

1699. December 21. JOHN DICK *against* ADAM HASWELL.

JOHN Dick, deacon-convener of the trades of Jedburgh, charges Adam Haswell there for 830 merks, contained in his bond. He suspends, *1mo.* That you have restricted it to 700 merks, in so far as, by an assignation you gave me for my relief against some co-cautioners in the tack, (which was the ground of this bond,) you expressly narrate it only to be 700 merks. *2do.* You have amitted the sum, by committing usury, in exacting the full annualrent without allowing me retention, conform to the Act of Parliament 1695; and the 222d Act, Parl. 14, 1594, gives the benefit of it to the informer: And this being referred to your oath, you have acknowledged it; only you adject some extrinsic qualities, that you allowed him as much excise, which he was owing you, as compensated two years of that retention: and, as to the other two years, you offered it; but they being owing three quarters farther, it was agreed to be reserved to be detained out of that subsequent term. And if such subterfuges were allowed, both the retention and usury may be easily frustrated and elided. And when retention was first introduced by the Parl. 1672, the matter coming to be questioned before the Lords, they, by their decision 30th July 1673, *Stevinson against Wilkieson*, found the offering to allow it in the next term's annualrent was not sufficient to excuse from usury.

ANSWERED to the *first*,---The narrating the sum wrong in the assignation can never be construed a restriction; for *hoc non agebatur*, and a false narrative *nunquam obest veritati*. Likeas, you have homologated the sum of 830 merks in the bond, by paying the annualrent of the same, being conscious there was no restriction designed. As to the *second*, Crimes are not to be presumed, especially *in re minima*, as this retention is. And the qualities adjected are clearly intrinsic, and the cause the one of the other, and so a part of the bargain; for if I allow you retention out of other funds you have of mine in your hands, it is *perinde* to you; and your offering the whole was insidious.

The Lords repelled the first reason of suspension, and found no restriction: And, as to the second, they thought it *male coloratum*, especially seeing he had given no discharge of the excise when he compensated it with the retention; and, as to the two years, that he laid it on the subsequent term's rent, was *mali exempli*, seeing each year should bear its own burden of retention; yet, finding there was no design, they repelled the reason founded on the usury: But, in regard the suspender had a probable ground, they assoilyied him from the penalty of the bond charged on.

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1699. December 23. RUSSEL of ELRIG *against* CAMPBELL of KILPONT.

IN the concluded cause, Russel of Elrig against Campbell of Kilpont, young Elrig being debtor to Kilpont, he poinded a mare he found in his possession. Elrig, elder, pursues Kilpont for a spuilie, and offered to prove the mare belonged to him in property; which probation being advised this day, the Lords found the witnesses deponed that the mare was old Elrig's in 1690; but did not think this sufficient, seeing, at the time of the poinding, she was in the son's