1698. *January* 20. JOHN MENZIES *against* SIR JAMES OSWALD of FINGLETON.

IN the competition upon Carberrie, betwixt Mr John Menzies, advocate, and Sir James Oswald of Fingleton, Mr John had right to an improper wadset affected with a back-tack. Sir James had a posterior infeftment of annualrent. There was no doubt but the principal sum in the wadset was preferable; but, there being several years' back-duties resting, the debate arose, Whether they had any preference, or were only personal against the reverser and back-tacksman. Sir James CONTENDED,---His annualrents were *debitum fundi*, and if he adjudged for them they would be drawn back *ad suam causam*; which privilege the back-tack duties could not claim; for a singular successor would be only obliged to pay them during the years of his own possession, but not preceding. ANSWERED,---They are a plain burden upon the reversion, so that neither the debtor, nor any coming in his right, can redeem without paying the bygones; and the remedy for making them real is by raising a declarator of the irritancy of the back-tack through the not timeous payment, that so the wadsetter may attain the natural possession; which he did: and, though the sale and roup of the lands intervened before he obtained his decreet, yet the price, as *surrogatum*, must come in place of the lands, and be liable to him for his back-tack duties.

The Lords found, The wadsetter having intented his declarator of the incurring the back-tack, he was preferable for his bygone tack-duties as well as for his principal sum; and that after that pursuit they were not merely personal.

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1698. *January* 25. WILLIAM M'AULL *against* ALEXANDER HERRIOT.

I REPORTED William M'Aull, late Provost of Haddington, against Alexander Herriot, merchant in Edinburgh, for payment of 1000 merks, contained in the Provost's contract of marriage with Elizabeth Herriot, the defender's sister, wherein Helen Scot, their mother, became bound, and whom Alexander, the defender, represents as her executor. The DEFENCE was, 1*mo*.---The obligement is to pay it to the said William M'Aull and the bairns of the marriage; *ita est*, she assigned his children to much more than this sum extends to; and, being debtor, *non præsumitur donasse*, but rather, *primo loco*, *debitum suum dissolvere*; as was found between *The Duke of Lauderdale* and *Lord Yester*, about his Lady's tocher; and that the *lex ult. C. de Dot. Promissione*, where they are found compatible *et distinctæ liberalitates*, was where the father *dotaverat filiam*, *non ex bonis propriis*, *sed ex maternis*. 2*do*. The Provost borrowed, from the said Helen, his mother-in-law, 1000 merks by bond, and so he was paid in his own hand. ANSWERED,—Whatever gratifications his children got, that can never be ascribed in payment of this obligement; because they were not the direct creditors, but only the father, as appeared by the conception of the clause in the contract of marriage. And, as to the *second*, If she had applied that 1000 merks to extinguish her obligement, then the compensation would have met; but she has as-

signed his bond to his bairns, her own grand-children; and so he is not discharged of the debt. REPLIED,---Though the debt be not paid *in forma specifica*, and directly, yet it is implemented *per equipollens*; and what his children have got is materially as if it had been given to him, and, *fictione brevis manus*, secured by him to his bairns.

The Lords thought the process invidious; yet, in law, they found him the only creditor in the obligement; and the performance to the bairns did not exoner the mother: and therefore repelled the defences, and decerned.

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1698. *January* 26. SIR PATRICK HOME *against* The EARL of HOME.

THE Lords advised the famous cause between Sir Patrick Home, advocate, and the Earl of Home. Sir Patrick, as having right, by progress, from Francis Stuart of Coldingham, to the lands and teinds of that abbacy, pursues the Earl to count and reckon for his intromission since his predecessor's entry in 1631. The Earl ALLEGED,—The title of his intromission was such as could not subject him to any counting; for, by the contract in 1631, he was to have the full rents for (the annualrents of) his £1000 sterling then owing, and the other debt of £19,200 Scots, without ascribing any part of them in payment of his principal sum; and accordingly, in 1643, he obtained a decreet in the same terms, which were sufficient titles for an unaccountable intromission. ANSWERED, 1*mo*.---The possession being ceded to the Earl, not only for his £19,200, but also for the current annuity, that cause ceased and expired, in 1632, by the Earl's death; so that *res devenit in alium casum*, and the half of the onerous cause failed; and so he could never retain the possession of the whole for the remaining cause. 2*do*. The paction was most usurious and unwarrantable, it being a most unjust profit to possess lands of a great value for an inconsiderable sum, whereby they got more than twenty per cent yearly; expressly contrary to the many good and laudable Acts of Parliament against ocker and usury. REPLIED,---These acts against usury take only place *in mutuo*, where there is the lending of money; but *hoc non agebatur* in this case, for here was no proper debtor, no requisition, nor obligement to pay. DUPLIED,—If this were once allowed, inventions would be fallen upon to cover the grossest usury and oppression under other names than that of borrowed money, which the canonists call *usura palliata*.

The Lords found the Earl ought to count for the superplus rents more than paid the annualrent of his principal sums, notwithstanding of the contract and decreet bearing that clause, *fructibus in sortem non computandis*. Then the question was stated, *a quo tempore* he ought to count? Some said, From the date of the right, it being an illegal paction, *et privatorum pactis non derogatur juri publico*. Others argued, The title was colourable, and sufficient to liberate from counting till the same was quarrelled; and, by interlocutor, found the Earl was liable to count for his super-intromission above his annualrents. But this part was not decided at this time.

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