An apprising is only *pignus prætorium*, and a security answerable to that in the Roman law called *missio in possessionem ex secundo decreto*, and not a right of property, till the legal expire; and, therefore, in charters on apprisings, they are bound to pass a new one after the legal. And what if there were twenty apprisers within year and day of ward-lands? shall the superior have right to every one of their marriages? *Vol. I. Page* 90.

1680. *February* 27. Sir GEORGE KINNAIRD of that ilk, Petitioner.

SIR George Kinnaird of that ilk being nominated by Dr Yeaman tutor to his children, together with his brother and Dryburgh; and they two, who were made *sine quibus non*, being both dead, Sir George gives in a bill to the Session, craving he might be liberated of his acceptation of that tutory-testamentar, in regard it was now impracticable, the two persons by whose advice he was adstricted to act being both dead.

The Lords freed him of that acceptation, but ordained him to take a dative, and administer by it.

I think it would, in the same very manner, annul the nomination of the tutory-testamentar, if the parties *sine quibus non* did repudiate and refuse to accept. *Quær.* whether a judicial disclamation be necessary, seeing without that they may repent and accept: though it be the opinion of some that they are limited within year and day. *Vol. I. Page* 91.

1680. *February* 27. JOHN M'LURG, JAMES CLELAND, and the OTHER CREDITORS of BOYD of PINKILL, competing.

IN the competition between John M'Lurg, James Cleland, and other Creditors of Boyd of Pinkill, for getting up of some money owing to him by Fergusson of Kilkerran; the Lords found, that Pinkill the debtor might give M'Lurg, one of his creditors, an assignation to a debt, and cause intimate it to his debtor, and all the while keep it in his own hand and custody: and if it be delivered after other creditors' arrestments of that sum, the receiver shall be preferred to these arresters, though the receiver upon oath hath confessed that the same was not delivered to him by the common debtor till long after the arrestments. Which seems to lay down a ground for permitting debtors to gratify one creditor before another, and so of defrauding of the rest. *Vol. I. Page* 91.

During this Winter Session there were several questions moved, and decisions whereof I was informed; and, not knowing their certain date, I have drawn them all together here, to the number of 51 :—

I.—Anent Inhibitions on Dependances.

Where an inhibition is served upon a depending process, and the defender gets a protestation for not insisting, and thereafter the pursuer cites of new, and insists, and obtains a decreet; it was doubted whether the inhibition reconvalesces and subsists, or if it falls. Some think it depends on the summons, and *illa instantia* being *perempta*, as the summons falls, so consequently the inhibition grounded thereon. Others affirmed, that if the year and day from the date of the summons was not run, though protestation were obtained, yet it might be executed of new, (for there is a *præscriptio annalis in* summonses;) and being once made litigious before the inhibition, would stand, as having the subject matter in controversy *medio tempore* to lean to. *Quær.* if the inhibition will sustain, where the process ends by a transaction, and bond is granted for the debt, which acknowledges the summons was just. If the bond be in corroboration, there is no doubt but the inhibition will stand.

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II.—AnentPenalties in Bonds.

If one charge before the term of payment of his debt come, or for more than is due, *viz.* where some of it is paid, or where the suspender hath some other probable reason against it; the Lords use to assoilyie the debtor from the whole penalty: though Calvin, in his Lexicon, *v. Pœna*, says otherwise. See Dury, *22d Feb.* 1639, *Johnston*. But if the bond or security bear more terms of payment than one, the charging for the whole, before the terms be all come, will liberate from a proportional part of the failyie, *viz.* of those terms that are not come, but not of those which were past before the charge.

Vol. I. Page 91.

III.—Anent Witnesses under Fourteen Years of Age.

Impubes (one within 14 years of age,) cannot be a legal habile judicial witness *in civilibus*, yea not in criminals, except in some very few cases. *Quær.* if he may be used as a *testis chyrographarius* or *instrumentarius*, and if the inserting him, or his subscribing as a witness before he is 14, be a nullity of the writ if there be but one other witness beside. Upon this the family of the lawyers is divided; but the Roman law is clear that he cannot. See Mack. Crim. p. 531, and *Cavalcan. de Testibus.* *Vol. I. Page* 92.

IV.—Anent the Proper Place for Denunciations.

