George Jolly, and reserved their reduction of the right the pursuers derive from the said Jolly, as accords.

DUPLIED for the defenders, They cannot be liable as successors, 1*mo*, Because that is an universal title, and supposes an immixtion *per universitatem*, which the acceptation of this disposition will not imply. *Secundo*, That passive title is only introduced in favours of those who are creditors for onerous causes before the said lucrative succession, and not in favours of those who acquire rights for love and favour, as the pursuer's right was. But, *tertio*, That passive title reaches only such as are *alioqui successuri et necessario hæredes*, as when the father or son dispones to their eldest son or grandchild; but not where the party receiver of the disposition is only *hæres præsumptive et probabiliter tantum*, as when a sister succeeds to a brother, which is our case; and that it was a certain principle, that lucrative succession was not a passive title except in the line descendant. (*Vide supra*, February, 1670, Whytfoord of Milnetown, No. 8.)

TRIPLIED for the pursuers, The defenders must be reputed as *necessario hæredes* to their brother, because at the time he made them that disposition he was on death-bed, and could have no other heir, *per rerum naturam*, being also unmarried. *Secundo, Esto*, That succession were not enough to make them liable to all their brother's debts; yet the Lords were in use to [find] always such successors liable in *quantum lucrati sunt:* and they sought no more.

QUADRUPLIED for the defenders, That though he had died instantly upon the making that disposition to them, yet it would not alter the case. As for the second, though they were liable in *quantum lucrati sunt*, that was not competent here, but only in a reduction or in a declarator; and it was not in all their libel.

QUINTUPLIED for the pursuers, That they might add it or reply upon it, since it was unexceptionably relevant, *et lites non sunt prolongandæ seu multiplicandæ.*

My Lord Gosfoord FOUND they could not propone upon it here, since it was not libelled, therefore repelled it, reserving to the pursuer their reduction and declarator upon that ground.

See the information of this cause beside me. See 15*th June*, 1678, thir parties, *Louthians;* 19*th December*, 1678, *Setons of Blair against Pitmedden.*

Advocates' MS. No. 444, *folio* 232.

1674. *February* 28. The MARQUIS of HUNTLY *against* HIS FEUARS.

A second appeal was given in to the Lords by the Earl of Aboyne as commissioner, and in name and behalf of the Marquis of Huntly, his nephew, in an action pursued by the Marquis against Gordon of Carneborrow, and sundry others his feuars, for reducing their feus, as having fallen under his forfaulture, they not being confirmed by the King.

The Lords found the defender's feu-infeftments good, valid, and sufficient to defend against the forfaulture; especially the apparent heir of the person forfaulted being restored, and the forfaulture *funditus* taken away as *ab initio* null and unjust, and the restitution being *non per modum gratiæ*, but *justiciæ*. See *supra*, No. 406, (June, 1673, General Dalzeel *against* Tenants of Caldwell,) 437, (28th January, 1674, General Dalzeel *against* Tenants of Caldwell,) where the Lords

maintain tacks against a donatar to a forfaulture. See *Hippolitus de Marsiliis singulari*, 122, where he defends that *propter domini delictum vassallus nequit feudo privari.* See Stair's System, *tit.* of Infeftments, §. See a discourse *apud me*, why neither the creditors, cautioners, nor vassals of forfaulted persons should be prejudged or be cut off by the forfaulture; it is elegantly enforced, folio 68 *et sequentibus.* And though, in strictness of rigour, by the feudal law, and nature of that contract, the fee reverting and opening to the superior by delict, it returns, *prout optimum maximum est*, as it was given out, without noticing any incumbrances contracted upon it since, except the over-lord had acknowledged, accepted, and owned them, by giving his consent or confirmation, or by admitting resignation in their favours; yet our law has oft inclined to a mitigation and temperament in this point, by mingling a little equity; lest otherwise, faithful, loyal, and innocent subjects be put to suffer, without any other fault than an omission of a nice punctilio of form. See act 37 in 1571; act 130 in 1592; act 201 in 1594; act 3 in 1600; and the rescinded acts, 33 in 1644, and 9 in 1645.

