offered but £28 sterling per tun, conform to their retailing price; which they contended to be the most equitable rule, on the sudden falling of the price by the Merchants importing too great quantities: and was so found in *January* 1682, betwixt *Sir Patrick Home and his Brother*, in the count and reckoning, that the prices of victual suddenly falling in 1655, Sir Patrick was not bound to count at the fiars, but only for what he got; and was also so decided betwixt my *Lord Oxford and his Curators;* and *l.* 15. *D. de Peric. et Commod. Rei Venditæ*, gives us a rule in such cases; and Cicero *de Officiis*, where a ship with corn arrives first at the market, and sells high, by concealing that a fleet of more ships will be there with relief, in a day or two, he does not act honestly in concealing.

ANSWERED for the Merchants,—That their price must not depend on so lubrick and various a circumstance as the price of retailing, for that may vary every month; and no general rule can be formed out of this uncertainty, *et res quæque perit suo domino;* and consequently the property of the wines being in the Vintners, they must run the risk of the falling of the price, or other accidental unforeseen damages.

The Lords finding themselves straitened to determine a middle price, *in jure*, prescinding from both extremes, they moved to the parties, if they would submit to the Bench as arbiters in the case; which they condescending to, the Lords fixed the price to be paid by the Vintners for the year 1697, to £35 sterling per tun. *Vol. II. Page* 36.

1699. *January* 27. JOHN MURRAY *against* SIR WALTER SETON.

SIR Walter Seton, advocate, having procured a gift from his Majesty to be Commissary Clerk of Edinburgh, vacant by the death of Sir Patrick Aikenhead, last clerk, and intending to present it to the commissaries to be installed; Mr John Murray, advocate, and brother to the Laird of Liviston, gives in a bill of advocation to the Lords, for stopping his admission till he were heard on a prior gift obtained by him when my Lord Tillibarden was secretary. Which being given up to Sir Walter to answer, he ALLEGED,—The said gift, though prior, could never compete with him, being null, as wanting *verum modum vacandi;* for though it bear to proceed on Sir Patrick Aikenhead's demission, yet truly he had not demitted at that time, but continued in the possession of the office long after; and Sir Patrick's letter to the secretary does noways import an actual demission, but only that Mr Murray and he had agreed towards his demission; which might be retracted: and that there was *locus pœnitentiæ* is evident; for, sundry months thereafter, they renew their communing, and, on new terms, Sir Patrick signed a demission ten days before his death.

REPLIED,—Sir Patrick's obligation to grant a demission was equivalent to an actual demitting, because he might have been compelled thereto.

DUPLIED,—The letter did not so much as amount to a personal obligation; and, though it had, the gift was still null, because the *modus vacandi* must always precede the gift; and a subsequent cause can never validate the same in competition with one more formal.

When the action was called,---Mr Murray shunning to produce his gift, and debate *in causa*, but rather let it pass in absence, without dipping on the validity of the two gifts,---the Lords refused his bill of advocation; but Sir Walter craving the Lords would recommend him to the commissaries to admit him, the same was declined, and the commissaries left to do as they would be answerable.

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1699. *February* 1. GEORGE MARSHAL *against* WILLIAM ALVES.

GEORGE Marshal pursues a reduction against William Alves, writer, of a decreet of general declarator of the escheat of umquhile William Russell; and the first nullity insisted on was, That the citation was only upon six days, whereas, by the Act of Sederunt, 21st July 1672, special declarators, and other summonses there enumerated, have that privilege, but not general declarators, which must be on twenty-one days as before. ANSWERED,---The writers to the signet had since that time raised them on bills, as privileged; which ought to support his diligence. REPLIED,---The privileges are but impetrated *periculo petentis*, and cannot alter a fixed custom. Likeas, it was alleged,---That Mr Marshal had no interest to object against his declarator.

The Lords found the citation unwarrantable, but sustained it as a libel, and allowed the parties to be heard how far George had an interest.

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1699. *February* 2. GEORGE COLVIL, ISOBEL and CATHARINE PRESTONS, and OTHERS, Creditors to Preston of Valeyfield, *against* GEORGE CLERK.

GEORGE Colvil, Isobel and Catharine Prestons, and other Creditors to Preston of Valeyfield, pursue George Clerk, bailie of Edinburgh, and tacksman of that estate, for their bygone annualrents. ALLEGED,---By the articles of the roup, by which that estate was set to him in tack, he has allowance and retention, out of the fore-end of his tack-duty, of whatever expenses he wares out in finishing the former coal-sinks, or setting down of new ones; and so it is, most of the rent has been expended in recovering the coal. ANSWERED,---Thir annualrents are not infeft in these parts of the lands where the coal is sought, but in other particular roums; and, as they would have no benefit by the coal, so they ought to sustain as little prejudice thereby; and the land-rent, wherein they stand infeft, ought not to be applied for supporting or defraying the expenses of the casual rent wherein they have no interest, but the same was to be adjudged *singula singulis*. REPLIED,---By the tack, both real and casual rents are set to him jointly and indistinctly *per aversionem*, and he pays a promiscuous duty for both; and no reasonable man would have engaged for so great a tack-duty in contemplation mainly of the profit to be gained by a coal, if he had not been allowed to retain for his expenses out of the whole head; for, in law, *impensæ utiles et ne-*