Where a debtor denounced has lands lying within a regality, *quær.* if a denunciation at the head market-cross of the sheriffdom will make his life-rent-escheat of these lands fall, or if he must also be denounced at the regality market-cross. Sir J. Cunningham resolved it thus: Either there is a known place appropriated by custom for denunciations and other executions within the regality, or not. *2do*, The party denounced either dwells within the regality or not. If there be a known place, and he dwell within the said regality

then he must be denounced there, to the effect of the making his escheat thereof fall; but, if he dwell not within the regality, a denunciation either at the market-cross where the lands lie, or where the party lives, will make his escheat to fall; because the Acts of Parliament take notice of his residence where he lives. And though some make a distinction between the single and the liferent escheat, that a denunciation at the market-cross where he dwells should only make his single escheat fall, *quia mobilia sequuntur personam*, yet there seems to be no disparity. And in George Cockburn and my Lord Sinclair's case, the Lords found the denunciation at the market-cross of Edinburgh sufficient to make the escheat of his lands in Fife fall; because it was proven he had been 42 days in Edinburgh before the denunciation, which they found enough to give a domicile. See Mack. Observes on the Act 1621, p. 130. This seemed very scrimp; for law should consider if he be there *animo remanendi*, and have *focum et larem;* or if he be only come to Edinburgh to follow his affairs at law, or otherwise for a time. See *Feb.* 1676, *the Marquis of Athol, supra*, page 59. *Vol. I. Page* 92.

V.—Anent a Son's Liability for his Father's Debts.

A man dies: his nearest in blood, who would have right to his moveables as executor, likewise dies, without either intromitting or being executor confirmed; his son establishes a legal title in his person, and, passing by his father, confirms executor to the first. *Quær.* if this will make him liable for his father's debts, because the *jus sanguinis* is conveyed, transmitted, and devolved to him, by his father, as the channel, and without that he could have no right; and since *ex ejus persona reportat commodum*, he ought also to pay his debts. *L.* 10 and 149 *D. de Reg. Jur.* This hath difficulty with it. *Vide supra*, 9*th Jan.* 1679, a case similar to this, if the using the father's minority be a *gestio*. *Vol. I. Page* 92.

VI.—Anent Caution for Presenting a Debtor.

One is cautioner for presenting a debtor to prison, and is pursued for payment of his bond, for not presenting him; any exception of payment, &c. which is competent to the principal may likewise be proponed by the cautioner. But *quær.* if the principal debtor (whom he ought to have sisted,) must be called to this process. I think not. See *Jan.* 1678, *Cleland.* *Vol. I. Page* 92.

VII.—Anent the Glebes of Ministers *sine cura*.

The fishers upon the river of Don being profaners of the Lord's Day, there is a chapel of ease erected for them without the city of Aberdeen, whereto there is a stipend mortified for a catechist to catechise them and preach, but not to administer the sacraments. *Quær.* if the glebe of this minister be free of payment of teinds by the 162d Act, Parl. 1693. Some thought not, because he was a minister *sine curâ*, and his glebe was not publicly authorised by the law; especially if it be a church-man that acclaims the teinds thereof. *Vol. I. Page* 92.

VIII.—Anent the Triennial Prescription.

If an account of goods be pursued for after three years, it must be libelled not only that they were delivered, but also that they were resting owing unpaid, and prove the libel *scripto vel juramento*. But, if he pursue within the three years, he needs prove nothing but the delivery and furnishing, and that *prout de jure*, and the defender must offer to prove payment. *Aliud obtinet* in Taverners; see *Ewart's* case *4th June* 1680, and *13th Feb.* 1680, *Master of Salton*. The French law allows process for no more but three years' salary, presuming all precedings to be paid. *Joan. Imbert. Instit. Forens. lib.* 1. *c.* 34.

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IX.—Anent the Import of the Words *Full Debtor*.

It was questioned whether thir words in a bond,—Such a man becomes cautioner and full debtor for another,—import an obligation for the whole debt, where it wants the words *conjunctly and severally*. Some think he is only bound in the half of the sum. But these words, *full debtor*, seem to contradict this. The most rational import of these words is, that he shall have *beneficium ordinis*, and not be liable till the principal debtor be first discussed.

Vol. I. Page 92.

X.—Annent Requisition of Sums Heritably Secured.

One is infeft in an annualrent bearing a requisition upon sixty days: the creditor requires his money from the debtor upon the foresaid space, and thereafter takes his annualrent from the debtor, which (if for terms subsequent,) is reputed in law a tacit passing from his requisition: thereafter he charges summarily with horning. This charge is quarrelled as null, because he ought to have required of new ere he had charged, the former requisition having been passed from by the taking of annualrent, which annualrent is payable by virtue of the heritable clause; and so he had recurred back to the heritable right, though it was once loosed and made moveable by the requisition and charge. Others thought this made it only moveable so as to fall to his executors, and not to his heir; but did not alter the case *quoad debitorem*. See Hope's Min. Pract. c. 2.

It were fit to insert a clause in such rights, that the requisition and charge shall not prejudge nor loose the heritable right, and that they may charge for the money on six days. See *March* 1671, *f.* 94.

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XI.—Anent the Effect of Premonition.

The Lords have found, though requisition doth loose a wadset, and make the heritable sum moveable, yet premonition does not, because it was no deed of the creditor's, unless an order of redemption had followed on the premonition, and a consignation had been used; for by that the wadset money became likewise moveable.

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XII.—Ruthven of Dunglass' Creditors competing.

