Bailies of Edinburgh, his defence was this, That with the bill he received likewise a letter of advice from Sir David, bearing that he needed not scruple to answer the said bill, in respect he would send him a parcel of good and sufficient wines, that would do more than repay him his money disbursed by accepting this bill; which was the sole motive that induced him to accept the bill. But the wines being now come home, there being nothing more rotten nor insufficient than they; and, therefore, since the only cause of his accepting that bill, was in hopes to have got good wines, which failyeing, he must be freed of the bill, at least of so much thereof as must in reason be abated of the price of the wines, by reason of their utter insufficiency. The Bailies not laying great weight upon this, Somervell advocates the cause to the Lords upon this reason, that his defence being *in ipsis apicibus juris*, and founded on the common law, *viz.* on the redhibitorian action *quanti minoris*; and that the bailies though most honest men, yet were not civilians; therefore that the question was altogether proper and competent to the Lords' cognition, and fit allenarly to be decided by them.

This being heard, it was taken to interlocutor to the Inner House; where the Lords found it was no good ground of an advocation, and therefore remitted the cause again to the baillies, *et merito.*

Advocates' MS. No. 176, *folio* 99.

1671. *June* 16.

THIS day my Lord Halkerton intimated to the advocates and clerks, that the Lords would receive no reports into the Inner House, except they were brought in the very next day after the Lords' answer was craved thereupon: and this, in respect, they found these reports being brought in unduly, consumed much of their time.

Advocates' MS. No. 177, *folio* 99.

1671. *June* 22. LORD BALMERINOCH *against* ——.

A MAN grants an infeftment of annualrent, which he appoints to be uplifted out of two tenements of land, whereof he had several seasines, and of both which he was heritor. The creditor is ever in possession, use, and custom of uplifting his annualrent out of one of these tenements, and never out of the other; for though the *duo tenementa diversa* were *aliud et aliud corpus* in themselves, yet as to the *jus pignoris* constitute therein to the creditor, that was indivisible, and so it was in his option to betake himself either to the one tenement or the other. Thereafter the common owner of both the said affected tenements, sells them to sundry persons, and the right of that tenement out of which the creditor was in use to uplift his annualrent for the space of sixty years and upwards, comes in the person of the Lord Balmerinoch, who pursues the heritor of the

other tenement, (which was also bound by the first original infeftment of annualrent,) to relieve him of the half of the said annualrent.

EXCEPTED,—He can never be made liable for the half of the said annualrent, because he has brooked and possessed his tenement these forty years and more, free of the said annualrent, and so has prescribed *liberum tenementum.*

ANSWERED,—He cannot be heard, because in all law and reason, the creditor's possession by uplifting his annualrent out of the other tenement, must be interpreted to retain to him his possession of this also, and so interrupt the running of prescription.

REPLIED,—*Esto* it were granted that prescription will not run against the creditor, so as to impede him, though after an hundred or two hundred years, to come back upon that tenement, though all the while he should have lifted nothing furth thereof; yet the case must not be reputed the same with a conjunct debtor, and to give him the power, after forty years that I and my tenement have been free of him and of any others, and so prescribed *immunitus*, to seek his relief of me; *vide supra, No.* 136, [21*st February* 1671.]

The Lords not the less found that he was liable in relief, though he had been able to say free for an hundred years together; and that he could lay no claim to prescription, because the use of payment out of the other tenement, as being a part, interrupted the prescription *quoad* the whole. This was thought a very hard interlocutor, and dangerous, *nec transit quidem mihi absque difficultate; see* 20*th July*, 1658, *Nicholsone* contra *the Laird of Philorth. Item servitus* is a *res meræ facultatis quæ numquam præscribuntur.*

The Lords found that tenement which was all the while free, would be bound to relieve the other tenement, for a proportional part conform to the value of that tenement, being compared with the tenement that bore the burden. See a parallel case, 6*th November* 1678, *Hay and Milne.*

Advocates' MS. No. 178, *folio* 99.

1671. *June* 22. Anent DISCUSSION.

A CAUTIONER in a testament being convened to make the confirmed goods forthcoming; it was excepted, that our law allowed no other action against such a cautioner, but only *in subsidium*, the executor being first discussed. *Infra No.* 432, [*December* 1673,] and 191, [30*th June* 1671.] ANSWERED, he confessed it was so, and therefore he had discussed him by obtaining a decreet *cognitionis causa* against the principal, in regard, he having been charged to enter heir, he had renounced. REPLIED, This is not a sufficient discussion, seeing he must not only be discussed in his lands and heritages, but also in his moveables, by poinding, arrestment, and otherways *usque ad peram et sacculum.* And it was remembered, that the Lords had found in a debate in the Inner House, an heir of line was not sufficiently discussed, (the defence was proponed by the heir of tailyie,) because they had done no diligence for reaching his heirship moveables: and though it was alleged, that moveables in respect of their uncertainty, and that they might be darned and carried from hole to hole, needed not to be discussed;