1695. *December* 21. MR ALEXANDER HIGGINS *against* HIS CREDITORS.

THE Lords, on Crocerig's report of a bill of suspension and charge to put at liberty, at the instance of Mr Alexander Higgins, advocate, against his creditors, found the sist of the execution given him by the Parliament 1693, till his creditors should see and answer, till the next sitting of Parliament, could not import a perpetual sist and protection till the Parliament should have leisure to determine; for that might be long enough; and here there had intervened another session of Parliament, *viz.* in summer 1695. Neither could these deliverances, which ordinarily passed of course without notice of the Parliament, amount to a *litis pendentia* to table the cause privatively before the Parliament, so as no other judge could meddle with it, there being no process nor warrant for citation before the Parliament, the form whereof is now prescribed by the 2d Act 1695; and so they found his imprisonment warrantable, and no contempt of the Parliament's sist; which he had enjoyed for several years, contrary to the Parliament's design: but ordained him to be set at liberty on caution for the debts of the caption on which he is incarcerated or arrested since.

On a new bill, the Lords, finding it was tabled before the Parliament by the creditors giving in answers, liberated him. *Vol. I. Page* 691.

1695. *December* 24. ALEXANDER WALKER *against* YOUNG of KIRKTON.

MERSINGTON reported Alexander Walker against Young of Kirkton. The father, having reported himself to be dead, and his son having acted as heritor, the country, for several years, looked upon him as such; and, on the faith and trust thereof, Walker lent him money, and affected his rents and goods. But the father, at last appearing out of his lurking holes, competes with the son's creditors, that the goods were originally his, and not his son's, who only acted as factor in his absence; which could not invert or take away his right of dominion and property therein.

The Lords looked upon this as a fraud, and found it relevant to prefer the son's creditors, who lent him during his father's absconding; it being proven that the father then, by the general voice of the country, was holden and reputed dead, and that the son was in possession of these goods; which presumes property till a better right be instructed: so that the creditors were *in bona fide* to contract with him, and look on him as *dominus* of these goods till the father again appeared. *Vol. I. Page* 691.

1695. *December* 25. MARGARET, JEAN, and MARY NAIRNS, *against* MR THOMAS NAIRN of CRAIGTON.

MARGARET, Jean, and Mary Nairns pursue a declarator of trust against Mr

Thomas Nairn of Craigton, their brother, bearing, That their father left a great estate in moveables without making any distribution of it amongst his children; —that they all lived in common, for many years, in a universal society and communion of goods;—and their elder brother, now deceased, intromitted with the whole, though each of them had a share equal to his; and he, having administrated in trust, bought the lands of Craigton with it, upwards of £200 sterling of rent, and refused to count to them for their share; whereupon they employed Mr Thomas, then the second brother, to pursue him, which he accepted by taking an assignation from them, and giving a back-bond to be countable; and declaring, before Mr James Fraser of Brae, minister, and sundry others, that his brother designed to cheat both him and his sisters of their father's executry, but he would bring him to an account. *Medio tempore*, the elder brother dying, and Mr Thomas succeeding as heir to him, he gives back the assignation, and retires his back-bond, and then refuses to count to the sisters; and would now repudiate the trust he accepted when a younger brother; because, by the devolution of the succession, he was come in his brother's place; and so would continue the fraud his brother intended.

ALLEGED,—That a trust of this nature could not be now proven, after his brother's death, by witnesses, but only *scripto vel juramento* of the defender, and particularly the emission of words, which were of most dangerous consequence.

ANSWERED,—In such a complex trust it was impossible to prove it without an expiscation of the whole circumstances, *ex officio*, by examining the debtors if they did not pay the whole sum to their defunct brother, by taking this defender's oath of calumny, whether he did not undertake the pursuit, and accepted an assignation under a back-bond, by calling Brae and others to depone, before whom he expressed himself on this point; and, though *nuda verborum emissio* be not probable by witnesses, yet qualifications of trust for discovering matters of fact are.

The Lords, finding a complication of probabilities here, allowed the pursuers, before answer, to adduce what probations they could, *ex officio*, for evincing this trust; though, where the circumstances are not pregnant, they only admit it probable *scripto vel juramento* of the defenders alleged to have been intrusted. *Vid.* Stair, 10*th January* 1672, *Deuchar.* *Vol. I. Page* 691.

1693 *and* 1695. CHANCELLOR of SHEILHILL *against* SIR JAMES CARMICHAEL of BONNYNTON.

1693. *January* 10.—The Lords found, The former probation, being only taken before the coming in of the summons, to lie *in retentis*, he could not be hindered now to adduce, upon his act of litiscontestation, what farther probation he pleased; and that he was not concluded; and that the fear of suborning could not debar him. *Vol. I. Page* 543.

1695. *December* 26.—The Lords advised the probation taken, before answer, in the mutual declarators of property pursued betwixt Carmichael of Bonynton and Chancellor of Sheilhill, of the haughs called the Park-holm. By the testi-