This ridiculous clause was found in a certain contract, that the party observer, or willing to fulfil, should pay one thousand merks to the failyier.

Anent Oath *de Calumnia*.

Since it may be craved *in quavis parte processus*, it may also be sought after the decreet is pronounced. I think either the pursuer or defender may seek it before the decreet is extracted, at any time; and if the party in whose favours the decreet is pronounced, refuse to give it, he loses the cause; but, after extracting, it cannot be sought, because it is competent and omitted.

Anent Teinds.

None can pursue for valuation of teinds, but only heritors and liferenters, by the Acts of Parliament 1633, and sincesyne. Hence rentallers, tenants, and tacksmen, (though for never so many nineteen years,) cannot. *Vid.* Durie, *8th March* 1639, *L. of Hesleside.* *Vol. I. Page 5.*

Sir George Lockhart *against* Hopeton.

This question occurred between Sir George Lockhart and Hopeton, who had bought Abercorn from Sir Walter Seton. Where a bond is a part of the price of the land, and narrates it to be so, and bears a simple obligement for payment, *quær.* if any of that money can be retained by the debtor, buyer of the land, upon the account of clear and liquid encumbrances, inhibitions, &c. which he knew not of when he gave the bond. Sir G. Lockhart contended it could not, since the bond was simple and pure, and is not payable to the seller, (which would much alter the case,) but to a creditor, who has a *jus quæsitum*, and is not concerned to purge with his money, which has now altered its nature, and cannot be more looked upon as the price of land; and the buyer should have searched for these encumbrances, *et sic caveat emptor.* Yet it seems very natural that the price of land should purge real burdens on it, and stand affected to that end. *Vol. I. Page 5.*

Anent Liferent.

A wife is infeft in the liferent of land, with the pertinents. *Quær.* if she may cut planting, if it be only for repairing tenants' houses upon the ground. If it be a forest, or such a wood as the law calls *sylva cædua*, she may. See Craig, p. 189, *et l.* 9 *D. de Usufr.*; but, if it be only policy or planting for decoration about a house, it seems hard to permit that devastation, though it be profitably bestowed, and converted to the good and utility of the fiar. Yet I hear that, this Session, the Lords found a liferentrix might cut trees for necessary uses. *Quær.* if a wadsetter may do as much. I think he may. Yet Craig, p. 214, tells how a vassal was quarrelled by the superior, as having amitted the feu, for cutting the great trees that were on the ground. *Vol. I. Page 5.*

Anent Redemption.

A father dispones lands to his son, redeemable on the payment of a rose noble. The son dies before the father, and no order is used, but the father contracts debt after that disposition. *Quær.* if the contracting of that debt be equivalent to an order, or will give the creditors a right to redeem; and if that personal faculty of the father's may be transmitted, by apprising or other legal diligence, to his creditors. See Dury, *12th July* 1631, *Huttonhall;* and Stair, *20th November* 1661, *Fleeming.*

Alienatio rei legatæ is in some cases reputed to be *ademptio legati.* § 12. *Inst. de Legatis.* *Vol. I. Page* 6.

Anent Succession in Conquest.

One who had conquest lands dies without children, and without brother or sister; his nearest heirs are three father-brothers, who were all younger than his father was. *Quær.* to which of the three will the conquest ascend. Sir George Lockhart resolved that it would go to the eldest of the three.

A man, who had conquest lands, dies, leaving behind him a consanguinean brother elder than himself, and a brother-german younger than himself. *Quær.* to whom will the conquest fall? Sir G. Lockhart affirmed it would not in this case ascend, but descend; because the brother-german, in all succession, is ever preferred to that brother who is only attingent by one side; so that the rule of ascending must be ever understood *positis terminis habilibus, et in eadem linea* of propinquity. See the case debated betwixt *Oliphant* and *King*, in Craig, p. 245.

Anent *Beneficium Discussionis.*

The discussion of the heir of line, before the heirs-male or of tailyie, is not satisfied by an unextracted decreet against the heir of line; but if any estate to which he can have right be condescended on, that must be affected and discussed first. Yet sometimes the Lords will decern against both heirs, superseding execution against the other heirs, till the lineal heir be first discussed; which is just. For this is no more but to constitute the debt against all.

Anent Substitution.

A minor having got an assignation to a sum of money, with this quality, that, if he die before majority, then the same shall belong to the heirs or executors of Titius, who was then dead when the assignation was granted,—the minor dies before he attains his perfect age; *Quær.* how Titius' heirs and executors shall establish the right of that sum in their person. Sir G. Lockhart thought they might do it by serving themselves heirs to Titius, or confirming executor. But Titius himself had never right to this sum, it was never *in ejus bonis;* and the sum needed not be confirmed; and this would make them liable for Titius his debt: so that, in case there were fear of his debt, then a summons might be raised, to hear and see that he, as nearest of blood, and the person who might

be heir or executor to Titius, had right to that money. And here a retouring the blood would do the turn. *Vol. I. Page* 6.

Anent Tutors.

It is inquired when a tutor or curator is liable for the annualrent of their pupil's annualrents. It is thought not till a year after the expiration of their office, and then they become accountable for the interest of their pupil's or minor's money. But what is the true *laxamentum temporis* here, see it more accurately distinguished in another MS. *Vol. I. Page* 6.

Anent Conjunct Right.

Where a sum is conceived payable to a man and his wife, and to the longest liver of the two in conjunct fee, *Quær.* if the wife surviving can seek the principal, or has only right to the liferent and to the annual; and if it be provided to their heirs and assignees, if it should be divided between the man and the wife's heirs equally. They say, if it be provided by an heritable security, then *sexus masculinus prævalet;* but if it be a moveable debt, then the wife has right to the fee thereof, if she survive; and if they be both dead, then it divides equally between their heirs. See Haddington's *Prac.* 10*th of November* 1609, the *Goodman of Carberry* and *Bartilmo Tulloch*; and Stair, *tit.* 27.

Anent Regality.

Some affirm, that inhabitants within a regality cannot decline the Sheriff-court, upon the pretence that they dwell within regality; since the sheriff is the King's lieutenant, and the lord of regality has only power to repledge.

1676, 1677, *and* 1678. Henderson of Fordell *against* Monteith of Caribber.

1676. *December* 5.—Fordell Henderson, as heir of tailyie to Monteith of Randifoord, obtained, at Secret-Council, the charter-kist to be given up to him, and Monteith of Carybber to be dispossessed, and himself put in possession; because the beginning of Carybber's possession was precarious, as a factor, and the disposition by which he acclaimed the estate was suspected of falsehood, and improbation of it depending before the Lords of Session. It was wondered how the Council could find this a competent business for them, it neither being a riot nor *metus majoris tumultus,* but merely civil. When the improbation came to be tried in February 1677, there being only two subscribing witnesses in the disposition, one of them, who had been Randyford's servant, and who was mightily suspected to be bribed, disowned his subscription; which tells us that frequent error of taking the subscriber's own men-servants or sons, to be witnesses in the writs granted by them. Mr George Norvell ever advised that writs, especially if of moment, should be subscribed before famous and honest