In the competition of the creditors of Ruthven of Dunglass, the Lords found, where a comprising doth not proceed upon an heritable bond, but only upon a moveable debt or a decreet, a charge of horning needs not of necessity precede the denunciation of the lands to be apprised, if it be the party's own debt whose lands are denounced; but if it be his predecessor's debt, then he must be charged to enter heir to him. But whether it be his own debt or not, if he lie out of lands to which he may succeed, yet he must (though it be his own debt) be charged to enter heir, before these lands can be apprised from him. *Vol. I. Page* 93.

XIII.—Anent Oaths of Calumny in Improbations.

In a reduction and improbation it was alleged, I cannot take a term to produce, because I crave the pursuer's oath of calumny if he hath reason to think the writ called for is false and feigned; and if he will not give his oath of calumny, I am not obliged to produce the principal, whatever nullities may be in the writ or decreet.

I think this is debateable, and the greatest effect it can have is, that the defender shall take a day to satisfy the production in the reduction, by producing an extract, and not the principal, which he behoved to do if the improbation was sustained. But the pursuer, if he can make any advantage by it, may produce the principal. However, it may be objected, that an oath *de calumnia* is only a complex oath *super toto libello*, and not upon every member and article of it. *Vide* Dury, 29*th June* 1626, *Lord Kildrummy.* *Vol. I. Page* 93.

XIV.—Anent Provisions in Contracts of Marriage.

Where a wife, in a contract of marriage or other writ, is provided to a half or third of the moveables or household furniture existing the time of her husband's decease, the husband's moveable debts will be deduced in the first place, and exhaust the moveable estate *pro tanto*, and she will only get her half or third proportion of what remains behind free, *deducto ære alieno mobili;* unless the clause be conceived thus, That a third or other proportion be assigned or disponed to her, *per verba de præsenti;* or 2*do*, That it be declared that it shall be a free third, and noways to be affected with the moveable heirship, or the husband's debts; for this will make the wife a preferable creditor thereon. *Vol. I. Page* 93.

XV.—Doctor Borthwick *against* John Burn of Midlemiln.

In 1677, in a case betwixt Doctor Borthwick and John Burn of Midlemiln, a comprising being annulled for wrong registration of the bonds *extra territorium* where the debtor lived, the Lords would not so much as sustain the comprising *quoad* the necessary debursed expenses, but assoilyied from all expenses whatsoever, and restricted it to principal and annualrents allenarly. *Vide supra*, 18*th Jan.* 1680, *Orrock.* *Vol. I. Page* 93.

XVI.—Anent the Act 62d, 1661.

Though the Lords have extended the 62d Act of Parliament 1661, anent the heirs of debtors acquiring apprisings upon their predecessors' estate, and declaring them to be redeemable; yet that hath not hindered them from making such fraudulent purchases. For, 1*mo*, though the act mentions only acquisitions in time coming, yet the Lords have extended it to such deeds as were prior to the act. 2*do*, It declares the same shall be redeemable by creditors having a real right; yet the Lords have allowed personal creditors this favour; yea they have sustained a summons of declarator, at his instance, against an appriser, to stop his legal from expiring, in these terms, That he is paid of his sums within the legal by intromission, and what he wants he will pay him at the bar: which they sustain to this purpose, that the lands may be open and affectable by the personal creditors following diligence: which the Lords admit, where the legal is near expiring and the personal creditor can shortly thereafter establish a real right in his person by apprising or adjudication. See February 1676, *supra*, No. 464, page 59, *anent apprisings*. This is done *in odium* of apprisings; for the which cause the Lords now, upon the least informality, loose apprisings, and restrict them to principal and annualrents: but this laxness may be dangerous; for many estates in Scotland are only possessed by apprisings. 3*tio*, Though the apparent heir have only a naked disposition to the said apprising, and no infeftment, yet the Lords find the terms and meaning of the foresaid Act of Parliament to reach him, and that he should prove what he gave for the said right, and his intromission within the ten years after the acquisition must be allowed in the first end of the price he gave. See the case if he got it *gratis*, 25th Feb. 1679.

But the exuberant trusts they put in other persons' names evacuated much of the design of this Act of Parliament; for they cause them dance through many hands, to involve and intricate the conveyance. *Vide* 11*th July* 1671, *Kirkonnel*; 14*th July* 1681, *Gordonstown*. *Vol. I. Page* 93.

XVII.—The Town of Edinburgh *against* The Earl of Marishall.

In the Town of Edinburgh's pursuit against the Earl of Marishall, it fell to be argued, if his exercing the *officium Mariscallatus* be a *gestio pro hærede*; it being more than his assuming the title of an Earl, or his place in Parliament, because he hath special obventions and emoluments by it. *Vol. I. Page* 94.

XVIII.—Anent the Passive Title of Uplifting Mailles.

