performance, the seller might notwithstanding, in case of not delivery, be liable in damages, but if by any fatality the seller be not able to deliver, as was generally the case in the year 1740, that in that case he ought only to be liable in the liquidate penalty. Arniston told us he had given such a judgment in a case before him; and Dun told us the same of a case before him; and I think at the same time, in February, affirmed an interlocutor of mine to that purpose betwixt Trades of Dundee and Earl Strathmore.

No. 2. 1743, July 20. DEMPSTER *against* FERGUSON of Kinmundy.

FIND Ferguson of Kinmundy is liable for the current prices of the undelivered bolls of all the victual actually paid to Kinmundy by his tenants, and for the remainder, that he is liable for the conventional penalty of one merk per boll, or in the buyer Dempster's option for the price paid to him, or promised to be paid to him by his tenants.

PERSONA STANDI.

No. 1. 1740, Jan. 6. CASE OF SIR ALEXANDER M'DONALD.

A pretty new question cast up in the process betwixt these parties, which had already been several times before the Court, but upon a petition in the name of Sir Alexander M'Donald, it was moved by Arniston, that the Court could give no judgment upon a petition bearing that title, in respect these honours were forfeited by the attainder of Sir Donald M'Donald, the petitioner's uncle; as to which it was observed by some of the Lords, that the honours in Sir Donald were certainly extinct; that if the petitioner could not have a title to the like honours of Baronet, otherwise than through Sir Donald, the Court could not receive a petition under that title; but as the petitioner (whose father also either had, or assumed the like title) might be entitled to the honours of Baronet, though Sir Donald had never been a Baronet, and that it was not the province of the Court to examine into or determine titles of honour incidentally in this way; yet by a majority it carried they could not give any judgment on the petition with that title. Accordingly the petition was reprinted, leaving out the title of honour, but complaining modestly of the judgment, and at the same time putting us in mind, that in the former interlocutor, we ourselves had given him those titles. There were several who differed from the interlocutor in the case of Knightship or title of Baronet, though in a title of Peerage we thought the case would have been otherwise, because only one Peer can have one title of Peerage, and none can claim it but in the right of the former Peers, and if it is forfeited by one, none other can take it without new creation, which does not apply to the honours of Baronet, *(inter quos dissent.* President *et ego.)* *N. B.* No judgment was given on this new bill, it having been observed that the preamble to it was unnecessary, because no interlocutor had been, or was intended to be put in writing upon the former