pains, the writs were recovered. And, as to the 3*d*, There is no use to inquire and search after witnesses, when the writ is holograph, all wrote with Kinfauns' own hand; and so is good and probative without witnesses; for *superflua non nocent, utile per inutile non vitiatur, et non solent quæ abundant vitiare scripturas, l.* 94 *D. de Reg. Juris.* Likeas, Spottiswood, *voce Improbation,* cites a case exactly parallel in 1583, where one Maxwell offered to improve the Laird of Stankie's testament *per testes insertos:* and the witnesses deponing they knew nothing of it; yet, because the testament was holograph, the Lords sustained it, and assoilyied from the improbation; for *quorsum* shall we examine witnesses, when I pass from them and can clip away their names and subscriptions, and yet the writ, after all, shall be good?

ANSWERED,—Whatever was the validity of this discharge, without witnesses, because it bears holograph, (and which is even denied,) yet you having, *ad majorem cautelam,* adhibited them, if their subscriptions be false, the discharge can never subsist on the bottom of its being holograph; because you have not rested on it yourself; and, by adding false witnesses, you have vitiated the whole writ. For falsehood may be perpetrated four ways. 1*mo,* SCRIPTO, in a false forged writ. 2*do,* DICTO, *in falso teste.* 3*tio,* USU, in producing and founding on a false writ. And 4*to,* FACTO, *in falsa moneta vel mensura.* And the first three are all to be found here. And the *Lex Cornelia, de Falso,* reckons the species of this crime to be not only *delere, mutare, subscribere,* but likewise *addere vel subjicere,* as is here. And Menochius, *de Presumpt.* says, a falsehood, defect, or nullity in any substantial part influences the whole writ. And the Lords, in that famous case, *Fleming* and *Nimmo, 20th February* 1673, found, though a writ was holograph, yet, having witnesses, it might be improven; and, on advising the testimonies, they found it null and improbative, though not amounting to falsehood. See also 22*d February* 1676, *Innes* against *Gordon.* And as to that old practick cited by Spottiswood, the witnesses, at most, was but a *non memini;* and so the Lords justly sustained the testament, it being holograph not being denied. But where a man tampers, by adding false witnesses, though the deed were never so true, it is just he lose the benefit of it.

The Lords, before answer, ordained the witnesses, if on life, to be examined on the verity of their subscriptions, and all other trial and expiscation to be taken for redarguing the truth of the discharge: But, likewise, allow Phineven to prove it holograph, *comparatione literarum,* and adduce what probation he can, for adminiculating and fortifying the discharge. For the Lords thought it their duty to inquire into such suspected deeds, though parties should lie by and collude among themselves. *Vol. II. Page* 692.

---

1711. *December* 26. HAMILTON of MONKLAND *against* HAMILTONS of ORBISTON and WISHAW.

WILLIAM Hamilton of Monkland was forfeited, *anno* 1673, for his accession to the rebellion of Bothwell Bridge; in so far as he sent turkeys, and other victuals, and provisions to their camp; though he alleged he was forced, to save his lands from being plundered; and his forfeiture being gifted to the Earl of Melfort, he caused try at his lady and friends, what they would give for a com-

position; and their utmost length being £1000 sterling, at last Orbiston and Wishaw were prevailed with to give 40,000 merks; and they took an assignation to the gift of forfeiture, and put in one James Black to be their factor, and entered in possession *anno* 1686. On the Revolution, Monkland not only got his doom of forfeiture rescinded by the general great act rescissory in 1690, but farther obtained a special act, reponing him to the bygone rents of his estate, preceding 1689, against all intromitters, only burdened with the payment of the £1000 sterling Monkland's friends had offered to give. But he dying, and leaving his son minor, the process against Orbiston and Wishaw, for restitution of his rents, slept, till it was of late wakened.

Against which it was ALLEGED for Wishaw,—That truly his meddling and interposing was in favours of Monkland, without any design of profit; and he was always ready to count for his actual intromission: and to stretch any farther is odious and unfavourable.