Where one is pursued on the passive title of uplifting the maills and duties of a father's lands, and this is referred to his oath, and he suffers the term to be circumduced, and decreet is extracted against him; this being objected against him as *probatio probata* of the said passive title, and though voluntary payment be not a passive title, yet payment by virtue of a sentence is:—the apparent heir alleges, though he intromitted, yet it was by virtue of a singular title, such as a disposition, gift of escheat, or the like, and so it was not a

gestion. ANSWERED,—This was competent and omitted in that former decreet obtained against him as intromitter, and so not receivable now.

REPLIED,—That was *res inter alios acta, et aliis non prodest*; and also cannot prejudge him here: and he was only holden as confessed.

I hear that the Lords, in the case of *Sir Robert Crighton*, as assignee by one Ker, and *Murray of Broughton*, found that Broughton behoved to purge his contumacy why he compeared not to depone; and he offered to prove he was then in Ireland. But here there was some jealousy against Broughton's purchase and right. I think a decreet upon a circumduction is no probation in favours of other creditors; but if the apparent heir's intromission be proven by witnesses, and there be a decreet thereon, it is thought that probation will be enough to make him liable to all the other creditors. See Stair, *tit. Behaving as Heir*, where he limits this by reponing the heir to his defences against others. *Vide* anent Broughton's case, *9th Nov.* 1682. *Vol. I. Page* 94.

XIX.—ANENT a PRESUMPTION of USURY.

WHERE a bond or right is dated about Candlemas, and yet, notwithstanding thereof, appoints the sum to bear annualrent from the Martinmas preceding, this is no sufficient presumption of itself to make the contract or bond usurary, (though it is to be shunned;) for the money might be ready at the Martinmas, and the security prolonged and delayed upon the absence of some of the subscribers. *Vol. I. Page* 94.

XX.—BURNET, Tutor of Leys, *against* A QUAKER.

IN the case of Burnet, tutor of Leys, the Lords found, that a Quaker should not be holden as confessed for refusing to swear; but allowed them to declare the truth in their own terms, *viz.* as in the presence of God. See *July* 1676, No. 257. No. 492, § 1, page 92. *Vol. I. Page* 94.

XXI.—WILLIAM STEVENSON *against* THOMAS ALLAN.

IN a case between William Stevenson, bailie in Edinburgh, and Mr Thomas Allan, minister; the Lords ordained this point to be heard in their own presence, If a minor in his testament might nominate his own curator to be his universal legatar; that being *mali exempli*, and presumed to be impretrated by himself. The civil law hath provided against this. *Vide* 10*th December* 1679, *Gairden.* *Vol. I. Page* 94.

XXII.—ANENT SUCCESSION to an UNKENNED TERCER.

A WOMAN having right to a terce, dies without being served or kenned to it: her second husband, or her nearest of kin, confirm themselves executors as to the maills and duties of these terce-lands, and pursue the intromitters.

It was ALLEGED, for them, That, though she had a right in her person, yet she never exercised the faculty; and so it was *jus personale, quod radicatur in ossibus, et non est transmissibile ad hæredes*, she dying without establishing a formal right thereto by a service.

Yet I think the right of it transmits to her representatives; though, it may be said, if she had been pursuing herself, it would have excluded her, that she was not served to the said terce. *Vol. I. Page* 94.

XXIII.—ANENT the KING'S ADVOCATE'S SERVANT'S DUES.

THE King's advocate's servant craving ten merks when improbation was proponed *incidenter* by way of exception, it was the general opinion of all the formalists about the Session, that it was a novelty, and that there was no such thing due, but only where there was a signeted summons of improbation. *Vol. I. Page* 94.

XXIV.—ANENT RELIEF in CASES of PARTIAL LOSS at SEA.

IN a pursuit, at the instance of some owners whose goods were lost, against the rest whose goods were saved, the Lords found they behoved to say, the goods of the rest were saved by the pirates or capers plundering of theirs. But it was offered to be proven, that a storm came on afterwards, by which all their goods would have perished if they had not run into land. *Vol. I. Page* 94.

XXV.—ANENT LANDS within BURGH but not BURGAGE.

QUÆR. where lands lie within a burgh royal, but not holding burgage, being either temple lands, or belonging to some chaplainry, prebendary, &c. if the magistrates may stent them as well as other lands. Much depends upon custom; and I think they may cause them bear burden with the rest. *Vol. I. Page* 94.

XXVI.—SIR ROBERT SINCLAIR *against* ——.

IN Sir Robert Sinclair's case and several others, the Lords found that intromission with victual maills and duties of land, though extending to £40,000, was probable by witnesses, and *prout de jure*, though it was to extinguish an infeftment of annualrent constituted by writ: but, if it be the intromission with the money rent of lands, then within £100 Scots, it may be proven by witnesses, and above that sum only *scripto vel juramento;* and thus, in January last, the Lord Castlehill decided in the suspension at *Mr Hugh Peebles'* instance against *M'Gill.* See 13*th Feb.* 1671, *Wisheart.* *Vol. I. Page* 94.

