to save his own people from being fined and forfeited, then it fell under the compass of that act, ordaining all compositions or bonds given for such forfeitures and fines to be restored; for, though the act speaks only of parties componing for their own fines and forfeitures, yet it was thought equitable to extend them to a master transacting for his tenants. Which would not sustain nor operate, if a stranger had made any such transaction. And, as to the *modus probandi*, they found it relevant to affect this bond, though assigned to Sir John Oswald of Fingleton for onerous causes, to prove, by his oath, that either he had retrocessed the Marquis, or some other to his behoof; or that he had this assignation only in corroboration and further security, and that he was *aliunde* secured for his money, beside this; and he deponing in thir terms, which will bring the right of the bond in the Marquis's person, (though some alleged, that, being granted for the cause foresaid, it was a *labes realis* that followed it through all the singular successors.) Then a new question arose, whether the true cause of the bond, (which bore in its narrative borrowed money,) could only be proven by the Marquis's oath, that it was granted on the account of his right of deputation to Calder, to cover these people, or if it was for any other cause; or if they would, *ex officio*, in this case, examine the writers and witnesses, not only of the bond, but of the assignation and deputation foresaid, to see if the one was the cause of the other: for, though this was called irregular, and tending to take away writ by witnesses, yet it was minded, that, in trusts and the like, witnesses were often examined contrary to the tenor of the writ; and that, in January last, a bond was annulled, given by Winram of Eyemouth to Daniel Nicolson, on the testimony of witnesses;—(but there fraud was proven.) But, in regard the bond and deputation were both of one date, before the same witnesses, and by one writer, therefore, this determined the plurality of the Lords to allow the writer and witnesses, before answer, to be examined *ex officio* anent the true cause of the bond. Which met with a struggle among the Lords, as a dangerous preparative; some proposing, rather, that the Marquis's oath should be taken in presence of these witnesses. But that confrontation was doubting the Marquis. Then it was found relevant to deduce, off this bond, whatever profits the Marquis should instruct that Calder made by that commission; though, in strict law, that benefit should not accrue to the Marquis, but to the tenants from whom it was exacted, and who have naturally a right to it, by the plain words of the Act of Parliament 1690, and are more clearly founded in the repetition of it than Calder, the master, is. But they are not claiming it. *Vol. I. Page* 615.

1694. *February* 23. THOMAS WYLIE, Merchant in Edinburgh, *against* WALTER CHIESLY, there.

THOMAS Wylie, merchant in Edinburgh, against Walter Chiesly, there, for paying his proportion of the gross averages he had been decerned in by the Admiral Court of Roan, at the ship-master's instance, for reparations of the ship after it was disabled by a storm at sea; and Mr Chiesly being an owner, as well as he, his share came to £100 Scots.

ALLEGED,—You cannot recur against him, because you lost the cause *ex propria culpa*, in so far as you omitted to propone an obvious defence,—*viz.* that, by Lewis XIVth's laws of the marine, the owners are not liable, if the skipper do not pursue for his damages within four months; and this was after that time.

ANSWERED by Thomas Wylie,—I could do no more but establish an advocate to plead for me; and, if he has omitted a defence, I am not to blame, who knew neither the French laws nor customs.

The Lords remembered, that *competent and omitted* is a peculiar municipal custom; and, therefore, in reclaiming of prize ships, condemned by the admiral, they never used to debar strangers by that exception of its being competent and omitted, because they might justly be ignorant of it, and were only to be judged *secundum jus gentium;* and, therefore, in this case, found Thomas Wylie was not to blame, and that he ought to have his relief against this defender *pro tanto*. *Vol. I. Page* 616.

1694. *February* 23. FRENCH, &c. *against* The COUNTESS of WEMYSS.

ALLEGED,—You have not proven your husband's death. ANSWERED,—He went to the West Indies nine years ago, and there is no word from him, but all the relations from thence bear that he is dead.

The Lords found this sufficient, if proven, where the subject matter was executry; because there they found caution in the confirmed testament, to make forthcoming to all parties having interest. *Vol. I. Page* 616.

1694. *February* 23. MORISON in Leith, *against* LORD SALTON.

ARBRUCHEL reported Morison in Leith, against the Lord Salton; being two objections against an arrestment:—1*mo*. That the writer was not designed. This the Lords repelled; in regard it was before the Act of Parliament 1681, and they offered to supply, by condescending on his designation. 2*do*. That one of the witnesses had only subscribed his name thus, "John Auld," without adjecting the word "witness." This the Lords also repelled, in regard he was called and designed as one of the witnesses in the body of the writ.

Vol. I. Page 616.

1694. *February* 23 *and* 27. JAMES MURRAY, late of SKIRLING, *against* JAMES DOUGLASS, now of SKIRLING.

February 23.—THE £17,000 bond, as the remainder of the price of the lands,