custody and possession, and grazing with his horses; which possession in moveables both presumes and proves property, unless old Elrig had likewise proven *quomodo desierat possidere*, that either he had lent her to his son for a time, or had only sent her to graze in his ground. And it is not enough that he was once *dominus* of the mare; for law presumes that, being in the son's possession the time of the poinding, she was his; and he might either have bought her, or got her in gift from his father some days before the poinding. If I have a watch, it is not relevant for the watchmaker to say, I offer to prove that watch was mine last week, to give him *rei vindicationem;* but he must also prove *quomodo* he lost the possession, else it is presumed to be mine who now have it; for the dominion of moveables transmits without writ, and oftimes without any witnesses present; and therefore, ere you can recover them, you must first prove that you lost the possession, *clam vi*, or *precario*, or by some title not alienative of the property, as loan or the like. *Vol. II. Page 75.*

1699. *December* 26. BROUN of FINMOUTH *against* DUNLOP of that ilk and WILLIAM HAMILTON of WISHAW.

DUNLOP of that ilk, and William Hamilton of Wishaw, having a right to a comprising on Broun of Finmouth's estate, he raises a reduction and improbation thereof; which being called, and they declining to take a term, contending the pursuer had no title sufficient to force them to produce, there is a certification granted, and, by inadvertency of the defenders, extracted: Against which Dunlop and Wishaw reclaim by bill, and crave to be reponed on production; and that it was extracted under communing, and after the agent had promised to forbear it for some time. It was ANSWERED,---The apprising was most unjust against Finmouth, who was only cautioner for Sir John Broun of Fordel in this bond, and the principal's estate had paid the debt; yet Dunlop, his grandchild, had suppressed the documents, and taken a right to this apprising, which he was bound to have purged, and relieved him; and, therefore, though certifications be odious in their own nature, especially when they pass before the taking of terms, yet here it is only to obviate an unwarrantable advantage they were taking of a poor cautioner.

Some were for the standing of the certification, and referring them to a reduction; but, seeing it was *de recenti* quarrelled, the Lords allowed the Ordinary to take trial, by examining the agent, clerk, and his extractor, anent the way and manner of its being taken out, and if any subreption was used therein. Some argued that an agent's promise did not bind the party; but, *in actibus processus*, they must stand to what their agents do.

Vol. II. Page 76.

1699. *December* 27. GLENDINNING of PARTON *against* NEILSON of CORSACK.

Neilson of Corsack obtains a decreet *in foro* against Glendinning of Parton,

for restitution of the rents of his lands intromitted with by him during his forfeiture, and for the annualrent of the said mails and duties since Martinmas 1688. Of this decreet Parton raises suspension and reduction, on this reason, That, for the mails and duties uplifted by me, I am willing to restore, and have offered them by way of instrument; but, *quoad* their annualrent, there is neither law nor warrant for it, seeing the act rescissory in 1690 has no such provision; and, though libelled at random, yet it was never adverted to by the defender's advocates, and so has passed by mere omission; and the clerk has, in extracting, made the decerniture as broad as the libel.

ANSWERED,—There being other defences proponed in the decreet, your not objecting against this article of annualrent, as well as you debated against the rest of the libel, must bind you; seeing Competent and Omitted can no more loose a decreet *in foro*, by the regulations 1672, than Proponed and Repelled. And, *esto* it were iniquity, and that it was *pars judicis* to have adverted thereto, and not suffered an illegal conclusion to enter into the decreet, yet being omitted to be proponed by the defender's advocate, and noways noticed by the judge, the same cannot be rectified now: seeing the Lords cannot reduce their own decreets upon injustice; but that only belongs to the Parliament. Some urged, it was a nullity in the decreet, and so might very well fall under the Lords' cognizance: but this seemed only to change the names of things, which cannot alter their nature; for the reason truly resolved into the iniquity of the sentence, as contrary to law. And, though the Act 1690, and the 25th Act 1695, allows annualrents for composition of forfeitures, yet there is no law that mails and duties bear annualrent: and though the Lords, in some cases, have modified an equivalent for annualrent, *nomine damni*, yet this was not so done here, but decern for the annualrent itself, without any law.

The Lords were all persuaded the defender had got wrong, but found not themselves empowered to rectify it, else they might, on the same pretence, annul all the decreets *in foro*, which are the great security of the people and their properties. Some argued it was in the Lords' power to redress it; but the plurality carried it *ut supra*. *Durum est, sed ita lex scripta.* See Stair, book 4. tit. 1. anent the authority of the Lords of the Session's decreets; *22d June* 1676, *Irving* against *Ross;* and *30th November* 1678, *Grant and M'Kenzie.*

Vol. II. Page 76.

1699. *December* 29. NICOLSON'S CREDITORS *against* The TOWN of EDINBURGH.

THE purchasers of Nicolson having consigned the price in the Town of Edinburgh's hands, who were to keep it till the ranking was closed and the Creditors could exoner the Town and lift their proportion of the money; and, in the meantime, the Town was only to pay three per cent. of interest, by the late Act of Parliament 1695:—the Creditors having charged the Town at Whitsunday last to get up their money, the Magistrates suspend, That they were not *in tuto*, except they had declarations from the buyers that the Creditors had made over to them their rights, and that the Town might be secure. The question arose, as to the half year now run, from Whitsunday to Martinmas 1699, at what rate the Town should pay interest, whether only three per cent. or the full annual-