XXVII.— —— *against* The MAGISTRATES of LANERK.

IN a pursuit against the Magistrates of Lanerk, for suffering a rebel to escape; those who were in office for the time are liable, though there be others who have succeeded in their office since, for they are convened *vel ex vero vel ex quasi delicto.* As also, I may convene the actual Magistrates, though it was not done in their time; neither need I say they are Magistrates elected, seeing I offered to prove he acted and exerced the office, and was *tentus, habitus, et reputatus;* for they who were elected refused, because of the declaration, and he having

been bailie the preceding year, continued to exerce for this also. See Dury, 11*th November* 1634, *Bower*. *Vol. I. Page* 95.

XXVIII.—Anent Gifts of Offices before Vacancy.

Sir William Ker being very sick in January last 1680, Scot of Ardrose presented his signature, as Director of the Chancery after his decease: the Exchequer, in respect of Sir William's recovery, delayed to pass it. But Sir George Lockhart thought his gift, in case of a competition of another granted by the King after Sir William's death, would be found null, because it did not bear the way of vacation in the King's hands; and, in the gift and disposal of all offices, they ought to bear *verum modum vacandi*. See Anton. Faber *ad tit. C. de S. Sanct. Eccles.;* and they ought truly to be vacant ere they be gifted, as the 23d Act, Parl. 1567, provides, in the case of gifts of escheat: but, if the King shall give no other patent of it, nor make another donatar, then Ardrose's gift will stand good. *Vide Ludov. Gomez ad Regul. Cancellar. Apostol. de impetrantibus Beneficia Viventium;* which is prohibited. *Vol. I. Page* 95.

XXIX.—Anent the Escheat of Uncompleted Apprisings.

A tack assigned falls under the single escheat of the assignee; but, *quær.* where one assigns a comprising whereon no infeftment had followed, whether that apprising will fall under the assignee's escheat, or if it will fall under the escheat of the apparent heir of the appriser. See Stair, as to the effect of assignations. *Vol. I. Page* 95.

XXXI.—Anent Charters by Superiors to Apprisers.

Charters granted by a superior to apprisers in obedience to a charge, and not bearing a *novodamus*, yea a precept of *clare constat* from a superior, does not import a discharge of non-entry and preceding casualties of the superiority; but, as soon as infeftment is taken thereon, it liberates for the future from non-entry and the other casualties during that vassal's lifetime. A superior or overlord may redeem a comprising; *quær.* if he may redeem a wadset or other voluntary infeftment, *a paritate rationis et vigore statuti, viz.* Act 36, James III. But, that being a correctory statute, *non trahitur ad pares vel similes casus.* *Vol. I. Page* 95.

XXXII.—John Philip, Minister of Queens-ferry, *against* His Parishioners.

In January 1680, Mr John Philip, minister at the Queen's-ferry, having only 400 merks of yearly stipend, pursues his Parishioners for an augmentation, before the Commission for Plantation of Kirks; who refused the same, in respect he already possessed all the free teinds of the parish; and, *intuitu* that he had a considerable fortune of his own, he was put into that lean benefice: and they found that the stock ought not to be burdened with ministers' stipends where there is not sufficiency of teinds; and that the stipend ought not to be modified *ex quolibet subjecto*, but only out of teinds. But sometimes, where there is not sufficiency of teinds in that parish, they may go to the next, as was done betwixt

the minister of the church at North-Leith, and at St Cuthbert's, or the West-kirk. *Vol. I. Page* 95.

XXXIII.—Lord Halton *against* The Town of Dundee.

Mr William Rait, second minister of Dundee, being dead; the Town, who had presented three or four ministers since the Reformation, gives a presentation to ———. My Lord Halton, as constable, having the presentation of the parson, claims right to present all the ministers in the Town, and prevails so far with the bishops, (who are too much subservient to the state,) to refuse to ordain him whom the Town had presented, (for they use not collation there, because he gets only an Act of the Town-Council for his warrant and his stipend;) and they dare not deny my Lord Halton's desire.

The point of law is the same with that of the Earl of Haddington and the Town of Haddington. The canon law was shown to the Archbishop of St Andrew's, and to Haliburton, Bishop of Brechin, *viz. Capitul.* 7, *extra, de Jure Patronat.* where it is ordained, that they who presented last to the benefice should continue in possession till the point of right were decided. But the bishops were timorous and unwilling to disoblige great men, and so refused ordination; yea, the Bishop of St Andrew's hath so far deceived them and yielded to Halton, that he, contrary to promise, hath collated one Irvine presented by him; which will not so easily be got reduced *pro hac vice*, though they gain the declarator. *Vol. I. Page* 95.

XXXIV.—Anent Pursuits by a Wife.

