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,

in so far as an Act renouncing farther probation was not as yet extracted. ANSWERED,—That old form was now in desuetude, and there [was a] signature and minute of process under the Clerk's hand, whereby the parties had called their Act in the Outer-House, and did renounce further probation; which was enough.

The Lords, for the benefit of the Clerks, revived the said old form and custom; and, by an Act of Sederunt, declared they would hold no cause as concluded till there was an Act of Renunciation of farther probation extracted and lying in the process. *Quid si* the other party has not as yet renounced his probation, and the term is not circumduced against him?—I think it should stop advising, till there either be an Act renouncing, or the term be circumduced against him.

This put a delay to the advising of Sir A. Birnie's cause till the 22d June 1678, in which day he gained the action; and the Lords found the filling up a disposition blank in the name of the party, on death-bed, equivalent to subscribing it on death-bed.

N.B.—There was no dispensation granted to the disponer, to nominate whom he pleased, *etiam in articulo mortis;* of which faculty, if legal, see more *alibi*, in Doctor Cuningham's case and others. *2do*, They found a husband might provide his wife, *etiam stante matrimonio*, to a moderate provision, effeiring to his estate and fortune; (whereof the Lords will take trial, as they did in this same case;) which the Lords will restrict to a terce or a third, which is the legal subsidiary allowance *ubi deficit provisio hominis*, where she is not provided *aliunde;* and they found such a moderate provision was not *donatio inter virum et uxorem*, though done *stante matrimonio*, and so was not revocable; yet the Lords kept it *in scrinio arbitrii*, according to circumstances, to moderate and qualify the said provision, and either exceed a third and terce, or go below it as they see cause. See 17*th June* 1676, *Mitchel.* *Vol. I. Page 3.*

See reports of this case by Stair and Gosford; Morison, 6124, 6126, and 3242.

ANENT BONDS of CORROBORATION by SONS.

A FATHER grants a wadset furth of some lands; his son (after the father's death or before *non refert,*) grants a bond of corroboration of that wadset; the son is charged with horning on this bond. *Quæritur* if this looses the real right of the wadset, and renders it moveable so as to fall to executors, under escheat, &c. The lawyers were divided upon it. Some thought not, because the securities were different, granted by sundry persons at several times. Others said, they were *super eodem subjecto;* and, if it was the eldest son, he was *eadem in jure persona cum patre suo.* *Vol I. Page 3.*

ANENT *BENEFICIUM INVENTARII* in HERITAGE.

SOME think that it were equal and just to give heirs the *beneficium inventarii* in heritage, (as Justinian does in *L. ult. C. de Jure Deliberandi;* and Craig in his private opinion inclines, in some cases, the heir after immixtion should be permitted to abstain, and be only liable *in quantum ad eum pervenit; p.* 153 and 257;) as well as our custom gives it to the executor, who is heir *in mobilibus;* and that there is more reason in the first case to allow it, since heritage is of

more moment, and so the adition more dangerous. Others are of opinion, that it would be a great bar against apparent heirs their cheating their predecessor's creditors, that he should be liable to pay his father's debt *eo ipso* that he possesseth his heritage: and that it shall not be enough to liberate him, that he shows he has acquired it *ex titulo singulari*, since that but palliates fraud; for, if he bought it at the full avail, then he might as well employ his money, and purchase other land; and his affection to his predecessor's ancient inheritance to preserve it in the family (which is oft assigned as the cause,) ought not to preponder the public good of the nation, and to be a *pallium iniquitatis*. And though the 62d Act, *Parl.* 1661, allows creditors to redeem such estates from apparent heirs, within ten years after the acquisition, upon payment of the true sums they gave for it, yet the difficulty of probation renders this almost impracticable, since the creditors from whom the apparent heir bought the apprising or other right, may be dead, and the apparent heir's oath is not always to be credited in such concerns. *Vol. I. Page* 3.

Anent a Register for Redemptions, &c.

It seems to be a great defect in our law, and in our securities, (which yet excel those of England,)—1*mo*, That we have no register for instruments of redemption; 2*do*, That there is no register for interruptions of prescriptions. For I suppose I transact with a man who has an expired apprising; I give him the full price, looking on his apprising as what clearly carries the irredeemable right of the lands; yet I find afterwards that, within the legal of seven or ten years, an order of redemption was used, by which I am brought to count and reckon, and found paid by intromission, and what is wanting is offered to me, and I am left to my warrandice against my author. Here is an unavoidable inconvenience, and irremediless as yet in our law, which a public register of such redemptions would obviate. Siclike in buying of land, men crave a forty years' clear progress, and with that think themselves secure, by the grand Act of Prescription 1617; yet what hinders but, within the course of these forty years, there might have been twenty interruptions used; so that, when he comes to clothe himself with prescription, he finds himself loose; and yet no care nor human prudence could obviate and foresee this. A record would do. And the Act 1699, ordaining interruptions to be renewed once each seven years, is not a large enough plaister for this sore. And the pretence that the lieges are too much overburdened already with the expenses of registration, deserves no answer: only let him who falls in the snare tell what he would have given that such deeds had been *in publica custodia*, and ordained, *ex necessitate*, to be registrate. *Vol. I. Page* 4.

Anent Recognition.

Where there is a feu *cum maritagio*, (as Craig says there are in Strathern sundry such feus, p. 296,) the alienating the whole or major part, without the superior's consent, will not infer recognition, because that makes it not a ward holding, in which only, *ex natura rei*, recognition takes place; unless the charter bear an express clause, prohibiting base alienations without the superior's

consent: as I have seen some of them do, and particularly the feu of the west mill of Kirkaldie. *Vol. I. Page* 4.

Anent Warrandice Infeftments on Ward-lands.

A warrandice infeftment on ward-lands, in valuation of a marriage, in other lands, is estimated as a burden affecting them, only conform to the value and quantity of the distress or eviction, and no further; or when it has not as yet existed, according to the probable appearance of hazard, it may be valued at two or three years' purchase. *Vol. I. Page* 4.

Anent Assignations by Executors.

An executor, before he obtains sentence against the defunct's debtors, or else get the security renewed in his own name, cannot assign debts; yet if he assign, and the assignee pursuing, that be objected to him, I think the executor's concourse with the assignee, offered by way of reply, will be sufficient to sustain process at the assignee's instance, albeit the executor's name be not contained in the summons, nor the defender cited at his instance.
Vol. I. Page 4.

Anent the Freedom of Universities from Excise.

The University of St Andrew's claim to be free from paying excise for all drink furnished to the scholars, and that upon the general privilege competent to all universities, by custom. I remember we enjoyed that privilege at Leyden, after our immatriculation; yet the —— Act 1661, imposing the annuity and excise, ordains all brewers to pay it, without excepting what shall be used by students in universities. *Vol. I. Page* 4.

1678. *June* 19. Agnes Wilkie *against* Morrison; and

1678. *June* 20. Sir Andrew Dick *against* ————.

Where arrestments upon dependencies were loosed, upon finding insufficient caution, if a bill had been given in by the party wronged, showing the irresponsality of the caution found, the Lords were wont always, in six or seven several cases, since the King's restoration occurring, to annul the letters loosing the arrestment, aye till more sufficient caution were found. Yet, on the 19th of June 1678, between Agnes Wilkie and Morrison, and on the 20th of June 1678, in a case of Sir Andrew Dick's, the Lords declined to meddle, pretending they would not annul the King's signet letters; but the party grieved had his action *in subsidium* against the clerk to the bills, if the caution was insufficient. And the President affirmed all the other instances were wrong decided: yet they seem very favourable, if not just. *Vol. I. Page* 5.