

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

ARBRUCHEL reported Morison in Leith, against the Lord Salton; being two objections against an arrestment:—*1mo.* 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. *2do.* 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.  
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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,

granted by the deceased Lieutenant-general Douglass, to the said James Murray, bore this express quality and condition in a marginal note:—That he should not only have right to retain the principal sum, but also the annualrents after May 1689, aye and until the special incumbrances condescended on, and contained in the said bond, were purged; and all others, in general, that could any way affect these lands: and *ita est* these incumbrances were never yet purged, neither by payment, nor by a legal sentence of absolvitor, though there was an improbation depending against them.

ANSWERED for James Murray,—It was not his fault; seeing, by the General's death, the process sisted, and his son is not yet served heir, and so wants a title to pursue; and there was no distress nor eviction, but they were in peaceable possession.

The Lords would not go over the clear and express paction of parties; though some contended it was but of the nature of an irritancy, and purgeable; but recommended to try if the sums contained in the apprising and inhibition, expressly mentioned in the bond, and ordered to be purged, with their annualrents, were within the principal sum of £17,000, for which the said bond was granted; so that the said principal sum would be a sufficient fund to pay them, in case they subsisted and were all due; then the annualrents might be decerned to be paid. Yet this was more favour than law; for there might be other incumbrances, not named in the bond, which might do more than exhaust these annualrents; which could not be summarily discussed in this process, the creditors not being called.

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*February 27.*—The Lords, having considered the case between Murray and Douglass of Skirling, mentioned 23d current, and, finding strong presumptions that Mr Lewis Stewart's apprising of Skirling was satisfied by Kincarden, the principal debtor; and that being the chief incumbrance that lay unpurged upon the estate, and there being near five years' annualrent lying in the Lieutenant-general's hand, they modified two years of it, to be paid to James Murray, *medio tempore*, during the dependence; and declared it alimentary, and not subject to arrestments; and granted diligence to James Murray, for recovering, out of Kincarden's charter-chest, the said apprising and disposition, or other conveyance thereof, to be produced betwixt and the first of June, that then they may consider whether or not he should get up the rest of the annualrents.

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1694. *Jan. 24 and Feb. 27.* SIR GEORGE CAMPBELL of CESNOCK *against* The EARL of MELFORT.

*January 24.*—HALTON reported Sir George Campbell of Cesnock against the Earl of Melfort, for repetition of the rents of his lands, during his possession by the forfeiture, conform to a special Act of Parliament appointing the same. He ALLEGED not only *bona fides*, which is good for bygone fruits consumed, but also the excambion of lands, which, if he had kept, he would have lucrated their fruits, they having no such special act; and that, if it was an Act of Parliament,