1677, *and* 1678. ——— SETONS, Heirs-Portioners of Blair, *against* LORD PITMEDDEN.

1677. *28th January.*—The two daughters Seton of Blair's reduction against Sir Alexander Seton of Pitmedden's adjudication [was this day] advised, wherein the Lords found the cause of the disposition from his brother James near onerous, and admitted sundry points to probation; *quæ omnia vide ad longum* in the information *apud me: infra, numero* 574, § 6. See this again advised on the 12th of June 1678, marked by me in the third page of my other manuscript book. *Advocates' MS. No.* 538, *folio* 274, *margin.*

1678. *June* 12, 13, *and* 22.—The Lords advised the actions betwixt ——— Setons, heirs-portioners of Blair, and the Lord Pitmedden. The Lords had ordained him to prove he had paid the usual rates lands were then giving in the country, for the acquisitions of Pitmedden and Alethin, which he had purchased from his brother James; otherwise, they would reduce these rights on the Act of Parliament 1621, as *inter conjunctas personas*, without a full onerous adequate cause, in prejudice of the absolute warrandice of the said James his brother's disposition of the lands of Blair to their father. And he having led probation thereon, and proven, with the incumbrances that affected it, and which he hath since relieved, or must take course with, he had paid £1000 Scots for each chalder, which was and is the price of the country in Buchan, even counting his patrimony only at 12,000 merks:

The Lords found an adequate price proven, and assoilyied him from their reduction. *Vide Informations hinc inde*, for the particulars in this case.

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1678. *June* 14. DAME MARGARET BAILLIE, Lady Luss, and SIR ROBERT SINCLAIR, *against* The LADY IDINGTON.

DAME Margaret Baillie, Lady Luss, and Sir Robert Sinclair, now of Lochend, advocate, pursue the Lady Idington, and the other seven daughters of Mr William Kelly, and the representatives of such of them as are dead, upon the 57th Act, Parl. 7, James III. to enter to the superiority of some lands in Newton-Leys, to the effect they give infeftment to the pursuers of the property; otherwise that the pursuers might be infeft by the King, upon precepts furth of the King's Chancery, and they lose their superiority *ad vitam.*

In this process some of the defenders compeared, and offered themselves willing to enter the pursuers, and give them either a charter, or precept of *clare constat*, in so far as concerned their shares and proportions. The pursuer alleged, She was not obliged to enter that way, except all of them concurred jointly, and were ready to enter her *quoad* the whole; else this were to divide her security, and make it party-coloured, the one half holden of them, and the rest of the King; and the superiority was *jus individuum*, and she could not be put to double charges, but behoved to be entered either wholly by them or wholly by the King.

ANSWERED,—The contumacy of those heirs-portioners who compeared not, could neither in law nor reason be prejudicial to the rest, who were willing to enter the pursuer as to their parts.

This being taken to the Lords' answer, and reported upon the 30th of July 1678, the Lords found the eldest daughter and her heirs were only liable in law to enter the vassals; the superiorities, as indivisible, belonging to her; but the obventions, and emoluments redounding therefrom, were divisible among all the heirs-portioners. See, anent this, a remark in another MS. which begins with the account of the General Assembly held at Glasgow in 1638, *fol.* 29.

N.B.—In regard of the contumacy of the eldest, he was admitted by the King. *Vol. I. Page 2.*

1677 *and* 1678. SIR ANDREW BIRNIE'S DAUGHTERS *against* MURRAY of POLMAIS'S BROTHER.

1677. *June* 26. IN the case of Sir Andrew Birny's daughter, and Morray, brother to the Laird of Polmais, it was doubted if it can be called *donatio inter virum et uxorem*, so as to be *ad libitum* revocable, where a wife is not anteriorly provided. To me it seems very clear and reasonable that a wife not *aliunde* provided, getting a jointure established on her *stante matrimonio*, it should not be revocable, as if it were *donatio inter virum et uxorem*, but should be reputed *donatio propter nuptias*, and subsist in so far as it is a moderate provision. (See this decided on the 15th and 22d of June 1678.) See Corser and Lutfuit's information, where our reason of reduction run upon this head, That the disposition given to the wife by the husband was *stante matrimonio, et tacite* revoked by the posterior disposition made by Corser to his brethren; and it is the very same reason whereupon, in Alexander Arbuthnot of Knox his information against Colonel Hary Barclay, the provision made by the said Colonel to his Lady during the marriage, is quarrelled. See both informations. *Vide infra, numero* 607, [17*th July* 1677, *M'Kenzie* against *Rosse.*]

II.—In this same cause it was debated,—Where a disposition is subscribed *inter vivos in liege poustie*, only the name is left blank, if it be filled up *in lecto*, whether the disposition can be quarrelled as done in death-bed. *Divus Marcus, Imperator, in lege* 11, *in fine, C. de his quibus, ut indignis, hæreditas aufertur*, says, *Nil actum credo si quid supersit agendum, ex Lucano.* See Craig, *Feud.* p. 91; and it is the *ultimus actus* that consummates it, and the nomination of the person is what perfects the disposition. Yet the last Earl of Erroll had a power and faculty from his Majesty to fill up in the blank whom he pleased, *etiam in ipso agone et articulo mortis. Vide supra*, February 1670, *Mossman* against *Bell*, No. 7. See the case of Doctor Cunyghame's heir *alibi* debated.

Advocates' MS. No. 580, *folio* 288.

1678. *June* 15.—The cause between Sir Andrew's Birnie's daughters and Murray of Polmais's brother, (see 26th June 1677,) coming this day to be advised, it was OBJECTED,—The cause cannot be advised, because not concluded,