

1621. June 11.

JOHNSTON *against* LOGAN.

SAMUEL JOHNSTON, heritor of a tenement in the Watergate of Leith, pursues Alexander Logan, baxter burgess in Edinburgh, to remove from a victual or wheat loft thereof. *Alleged*, That the pursuer, for four lib. of fore run mail, received in *anno* 1608, promised not to remove the defender for five years. Admits the allegiance to be proven by oath of party; for the opposed another allegiance on the same promise by writ, which was also admitted.

*Fel. Dic. v. 1. p. 561. Nicolson, MS. No 341. p. 236.*

No 5.  
Found in conformity with Bailie against Somerville, No 3. p. 8398. In this case, the promise was, not to remove the defender for five years.

1626. December 26.

JOHN POWER *against* The CUSTOMERS.

JOHN *alleging*, That Robert Arnot, Archibald Primrose, &c. and taking burden for the rest of the customers, faithfully promised to set him a tack of the imposts of the wines in the West, for all the years of their own tack, or so many as John would be content of, upon also reasonable conditions, and 300 merks cheaper by year nor any other should offer, and that they should acquaint him with any other's offer before they ended with any other; whilk promise he then accepted; likeas they offered their writ thereon, and promised that, in respect he was not then at leisure, to have the writ ready and subscribed to be given him whenever he required; and yet that since they have set a five year tack to William Anderson and others in Glasgow, for payment of 11,500 merks by year; therefore pursues them for giving him a tack of five years, for payment of 11,200 merks, conform to promise; whilk summons is referred to their oath. *Alleged* for the defenders, That the summons is not relevant, because the promise libelled was not a perfected block, but a naked free communing, neither bore it any special condition or duty whilk had been agreed upon, or writ passed on the same. Either party might have refused the block; for in blocks of selling of lands, and other sicklyke matters, albeit by verbal communing the purpose be agreed upon, and the writs formed and written, yet before the subscribing *locus est poenitentiae*, and they are not obligatory, but subscribed and delivered *quia nudum pactum nihilo dato nihilo accepto non obligat*. *Replied*, The condition is special, as in the libel, viz. 300 merks cheaper than any other, and the tack set by them for 11,500 merks concludes necessarily a special condition to be performed to the pursuer of a tack for 11,200 merks. Finds the summons not relevant to compel the defenders to their oaths, in respect of the allegiance, notwithstanding the reply, and therefore assoilzies.

No 6.  
A promise to let a tack, no writ being admitted, found not to bar *locus poenitentiae*.

Act. Oliphant and Learmonth.

Alt. King.

*Fel. Dic. v. 1. p. 560. Nicolson, MS. No 402. p. 279.*