1712. *January* 9. LORD NORTHBERWICK *against* SIR ALEXANDER HOPE of CARSE.

LORD Northberwick, President of the Session, against Sir Alexander Hope of Carse. It being alleged that Sir Alexander granted bond, in 1691, to the Mistress of Bargeny for 1000 merks; and the bond miscarrying after her death; the President, confirming himself executor-creditor to her, pursues Sir Alexander, and offers to prove by his oath that he granted her a bond for that sum.

ANSWERED,—*Esto* he had given such a bond, it is noways relevant to make it up by his oath; because the not producing of it presumes it to have been satisfied and paid, or retired; and *de non existentibus et non apparentibus idem est judicium;* and therefore it is not sufficient to prove its once existence by his oath, unless you likewise say it is yet resting owing unpaid. In which terms he is willing to depone. It may be very true a bond was granted, but it is no consequence to infer it is still due, unless it were produced, or the tenor of it proven, with a good *casus amissionis* instructed; for there is nothing more frequent than to retire personal bonds, where no registration or diligence has followed, and cancel them, without taking any discharge. And it were a most dangerous preparative to sustain such a libel:—"You once granted a bond; *ergo* it is still owing, or you must prove *quomodo* you paid it." If so, thousands who thought themselves secure by retiring their bonds, would be catched; especially where the creditor is dead, by whose oath I could have proven a compensation or paction, which now I have lost.

REPLIED,—To refer simply to his oath that he had granted a bond, it is acknowledged were not relevant; but as it is qualified, he cannot evite deponing; *viz.* whether or not he paid it to the mistress, or any in her name, or by her warrant; and whether he retired the bond, and who delivered it to him. For him to say he once did give her a bond, but it is not now resting, is to depone *in jure*, and wrap up the fact in a generality, *ubi latet dolus*; his excuse being that the mistress's mother was owing him the like sum, and she promised to allow it in his bond; for that were to make up her promise by his own oath: therefore he must depone the true matter of fact, and the Lords, at advising his oath, will declare whether the qualities he adjects are relevant, competent, or intrinsic; but he must not judge on their relevancy himself, by deponing on a point of law, and imagine that will exoner him.

The Lords, before answer, ordained him to depone if he granted such a bond; if he paid it in whole or in part; if he got it up; how; and from whom; and on any other pertinent qualities he thinks fit. For what if one should find his own bond accidentally lost, or the creditor's servant take it off his master's table or cabinet, and for a small reward deliver it up to the debtor? It is true, in the quinquennial prescription competent to tenants after their removal from the ground, it will not be relevant to offer to prove, by the tenant's oath, that he was under tack, and possessed so many years, and therefore must pay the rent; but they must prove, either by a writ under his hand or his oath, that the rent is yet owing. But, in bonds, the Lords have been in use to take all manner of expiscation and trial how the same came to be retired or paid. And if he clearly depone that he either got it up on payment or transaction, he will not be put to prove it, but he will fall to be assoilyied; and, on the other hand, if he can nei-

ther say he paid it, nor got it fairly delivered up to him (though gratuitously,) his oath will never exoner him. *Vol. II. Page* 700.

1712. *January* 10. JOHN WHYTE *against* DANIEL REID and the TENANTS of BIRKHILL.

JOHN Whyte, Bailie of Kirkaldy, having right, from Sir David Arnot of that ilk, to an adjudication on the lands of Birkhill, pursues the tenants for maills and duties. Daniel Reid compears, as having right to the said Sir David's single and liferent escheat, the gift and declarator therein being prior to the said adjudication; and craved to be preferred.

ALLEGED,—Daniel's right from Sir William Bruce conveys only the single escheat, in so far as the clause runs thus,—" assigning him to the gift of escheat, and the sums of money falling under the same;" which is the style for single escheats, only sums being the proper subject of such; whereas if the transmission of the liferent escheat had been designed, it would have named it, or at least have assigned to the rents of his lands: all gifts being *stricti juris*, and not to be extended to things of a different heterogeneous nature.

ANSWERED,—The distinction is empty and frivolous; for he is assigned indefinitely to the gift of Sir David Arnot's escheat in the general, without any restriction; and the gift produced contains both the single and liferent. And if Sir William had designed to retain the liferent escheat, he would have expressly reserved it.

2do, OBJECTED,—The gift and denunciation is null; for the execution wants that essential solemnity of leaving and affixing a copy at the market-cross; and which is as material and necessary to the certioration of the lieges, as either the blasts or three oyesses; and yet the want of these has oft been found to annul the horning. And the not leaving a copy is a plain nullity in an inhibition, and so sustained; and there is the same parity of reason for it in a horning. And not only our consuetudinary law, but even our statutory requires this; as appears from Act 33d 1555, and Act 86th 1587; to which we may add Stair's authority, *lib.* 4, *tit.* 38 and 47.

ANSWERED,—Many of these ancient forms are now gone into desuetude; and on a late occasion, betwixt my *Lord and Lady Semple*, this individual nullity being obtruded to a horning, the Lords caused inspect the registers; and, on report, found, that, generally, the executions, these twenty years bygone, wanted that clause; so that the Lords repelled it in that case, in regard the sustaining it might make a great convulsion in the securities of the people.

REPLIED,—The ignorance, error, and mistakes of writers, notaries, and messengers, in omitting to insert necessary clauses, can never abrogate clear laws, which cannot be enervated by their ignorance or knavery, whereas cautious and skilful messengers use the old style to this day.

3tio, ALLEGED,—The gift is yet null by the 145th and 147th acts 1592, declaring it shall be a relevant exception against a gift, that the rebel continues in possession of his lands and goods; but so it is, that Sir D. Arnot possessed thir lands many years after the gift and declarator.