A wife pursues for a debt with concourse of her husband: a horning is produced to debar the husband: *quær.* if this should sist the wife's process, the husband being only pursuer *pro interesse;* especially if it be produced after litiscontestation. Some think it should not. *Quær.* if a horning against a tutor would in law debar a minor *ab agendo*, as not being fully authorized.

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XXXV.—Anent Donatars to Escheats.

A donatar is liable for the debt of the horning whereupon his gift proceeds: *quær.* what if he hath not intromitted with as much of the escheat goods as will pay the said debt, or if he hath not done diligence; if he may be reached, as he who ought and should have intromitted, at least *in quantum* will pay that debt. *2do*, If the debt bear no annualrent *nec pacto nec lege*, but only after the denunciation, whether the donatar will be liable for the accessories of the said debt, *viz.* the annualrent that falls due after the denunciation; or *esto* the annualrent were only due by the custom of merchants. *Vol. I. Page* 96.

XXXVI.—Anent Advocates Acting without Mandates.

An advocate compears for a defender in a decreet, and the decreet is afterwards annulled, because the defenders disclaim the employment or mandate; whereby the pursuer is put to great loss and prejudice: whether or not will he

have action of damage against these advocates for their officious compearance? This is to touch advocates in their copyhold.—If witnesses refuse to compear, the English law gives action of damage against them for his loss through their not deponing.—The remedy for this would be, for advocates to have written mandates to warrant their compearance: and this was so ordained by an old Act of Sederunt, *in anno* 15—, and is no disparagement; and in disclamations, and in some other special cases, they are yet required; and it would help many inconveniences. *Vol. I. Page* 96.

XXXVII.—Anent Poinding.

A poinding is quarrelled, because the apprising of the goods is a month after the poinding. This seems not to be a nullity, there being no time prescribed in law; and the debtor hath an advantage by the delay, *viz.* the benefit of redeeming *medio tempore*, aye till they be carried to the market-cross, and there rouped and apprised. Some say he hath also *jus luendi pignoris* for twenty-four hours thereafter. See *Feb.* 1676, [No. 465, § 2, page 61.]

Quær. Where the heritor of a mill convenes another man's tenants for abstracted multures, if he ought not likewise to call their master to the said pursuit. *Vol. I. Page* 96.

XXXVIII.—Anent Superintromission with Executry.

Where one pursues an executor, and he defends upon exhausting, and it is replied, that they must still be liable because of superintromission above the inventary confirmed; if this be urged as an universal passive title to make them liable for the whole, it will be repelled, unless they have a title as executor-dative *ad omissa*; but if they can qualify evident fraud and dole, that they know of the omitted goods and concealed them, the Lords will in that case sometimes admit it by way of reply, without putting them to take a dative, *28th Jan.* 1678, *Andersons.*

But if the pursuer declares he propones the superintromission, not *ad hunc effectum* to infer an universal passive title to be liable for the whole, but *in quantum* they have intromitted with, conform to the value, this reply of superintromission will be sustained without the necessity of taking a dative *ad omissa.* This is denied by others; *vide supra, p.* 1. *Cockburn.*

If the superintromission was before confirmation, then it is receivable *hoc loco* summarily; but if it be after the confirmation with goods not confirmed, then it is not admitted without a dative. *Vol. I. Page* 96.

XXXIX.—Anent Presentations to Kirks, by Females.

An heretrix of lands to which lands there belongs a patronage of a kirk, may present a minister, though it be of its own nature *actus virilis.* But *quær.* if a liferentrix of lands having a patronage therein, may present. I think, if she be infeft as a conjunct fiar, she may. See *Vinn. ad pr. Tit. Instit. de Usufr.* and Craig, *p.* 264, &c. in the case of a donatar to a ward. *Abbas Sicul. Panormitanus*, in three several places, *ad tit. extra, in Decretalibus de Jure Patronat.*

affirms a woman may present. See Basnage on the reformed Norman customs, *p.* 69, where a liferentrix *(une douarriére,)* may present. *Vol. I. Page* 96.

XL.—Anent the Prescription of Bonds.

A bond is alleged to be prescribed. Answered,—An inhibition was raised thereon within the forty years, though it was never registrate; for it is an execution in its own kind, though it infers not present payment; and *quævis insinuatio pro interruptione habetur.* See *July* 1671, *Mackraw.*

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XLI.—Anent Relief among Co-cautioners.

There is a bond, wherein, with the principal, there are five cautioners bound; one of whom paying the debt, he gets assignation to the bond against the principal and two of the cautioners, (for they were obliged to relieve one another *pro rata;* and though that clause were not expressed, yet *inest de jure;*) but he discharges the other cautioners, and declares he shall use no execution against them; and then he pursues one of the two cautioners for the sum, who excepts, and alleges, I cannot be bound to pay neither your fifth part, nor the two parts of the two cautioners whom you have discharged; as for the two fifth parts remaining, I can only pay my own fifth part of the whole sum; and further, a fourth part of the other fifth cautioner his part, because he being *lapsus bonis,* his fifth part divides in four parts, to be equally paid by the other four remaining cautioners. *Quær.* if the co-cautioner will be liable for the whole fifth part of him that is insolvent, or only for a fourth part of it.