When the Marquis returned from the French camp, my Lord Lauderdale persuaded him judicially to compear before the Lords of Session, and take up his appeal and declare he past from it; and which he did on the 26th of January, 1675. And though they had promised him not only a new hearing, but gave him some insinuations to hope a redress, yet, after a second debate, they adhered to their former interlocutor, and so he was either ill or well served for his complimenting them. But the times were such as no rational man could expect a ratification from them of what had once escaped them, though unawares. They blushed to confess what is incident to humanity itself, (*nam humanum est errare,*) where their honour was once engaged at the stake; lest they should inflame, foment, and encourage the insolence of many who were watching for their halting: and which censoriousness was improven to that height that they were ready of molehills to make a mountain, by turning to themselves the wrong and magnifying end of the prospect; and even to name and stamp what is just, legal, and warrantable, not with the pardonable nickname of an error and frailty, but even with the most intolerable and ignominious brand of downright injustice, partiality, and subversion of the interest of the subject, and the settled laws of the kingdom.

Advocates' MS. No. 446, § 1, *folio* 234.

Anent the APPEAL to the King and Parliament presented by LORD ALMOND, against an Interlocutor of the Lords of Session, in the case, THE EARL OF DUMFERMLING *against* THE EARL OF CALENDAR, *in February* 1674. See that case.

Notwithstanding all the pains was taken on the Lord Almond to pass from his appeal, and take it up, yet nothing hath hitherto prevailed with him to make him do it, but he lives in hopes to make it rise up in judgment against them whenever we get a fair and unprelimited parliament: which may be long enough ere we see it. *Vide practicam præcedentem; infra, num.* 479, (Tenants of Bathgate, June, 1676;) *supra, num.* 122, (Earl of Argyle *against* Campbell, February 2, 1671,) and 156, (Hamilton *against* Bell, 25th February 1671;) *infra, num.* 487, Bishop of Dumblaine *against* Kinloch, July, 1676.

Advocates' MS. No. 446, § 2, *folio* 235.

I HAVE few or no observations by the space of three Sessions and a half, viz. from June 1674 till January 1676; in regard I was at that time debarred from my employment, with many other lawyers, on the account we were unclear to serve under the strict and servile ties seemed to be imposed on us by the King's letter, discharging any to quarrel the Lords of Session their sentences of unjustice, and was not restored till January, 1677; so that we shall content ourself with remarking a few things that occurred in that gap and interval.

Advocates' MS. folio 235.

1674. *June.* GEORGE YOUNG *against* GEORGE COCKBOURNE.

GEORGE YOUNG, bailie to the Earl of Winton in his barony of Niddry or Winchbrugh, pursues George Cockbourne, who had possessed the yards and park, for payment of the duty thereof for the years of his possession; in which the quantity of the yearly rent being controverted, I contended, the *quota* paid for the preceding years behoved to be the rule, where no particular farm (tack-duty) was pactioned and conditioned; for *consuetudo in pensionibus est servanda, L.* 18, *C. Locati, ibique Glossa magna Accursum,* who cites Everhardus, *in loco legali a solitis.*

See Benevenutus Straccha, *tractatu de navibus, parte* 3, No. 10, *pagina* 306. *Infra,* 8th November, 1677, Prestongrange, No. 649.

Advocates' MS. No. 447, *folio,* 235.

1674. *June.* ANENT USURY.

ABOUT this time I heard it queried, if it was usury to take more annualrent from the King, in advancing him money, than 6 of the 100. Sir George Lockhart was of opinion, in a contract with the King, it would fall under the compass of usury; but where it is done by way of traffic, merchandising, or bills of exchange, even *centesimæ usuræ,* which is 12 of the 100, might lawfully be taken: as both Sir William Sharp and Sir Patrick Morray had practised, when they lent some money for defraying the charges of the Commissioners to the Union in 1670; the L.30,000 Sterling imposed on the country by the Parliament for that end, not being so soon got up. Some may think, may not the King give as much annualrent as he pleases? He is not tied by these positive statutes; he is above the municipal laws; he may dispense with them in his own particular. I confess he may gift as much as he thinks fit; but to pay money, *nomine usuræ,* seems unsafe to the receiver: seeing in these acts, *rex utitur jure privati; et tanquam minor et læsus,* he may be restored. See Guibertus Costanus, *cap.* 1. *Quæstionum, et Titulum Cod. de fiscalibus usuris, ibique Ant. Perez in commentario.*

Advocates' MS. No. 448, *folio* 235.