that will operate to liberate him only *pro futuro ;* but all deeds without the interdictor's consent, prior to the decreet of reduction, will be void and null.

3tio, Houston ALLEGED,--The execution of the interdiction was null, because, being wrote on a paper apart, and not on the back of the bond and letters, it did not specially design the parties, but only related to the within designations ; which might agree to any Patrick Maxwell in the kingdom as well as Patrick Maxwell of Newark. Neither are the interdictors designed otherwise than relatively, " the within designed," and, by the 6th Act, Parliament 1672, such indefinite executions on summonses are declared void and null.

ANSWERED,---There was no hazard of mistake here, seeing the bond, letters, publications, and executions were all duly registrate ; which fixes the executions to such particular persons, and clears the ambiguity, if any be ; and the Act 1672 being a correctory law, cannot be extended beyond its precise case.

2do, OBJECTED,---That the execution is still null ; for though its warrant requires three oyeses, open proclamation, and public reading of the letters, yet the messenger executor has omitted the word " proclamation," which is an essential requisite of the solemnity.

ANSWERED,---The execution is opponed, bearing the three oyeses, with open and public reading ; and what could that be other than open proclamation.

A third nullity objected was, That the letters required a schedule to be left and affixed on the market-cross ; whereas the execution bears, that only a double and copy of the letters was left : and the style of such writs should be inviolably kept. See the *22d December* 1622, *Seton* against *the Creditors of Atchison.*

ANSWERED,---This seems but to be a quibble on words ; for a copy seems to be the equivalent of a schedule, and only another word signifying the same thing.

The Lords thought the points so perplexed, that they declared they would hear the cause in their own presence. *Vol. II. Page* 306.

1706. *January* 8. JAMES CORBET *against* WILLIAM COCHRAN of KILMARONOCK.

JAMES Corbet, merchant in Glasgow, charges Mr William Cochran of Kilmaronock, on a bond of £300 sterling, as the price of his twelfth part of a ship sent with a cargo to Guinea, and for £30 sterling as the premium of insurance.

ALLEGED,---The obligement was conditional, payable only in case the ship should arrive safe in any harbour of Scotland or England ; which it never did.

ANSWERED,---That though the obligement was simple, yet he offered to prove, by the communers present at the bargain and communing, that the obligement was in place of the policy of insurance ; and though the ship never returned, yet the condition was implemented by the equipollent, in so far as Kilmaronock's supercargo sold the ship in some of the West India plantations, and remitted the price and effects to Scotland ; which succeeding *loco rei*, the ship, in construction of law, returned, and so, the condition being purified, the obligement takes effect.

REPLIED,---Whatever the Lords may do *ex officio nobili*, in examining the writer and instrumentary witnesses present at the time of perfecting and signing of the bargain, yet it is against the known principles of law to take away writ by extrinsic witnesses ; which can allenarly be convelled *scripto vel juramento*

of the party in whose favour the writ is conceived: upon which principles stand the greatest securities in the nation; for, *esto* that some merchants in Glasgow heard a transient communing betwixt the parties some weeks before the closing of the bargain by entering into writ, what can that import? seeing many projects of commerce are contrived amongst merchants which never take effect, but by posterior treaties and communings are cast into new shapes; so that to prove loose talkings and projects may be dangerous, they never proceeding on that foot, but come afterwards to be wholly altered. And as to the insurance, whatever it might operate against sea-hazard, by storm and shipwreck, fire or piracy, yet it can never extend to insure against the infidelity of the supercargo, who disposed on the ship and goods without warrant.

The Lords refused to examine extraneous witnesses, (for *non constat* they were communers,) but allowed the writer and instrumentary witnesses to be examined, before answer, as to the parties' meaning; and allowed them to prove that the ship was sold in the plantations, and that the price and effects were remitted to England or Scotland, to the effect they might the better judge, when they had the whole matter before them, whether the condition of the obligation was purified or not. *Vol. II. Page* 309.

See the subsequent part of this Report, *infra*, 2d December 1707.

1706. *January* 11. GRAY of BALGOWNY *against* BAILIE HOG and THOMAS BENNET in Dalkeith.

BALGOWNY having a park lying near Dalkeith, wherein it was supposed there was a coal, he sets a tack, both of the park and coal, to Hog and Bennet, and they oblige themselves to pay 2000 merks of tack-duty for a year; and he having charged on the tack, they suspend on this reason, That the principal subject set to them was a coal to be wrought only by ten colliers, which supposes there behoved to be a coal there; but, *ita est* there was no such workable coal in that ground; but, on the contrary, they were at great expense in boring and working, and could find none but only a face of a coal half a foot thick, and which presently ended, having neither back nor following. And it is a principle in location, that there must be *res locata*, otherwise the *merx* or *pretium* cannot be due, which is given for the use and profit of the thing set; and, if that fail, or be not extant, then the hire cannot be demanded from the conductor, *qui pensionem solummodo præstat pro usu rei*; and in case of sterility, inundation, vastation by war, or the like, hindering the tacksman's fruition of the subject, the heritor can get no rent. And it choaks the sense of mankind to pay for a coal, when it cannot be made appear that there was any coal there; which were to establish iniquity by a law, even as if one should exact a price for a thing he neither did nor could deliver to the buyer; and the common law was clear on this head, *sec. 5. institut. De Locat. et Conduct.* seeing the use and possession of the thing set and the tack-duty are mutual and correlative, so that, *uno sublato, tollitur et alterum.*

ANSWERED,—The tack is opponed, bearing it was a going coal; and you, dwelling so near it, had occasion to both see it and inform yourself of its condition, and your eye was your merchant; for there is a great difference betwixt subjects