

charter in 1638; anent arbitrations; anent the clerk of the bills his being liable for the cautioners he receives; anent the King's advocate's pursuing improbations alone; anent inverting pious donations; anent the true crisis of a process; and an infinite number of other observations that are to be seen in that book; to which I refer, it being sufficient to have hinted at a few of them.

Advocates' MS. No. 643, folio 301.

1677. *November 1.* ACTS OF SEDERUNT.

THE Lords fell upon some acts of Sederunt,—*1mo*, Discharging all solicitations to be made to the Lords of Session by the parties, their advocates, &c.; see two old acts against it, one in July 1596, another in July 1657.* *2do*, That where the charger or pursuer is not ready to insist for that week, he shall be heard upon his application to the Ordinary; but if he do not crave a hearing during the time that the Ordinary who called it is in the Outer-House, then it must be enrolled of new in the end, and posterior to all the causes in the book of enrolment; else defenders shall be defrauded of all the benefit and certainty designed them by the regulations, and be put week after week to attend the pursuer's malicious delay and uncertain motions. *Vide supra, January 1677, No. 529, the same thing done.* The third was prohibiting the clock to be kept back at 12 hours, at any's desire whatsoever.

Advocates' MS. No. 644, folio 302.

1677. *November 3.* ANENT MINORS INCURRING PASSIVE TITLES.

A MINOR is convened upon the passive titles, to pay a debt owing by his father, and in the relevancy and probation it is condescended on, that his tutor intromitted with the maills and duties of the minor's father's lands, and applied them to the minor's behoof; which must infer *gestionem pro herede* upon the minor.

ALLEGED,—*Non relevat*; for tutors and other administrators *meliozem possunt facere pupilli conditionem sed non deteriozem*, and it were hard that their deeds should bind an odious passive title upon an apparent heir, not being his own deed, though it be converted to his utility; since *id intelligere non presumitur*, unless he were infeft in those lands; and the most he can be made liable in, is allenarly *in quantum minor locupletior factus est*, or to restore what he so intromitted with.

ANSWERED,—That a pupil or minor acting with his tutor or curator's advice, that so redintegrates his person, and supplies the defect and imbecility the law presumes in him, that *minorem representat majorem*; else creditors might be disappointed of their payment where the apparent heir was minor. Neither would this anyway evacuate the privilege of minority; for though the tutor's intromission was

* *Carfania impudentissima mulier causam prætoris edicto de postulando dedit, L. 1. paragrapho 4. de Postulando.* Some named Tolquhon, and his brother Thomas Forbes, as they who gave principal occasion to the making this act against solicitations.

actus in jure validus to import a passive title, yet if the minor found himself lesed, he might revoke and be restored against it *in integrum*.

Craigie went a greater length than was needful, for he thought even a protutor's intromission would bind a passive title on the pupil; but this is scarce consonant to the analogy of law. *Advocates' MS. No. 646, folio 302.*

1677. *November.*

ANENT REFERENCE TO A WIFE'S OATH.

IT was questioned, where a woman in her viduity lends out a sum of money, and takes a bond for it, and afterwards marries, and her husband charges the debtor to make payment, and he suspends, and offers to prove by the wife's oath that either it is paid, or that she discharged him of it, or promised never to seek it; and the husband answers, that he will not suffer his wife to depone to his prejudice; whether this be a good answer, yea or no. If he produce the wife's discharge in writ anterior to her marriage, there is no doubt but it will cut off the husband from seeking that debt. But it remains more controverted where he has no other way of probation of the payment or promise, but by the wife's oath; for if her oath were receivable, a widow of an opulent fortune might easily, by her oath, defraud and disappoint her husband, for she might lift up all she could get, and give them down the one half, to get it up from her husband: which is not to be allowed; yet see it sustained in Dury, *March 16, 1622, Home and Macmath*. Yet some make a distinction, that a husband needs not suffer his wife to depone in a cause where the result of is *ad debitum contrahendum*, to infer or draw on an obligation or a debt upon the husband, for there he is *in damno vitando*; but she may be forced to depone *ad debitum distrahendum*, for liberating a third party from a debt, because there the husband's prejudice is not so great, and he is *in lucro captando*; yet even there she has a prejudice. Yet if collusion could be made out, that she did it maliciously, and, only to prejudice her husband, lifted sums, I think it would have its own weight, and deserve consideration, since *dolus proprius nemini debet prodesse*. What if the sum lent by the wife, in her viduity, be due by an heritable surety? then the husband, *jure mariti*, has right to no more but the bygone annualrents of it, and in time coming, unless it was made moveable by a charge of horning; yet, as administrator to his wife, he may uplift the principal, and he and she discharge it; and if she once consent to that, then it becomes moveable, and falls under his *jus maritale*.

1677. *November.*

ANENT BONDS BY MARRIED WOMEN.

WHAT if a woman grant a bond with her husband, and swear never to come in the contrary, nor to quarrel or impugn it, if she be charged for the sum, and allege *absolvitor, ex senatus-consulto Velleiano*, as being married at the time, whether the oath integrates the obligation, so as to make her liable? Either she is bound as principal, or as accessory with her husband, *et eadem facilitate jurat qua contrahit*. See the *Authent. C. Si adversus venditionem*, beginning *Sacramenta Puberum*. See Dury, *March 16, 1622, Sir George Home* against *Macmath*. *Vide supra, June 26, 1677, Charles Oliphant and Provost Curry*.

The Lords, on the *8th of November 1677*, found the bond, *ipso jure*, null, *quoad*