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XLII.—Anent a Possessory Judgment.

In a removing, the defence of a possessory judgment, *viz.* I have been seven years in possession by virtue of a right and title, (though never so defective,) defends, and they must reduce it.—It was formerly thought, that the same defence of a judgment possessory would be sustained in an action for maills and duties; but now of late the Lords begin to alter, and in such actions ordain them to debate the preferableness and validity of their rights, notwithstanding of their septennial possession. *Vide supra, 30th July* 1679, *Boog.*

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XLIII.—Anent Objections to the Warrants of Decreet.

In the transferring of a decreet it was alleged, that the defender in that decreet was only holden as confessed, and he had craved to be reponed.

Answered,—The contumacy cannot be purged now, because he is dead.

Then they offered to improve the executions of the summons by which he was cited as false; as also the grounds and warrants of the decreet, *viz.* the signatures of process, acts of litiscontestation, &c.

ANSWERED,—The decreet is dated in 1649, thirty years ago, and the registers of that year are lost; and therefore the pursuer and user of the decreet cannot be obliged to produce small executions. The Lords found the pursuer could not be holden to produce the principal executions and minutes of process now, *post tanti temporis intervallum*. *Quær.* if the clerk of the Court where this decreet was given was called here, or not. *Vol. I. Page* 97.

XLIV.—ANENT the PUBLICATION, &c. of INHIBITIONS.

A PERSON who is inhibited dwells in one shire, and hath his lands lying in another. The inhibition is only published at the market-cross, and registrate in the Court books of the shire where the party dwells; but is not published at the market-cross, nor registrate in the books of the shire or regality where the lands lie. This is certainly a nullity, as being contrary to the 118th Act, Parl. 1581. It is true, it may serve as a diligence in the sense of the 18th Act, Parl. 1621, against bankrupts, to reduce posterior gratuitous deeds; but will go no farther. *Vol. I. Page* 97.

XLV.—ANENT COMPENSATION and QUALIFIED OATHS.

I ARREST in the hands of my debtor's debtor; he depones he is owing, but produces a bond by which my debtor is owing him as much, only the term of payment in it is not yet come, and it hath some other qualities. *Quær.* if this be such a liquid compensation as that it *ipso jure* extinguishes the debt, or if he may be decerned to make forthcoming notwithstanding thereof.

One was cautioner in a bond; the bond is lost; the debt is referred to the cautioner's oath; he depones *qualificatè* that he was indeed cautioner for such a person, but he knows not but the same may be paid, and the bond retired by the principal, since it is not produced; and that he is frustrate of his relief, since his oath will not prove against the principal debtor. *Quær.* if this quality will assoilyie him, at least if it will procure him relief against the principal for whom he was bound; or if the Lords will decern for his relief.

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XLVI.—ANENT RIGHTS containing no MENTION of HEIRS, &c.

A BOND is granted, payable only to a man himself, without mentioning his heirs, executors, or assignees. The creditor dies before the term of payment. *Quær.* if it will transmit to his executors. I think it will; for *dies cessit sed non venit*. Though some object that *dies adjectus* is like a condition; and if it do not exist, then the conditional debt ceases; and the bond might be granted for personal considerations to the man himself only. Yet it was decided, where a man gives a bond of provision to his daughter, payable at her age of fourteen years, if she die before that age it doth not pass or transmit to her heirs or executors. See 23*d Feb.* 1671, *Viscount of Oxford*, where the day was found to be adjected *differendæ obligationis gratia*, and not merely *differendæ solutionis causa*.

Where a man only infefts himself, without mention of his heirs or assignees, or (as Stewart of Shambelly did,) takes it only to himself and to the heirs-male

of his body; if he die without sons, though he have daughters, or brothers and sisters, yet it will belong to the king as *ultimus hæres*. On which ground Halton got the Earl of Dundee's estate, though the Earl had a sister.

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XLVII.—Sir John Dalrymple *against* Drummond of Carlowrie.

Sir John Dalrymple, advocate, pursues Drummond of Carlowrie upon a tack of teinds, set by the Archbishop of St Andrew's to the Laird of Newliston, his lady's grandfather. Alleged,—the tack bears, it shall belong to him and his heirs, they always being entered heirs and infeft; which Sir John's lady is not. Replied,—She is infeft upon an adjudication, which is equivalent. Duplied,—The Archbishop in that clause hath not intended to gratify singular successors; but had an eye to the honour of the family, that they might only bruik as heirs by service.

