1697. *December* 22. WILLIAM BOICK *against* JAMIESON.

WILLIAM Boick, merchant in Edinburgh, receives a precept from one Jamieson, in Kennoway in Fife, upon a merchant in Kirkaldy, to deliver 1000 ells of linen cloth at a liquidate price. Boick requires, and the precept is protested for not delivery; whereupon they are summarily registrate, and horning raised thereon; whereof a bill of suspension is presented on this reason,---That the Act of Parliament 1696, allowing summary registration of inland bills and precepts, is relative to, and so must receive its extensions, limitations, and regulation by the Act 1681, appointing summary execution on foreign bills of exchange, which only takes place where the bills or precepts are for liquid sums of money, and such fungibles *quarum una alterius vice fungitur;* which cannot hold in precepts for delivery of goods; for, there, controversy may arise as to their sufficiency or defects; and laws, being strictly to be interpreted, are not to be extended *de casu in casum.*

ANSWERED,---Here no question can arise upon the quality of the goods, whether conform to paction or not; because there was none offered when required; but the precept being protested for not delivery of goods, it is equivalent in law to a bill of exchange protested for not payment; likeas here, in contemplation of the bargain, I advanced you £10 sterling of money; and the precepts contained a liquidation and conversion into a price, and therefore the summary charge of horning should be sustained.

The Ordinary refused to sustain it as a summary charge; but allowed them to insist in it as a libel, so that he should not be obliged to prove his reasons *instanter*, but should have terms to prove, as if he were in an ordinary action.

This being reclaimed against by a bill to the whole Lords, as cutting him off from the *inducię legales* he would get, if he were pursued *via ordinaria*;

The Lords did not decide the point, How far inland bills and precepts, not for money, but goods, are summarily registrable on a protest, and the foundation of a charge of horning, as well as bills of exchange for money within six months; yet, for dispatch of trade, especially when protested for not implement, they ordained the parties to debate here *tanquam in libello;* and sustained the charge to have at least the effect of a libel, just as a null unformal charge or decreet is commonly turned into a libel, *ad resecandum multiplicationem litium*, and to shun farther expense and delay to the parties. *Vol. I. Page* 804.

1697. *December* 30. CHRISTIAN BLAIR *against* BESSIE CUMMING and JAMES JOHNSTON.

I ALSO reported Christian Blair, attending the Countess of Home, against Bessie Cumming, and James Johnston, indweller in Canongate, her husband. Christian, having some gowns and other clothes stolen from her, to the value of £200 Scots, and discovering one of these gowns was in the hands of the said Bessie, she pursues her before the Bailies of the Canongate, not only *rei vindicatione*, for restoring that gown, but likewise for the whole stolen at that time

from her, *super hoc medio*,—that you, as guilty of the reset of that theft, must be liable for the whole damage. Bessie, thinking herself aggrieved by the Bailies' interlocutor, procures an advocation; and, at discussing, insisted on thir reasons, That the Bailies had committed iniquity in not ordaining Mrs Blair, the pursuer, to prove *quomodo desiit possidere; 2do.* That she did not first discuss the principal thief; for, if the principal were assoilyied, there could be no punishment for reset; *3tio.* They had been iniquitous in sustaining and inferring her knowledge from presumption, *viz.* That she dwelt in the neighbourhood, and the hand-bell intimating the thief went daily by her door, and the proclaimer ordinarily came in and drank in her house;—all which might be true, and yet the marks and qualities of the stolen goods never come to her knowledge; *4to.* They committed iniquity in stretching it to the whole goods stolen; *5to.* Though they sustained her defence, That the gown was pawned and impignorated in her hands for a little money, which is a fair and usual bargain, yet they would not allow her to prove this by women-witnesses, though others are seldom present at such transactions.

ANSWERED,—The Bailies committed no injustice; for they ordained the pursuer to prove that her clothes were amissing; and, as to the *second*, There was no need of convicting the principal thief, where they are not insisting *ad criminalem effectum*, to put the resetter to the knowledge of an assize, but only are craving damage and interest:—To the *third*, Her knowledge must be presumed; for Janet Robertson, whom she names as the impignorator, is a notorious strumpet and thief, enacted in the Court-books as such; and this very defender is *pessimæ famæ*, and under the name of a common resetter; and it is *ignorantia affectata* in her to pretend *nescire id quod omnes de vicinia sciunt*:—To the *fourth*, Reset would have no singularity at all if it did not operate more than the mere restitution of what is found beside them; and, therefore, to discharge that wicked trafficking, they must be liable for all, as is practised in thefts committed in the Highlands:—To the *fifth*, If women be allowed to prove these hypothecations of goods, it shall palliate that usury and infamous trade of resetting stolen goods under the pretence of pawning them for money; and they shall adduce the pawners and thieves for witnesses; and women, being inhabile in law, much more are these in such hidden bargains. Therefore the Bailies did justly in ordaining the impignoration to be proven *per testes omni exceptione majores*.

Some of the Lords thought the Bailies had stretched the case too far, and were for remitting it back, with some qualities and directions; but the plurality remitted it simply, to discourage that too frequent trade of resetting stolen goods under the borrowed name of pawns. *Vol. I. Page* 807.

1698. *January* 4. LADY CLACKMANNAN and HARY BRUCE *against* Her HUSBAND'S CREDITORS.

THE Lady Clackmannan, and Hary Bruce, her factor, by a bill, represented, That, on the divorce obtained by her against her husband, she has entered to her jointure of thirty chalders of victual, and the house of Sauchie, in which she