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, 1*mo.* 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. 2*do.* 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 compensed 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 compensed 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. *Vol. II. Page 75.*

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 spuilyie, 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

custody and possession, and grazing with his horses; which possession in moveables both presumes and proves property, unless old Elrig had likewise proven *quomodo desierat possidere*, that either he had lent her to his son for a time, or had only sent her to graze in his ground. And it is not enough that he was once *dominus* of the mare; for law presumes that, being in the son's possession the time of the poinding, she was his; and he might either have bought her, or got her in gift from his father some days before the poinding. If I have a watch, it is not relevant for the watchmaker to say, I offer to prove that watch was mine last week, to give him *rei vindicationem;* but he must also prove *quomodo* he lost the possession, else it is presumed to be mine who now have it; for the dominion of moveables transmits without writ, and oftimes without any witnesses present; and therefore, ere you can recover them, you must first prove that you lost the possession, *clam vi*, or *precario*, or by some title not alienative of the property, as loan or the like. *Vol. II. Page 75.*

1699. *December* 26. BROUN of FINMOUTH *against* DUNLOP of that ilk and WILLIAM HAMILTON of WISHAW.

DUNLOP of that ilk, and William Hamilton of Wishaw, having a right to a comprising on Broun of Finmouth's estate, he raises a reduction and improbation thereof; which being called, and they declining to take a term, contending the pursuer had no title sufficient to force them to produce, there is a certification granted, and, by inadvertency of the defenders, extracted: Against which Dunlop and Wishaw reclaim by bill, and crave to be reponed on production; and that it was extracted under communing, and after the agent had promised to forbear it for some time. It was ANSWERED,---The apprising was most unjust against Finmouth, who was only cautioner for Sir John Broun of Fordel in this bond, and the principal's estate had paid the debt; yet Dunlop, his grandchild, had suppressed the documents, and taken a right to this apprising, which he was bound to have purged, and relieved him; and, therefore, though certifications be odious in their own nature, especially when they pass before the taking of terms, yet here it is only to obviate an unwarrantable advantage they were taking of a poor cautioner.

Some were for the standing of the certification, and referring them to a reduction; but, seeing it was *de recenti* quarrelled, the Lords allowed the Ordinary to take trial, by examining the agent, clerk, and his extractor, anent the way and manner of its being taken out, and if any subreption was used therein. Some argued that an agent's promise did not bind the party; but, *in actibus processus*, they must stand to what their agents do.

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1699. *December* 27. GLENDINNING of PARTON *against* NEILSON of CORSACK.

Neilson of Corsack obtains a decreet *in foro* against Glendinning of Parton,