old decreet-arbitral pronounced in 1673, decerning his father to pay 1300 merks to Maxweltoun's father.

ALLEGED,—This being a decreet thirty-seven years ago, and never heard of till now, and being a sum modified to be paid by Gibson, vassal to Maxweltoun, for an entry to his lands, and for discharging bygone non-entries; and it being asserted that Maxweltoun gave him a charter, and performed his part of the decreet-arbitral, law presumes the other mutual prestation has been *simul et semel* performed; seeing a superior will not readily enter his vassal till he pay the composition. But, whatever be in this, the decreet-arbitral is null, being founded on a prorogation; the sole warrant of which is only subscribed by the arbiters, and wants both writer's name and witnesses.

ANSWERED to the *first*,—Anent the prestations enjoined by the decreet, that can import nothing, unless he have a discharge. And, as to the nullity, they had, by the submission, power to prorogate; and the Acts of Parliament requiring writer's name and witnesses relate only to probative writs betwixt parties, but not to writs of persons acting by virtue of an office and trust, such as arbiters; and was so found in a notary's seasine, 26*th June* 1634, *Lord Johnstone* against *the Earl of Queensberry;* and 9*th December* 1635, *Earl of Rothes* against *Leslie;* where the Lords sustained a decreet-arbitral, though it wanted witnesses: and the like, 10*th December* 1632, *Hunter* against *Haliburton*.

REPLIED,—Their faculty of prorogation was but a delegated power, and so they could do no more by virtue of it than the parties themselves could have done; and, as they could not prorogate by a writ wanting writer's name and witnesses, so neither could the arbiters. And as the submission would be null without witnesses, so will the prorogation be in the same way, it being upon the matter a new submission, and the immediate warrant of the decreet-arbitral following thereon. And, as to the decisions cited out of my Lord Durie, they cannot influence this case; for the solemnities of writs were not come to a consistency at that time, but were fluctuating, and can be no rule now.

Several of the Lords thought the prorogation null; but, being of importance, they took hold of the first allegeance, and allowed probation, before answer, what implement or performance had been made of the prestations *hinc inde*, contained in the decreet-arbitral; and recommended to the Ordinary to hear the parties thereupon. For the Lords thought, if the superior had fulfilled his part in granting a charter, it was a strong presumption that the vassal had also paid the entry; especially seeing his house, since that time, had been burnt, where the discharge might have been lying.

There was another point started, That the prorogation was signed on the 20th