ANSWERED,—He had proven the rental, and their entry to possess; and under whatsoever notion or capacity they fell to be considered, they behoved to count to him conform to the proven rental, whether they called themselves his trustees, or creditors, or assignees, to Melfort the donatar; and as he would have been bound to count for the whole, so must they: Which rule they did not stretch any farther than in the terms of the late Act of Sederunt, 20th November last, that he may give in a charge against himself, that, under certification if it be short, he shall be liable in the double; and in his discharge all legal deductions shall be allowed, as cesses, minister's stipends, depauperation of tenants, waste rooms, &c. And to restrict his counting to actual intromission were both unjust and ridiculous. For, 1*mo*, It is contrary to the express terms of the said rescissory act 1690, which ordains all who obtain special acts not only to be restored *per modum justitiæ*, but also to get repetition of all bygones; and on that very clause did Jerviswood recover from the Duke of Gordon, and Marchmont from Seaforth, all their bygone rents. 2*do*, All lawyers, and particularly Antonius Mattheus *de Criminibus*, agree that the natural effect of a restitution *per modum justitiæ*, is to repone them *cum omni causa*. 3*tio*, You can be in no better case than an adjudger or appriser, who, entering once into possession, must continue and count for the whole, unless they instruct that they were debarred: Even so, you having come in the donatar's right, and entered to the house and yards, even to the carrying away of the kitchen chimney, and to a promiscuous possession over all the barony, getting more or less from every tenant, you must count for the whole; seeing it is not pretended that Monkland's lady or relations had intromission with a sixpence, or that he was interrupted by them or any others in the peaceable possession till after the Revolution: and our law has ever sustained the entry to possession of a part sufficient to make them count for the whole, unless debarment be proven; as is clear from Stair, *lib.* 2, *tit.* 1, *sect.* 13; and from Dury, 14*th January* 1630, *Hunter* against *Tenants and Hardy*; and likeways from Spottiswood, *voce* Removing and *voce* Possession, where possession of a part of land validates a base infeftment *quoad* the whole, being *unum continuum tenementum;* and, in a cause betwixt *Merchiston* and *the Goodman of Wright's-houses*, by apprehending a possession of a part of the teinds, the pursuer *censebatur fuisse in possessione totarum decimarum.* Neither does this go so much upon the head of "ought and should," as that

their uplifting a part presumes their intromission with the whole, unless they tell who got the rest, seeing no other had a title to uplift but they.

REPLIED,—Their case was carefully to be distinguished from the donatar's; for they were assignees for an onerous cause, and now, after twenty years, could not give that satisfaction demanded, but were willing to count to the utmost penny received; and no rigour of law can seek more. And where the Act speaks of counting for intromissions, it must be understood of actual intromissions, that being the genuine grammatical sense of the word, and not to be strained to remote consequences.

The Lords thought the case new, and would not summarily determine it on the debate, but ordained the parties to inform. *Vol. II. Page* 693.

---

1711. *December* 27. ROBERT STEWART and OTHERS *against* CAPTAIN WILLIAM COLLYAR.

ROBERT Stewart and other merchants in Aberdeen having fitted out the ship called the Virginia, with a cargo of Scots manufactories for the West Indies; about the Orkney isles she is attacked by a French privateer called the Pontchatrain, and taken; but the merchants ransoming her for 200 guineas, yet the pirate took out a great deal of her loading into his own ship before he restored her. A few days after this, Captain William Collyar, commander of one of the Queen's men of war, called the Mermaid, rencountered the privateer, and took him, and got him adjudged lawful prize: and, dividing the goods, he got 3-8th parts for his share, conform to the maritime custom. Stewart and his partners, owners of the ship out of which these goods were taken, pursues Collyar as intromitter therewith, when he took the privateer: and he having failed to find caution *judicio sisti et judicatum solvi*, is decerned by the admiral. Whereof he presents a bill of suspension on thir grounds: That the privateer was a legal prize; and what he found therein, by the rules established by the English Admiralty, belonged to him and his crew; and that their agent, in whose hands their goods were consigned, had put them in the Greyhound, which perished at Newcastle bar; and so he cannot be liable. And this case not being truly maritime, he was not bound to find caution; as the Lords had found, *January 16th*, 1636, *Stewart* against *Ged*.

ANSWERED,—The uncontroverted practice of the admiral-court is to put the defenders under caution, founded on this unanswerable reason, that they are generally strangers; and, by withdrawing, would make the process elusory and ineffectual. *2do*, In captures at sea, the property and dominion of ships and goods is not lost nor transmitted, but, *juris postliminii fictione*, remains with the first owners till it be brought *inter præsidia hostium*, and twenty-four hours there, seeing all hopes of recovery then ceases. But so it is, the privateer was taken shortly after, when cruising on our north coast, and so the property still remained with Mr Stewart, and noways accresced to Captain Collyar.

This bill being sought to be passed without caution or consignation, the Lords refused it; but allowed it to pass if he offered caution.

*Vol. II. Page* 694.