The Commissaries, before whom this pursuit was, sustained her entry by adjudication as equipollent. *Dubitatur an recte.* See this decided *infra*, 16*th Nov.* 1680. *Vol. I. Page* 97.

XLVIII.—Anent the Park of Holyrood-House.

Duke Hamilton, as keeper of the palace of Holyrood-house, was, by letters from his Majesty, ordered at several times to furnish rooms, lodgings, and apartments there, to the Marquis of Athol, Halton, &c. Sir James Hamilton hath no more but the heritable keeping of the park of Holyrood-house from the king, (which the Earl of Haddington hath now adjudged from him. *Quær.* if this be transmissible voluntarily to assignees, or judicially to creditors. For one who apprises the Earl of Errol's lands and offices, will not thereby be constable of Scotland, or Earl of Errol.) *Quær.* if the king, *ex eadem paritate rationis*, may not grant precepts, appointing the keeper of his park to take in 100 horses, sheep, or cows for Halton, or any others, to be grazed there *gratis*, and so evacuate the keeper's benefit. *Vol. I. Page* 98.

XLIX.—Anent Conjunct Persons.

The Lords are now constantly in use to force conjunct persons, as brother and brother-in-law, uncle and nephew, to astruct the onerous cause of their debts otherwise than by the assertion of the bond itself, or of their own oath; and though the 18th Act, Parl. 1621, does not mention bonds, yet the Lords, *a paritate rationis*, extend it to bonds; as lately in the case of the Laird of Renton against Lamerton; and in July 1674, in Mr Patrick Couper's case against Blair of Kinfauns, who was only uncle to the common debtor; and so was it decided of old, Durie, 23*d March* 1674, *Duff*; 29*th Jan.* 1629, *Auld*; 9*th March* 1639, *Riddoch*. But if the assignee be an extraneous person, then his own oath is taken on the onerous cause; Dury, 22*d June* 1642, *Nisbet*. *Vide supra*, 6*th Dec.* 1679; 24*th Jan.* 1680, *Ker*. *Vol. I. Page* 98.

L.—Anent the Brocard, *Falsum in Data*, &c.

Falsum in datâ falsum in omnibus, (as Craig hath it, *p.* 156,) is a brocard

which holds only in case there be a competition between rights and diligences, where they are preferred according to their dates; or where a writ is antedated to evite the reason of reduction *super lecto ægritudinis*, and the like.

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LI.—Anent the Executors of Liferenters.

That liferenters and their executors may have right to the half year preceding Whitsunday or Martinmas, it is required that they live till these termdays. But it is not well agreed upon, whether they must outlive twelve o'clock of that day, or two o'clock in the afternoon, or twelve o'clock at night after Whitsunday or Martinmas. For ministers' stipends, the terms are Whitsunday and Michaelmas, by 13th Act. Parl. 1672. *Vide* 31st July 1679; and Stair, *tit.* 30, § 54, where he shows that it was interpreted Martinmas day in the afternoon.

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1680. *June* 4. Home of Wedderburn *against* George Park of Foulfuirdleys.

George Park of Foulfuirdleys holds his lands feu of Home of Wedderburn, under this irritant clause, that, *sub pœna amissionis feudi*, he shall ride and wait upon his superior whenever he shall be required to attend him; and this clause is in the charters of the most part of Wedderburn's vassals. And, upon a debate betwixt him and them in 1638, the Lords found, if Wedderburn called them to attend him in his own private concerns, then it was upon his charges; but if it was on any public concern of the kingdom, then their attendance in that case behoved to be upon their own proper expenses; yea it bore, when he was bound to entertain them, he might set them down at the table, and give them meat with his servants; though Home of Ninewalls, and some other good gentlemen, hold of him by this tenor. It may be doubted if they may perform these servile parts by a substitute; but it is certain, where they find the terms dishonourable, *licet iis refutare feudum*, and abandon it to the superior.

In June 1679, when the heritors were called to the West against the rebels, Wedderburn required Foulfuirdleys and other vassals to attend him, conform to the *reddendo* of their charters; Foulfuirdleys went indeed to the host with the heritors, but did not attend his superior; whereupon he convenes him in his own baron court, (for by their rights they are liable to answer to his head courts if cited, and *curia domini et pares curiæ* are most competent, especially to judge on feudal prestations and services;) and fined him in 100 pounds Scots. Foulfuirdleys suspends, 1*mo*, That he was not lawfully cited, being only cited on the ground of the lands, and he dwelt *alibi*. 2*do*, He had lands holden of the king; and so, being called forth by his proclamation, he was obliged *obedire domino antiquiori* in a competition; as is decided in all other casualties.

Answered, to the 1*st*,—The superior was bound to know no other dwelling but the land he had given him; likewise he had labouring there, in his own hands, and so it might soon come to his knowledge. To the 2*d*,—The king's command and Wedderburn's were *ad idem*, and it detracted nothing from the