No 1.

100 merks, is appointed to belong to the poor; and the defender shall answer the poor whenever they shall pursue; but it is *jus tertii* to the loser, who cannot detain the money thereupon; but whatever was the cause, the defender having received the bond for a cause onerous, and being ignorant that it was for any other cause but true bestowed money, he must be *in tuto;* otherwise, upon this pretence, any bond may be suspected, and the cedent, after he is denuded by witnesses, may take the same way.

The Lord Advocate did also appear for the poor, and claimed the superplus of the money more than 100 merks, and alleged that the act of Parliament did induce a *vitium reale*, which follows the sum to all singular successors; and that though ordinarily the cedent's oath or witnesses be not taken against the writ, yet where there is fraud, force, or fault, witnesses are always receiveable, *ex officio* at least, and ought to be in this case, where there is such evidence of fraud, that it is acknowledged the bond was blank in the creditor's name, when Nicol received it, and the filling up was betwixt two brethren, and the debtor dwelling in town, did not ask him what was the cause of the bond; and that an act of Parliament cannot fall in desuetude by a contrary voluntary custom never allowed by the Lords, but being vitious against so good and so public a law.

The Lords found the act of Parliament to stand in vigour, and that the loser was liable upon the same grounds, and therefore ordained the sum to be consigned in the clerk's hands; and before answer, to whom the sum should be given up, ordained Nicol's oath to be taken when his name was filled, and for what cause.

Fol. Dic. v. 1. *p.* 235. *Stair, v.* 1. *p.* 561.

No 2.

The heritable right of presentation to an office, exercised contrary to the terms of an act of Parliament, was found not null by exception; and that the question of the desuetude of the statute must be tried in a reduction.

1693. *January* 11. King's Advocate *against* Moncrieff.

The Lords advised the debate, mentioned 3d November last,* between Moncrieff of Reidy and John Adam, craving to be admitted a macer on the King's gift It was moved by some of the Lords, that there was a competition between two gifts, and each of them objected subreption and obreption against the other, and that there was no way to know if his Majesty proceeded *ex certa scientia et proprio motu*, but by consulting himself, and laying the case before him. Others *answered*, That this might be a bad preparative, to trouble the King with points of law, and that it would reflect on the secretaries if the King should say, that the one or both were impetrate from him without making him understand the state of the case; and that wherever there were double gifts, one of the parties would crave to have it remitted to the King. So it was voted, recommend to the King, or decide; and the last carried; though all gifts

* See Appendix.

and rescripts of princes, either have that clause expressed or implied, *si preces veritate nitentur*, and *relatio ad principem* in dubious cases, is a remedy introduced by law, *Tit. D. et C. de appellat.* Then the next vote was, if the new charter, given by King William to Reidy, was conform to the old rights, which bore only *officium Clavigeri et Serjandi armorum*, whereas the *novodamus* bore *jus præsentandi et nominandi* of a macer before the Lords of Session. The plurality carried, that the new charter was disconform to the old infeftments. Then the third vote was, if the new charter was sufficient to give Reidy a title, right, and interest, to present a macer; and it carried by one vote, viz. six against five, that it gave him a right; though it was urged, that this being only a relative charter, it could convey no more right than what was in the first; and seeing the old charters are not express, and this explication does not quadrate, it can never give him a right to present a macer; and though princes *ex plenitudine potestatis* may give away offices heritably, yet it is a dilapidation and misadministration, and wrongs the Crown; and in process of time, not only the four macers, but many other greater offices may be dismembered from the royal prerogative by sustaining of this. No 2.

February 2. 1693.—The King's Advocate's debate against Moncrieff of Reidy's right of presenting one of the macers of Session, mentioned 11th January last, was decided, the Chancellor being present; wherein the LORDS, by several votes, found the following points, 1*mo*, That, John Adam, the private party's right being now ended and transacted, that the King's Advocate could not insist for the King's interest, without a special warrant from his Majesty; there being only two cases wherein he could quarrel the subject's right, either by giving his concourse to actions of one subject against another, or when he had a mandate from the King to that effect; otherwise he might vex all the lieges with processes, and open their charter-chests; and it is so observed by Hope, Tit. of REDUCTIONS and IMPROBATIONS; and by Stair the 20th January 1680, Earl of Southesk, *voce* KING'S ADVOCATE.

The 2*d* point decided was, that the LORDS could not supersede till June, that either they might acquaint his Majesty, to see if there was any subreption or obreption in Reidy's gift and charter; or at least, that the King's Advocate might apply to see if his Majesty would give him a warrant to quarrel Reidy's gift; for the plurality thought that of dangerous example, and impinging upon the claim of right, to stop justice either by letters to or from the Session; or to insinuate that the King had violated, transgressed or contravened the claim of right, or diminished any branch or part of his prerogative. The 3*d* point was, that though the Advocate could not compear without a warrant, yet the Lords, *ex officio*, might consider defences *in jure*, and their relevancy; seeing it is the duty of Judges to supply the omissions, either of parties or their advocates, in points of law, but not *in iis quæ sunt facti*, according to the *tit. C. Ut quæ desunt advocatis judex suppleat.* *See* Thornton against Keith, *voce* PROCESS.

No 2. 4*to*, The Lords, by a plurality, found Reidy's gift not null on that head, that it gave him the presentation of offices before they were vacant; seeing *beneficium non vacans nequit conferri*; for the Lords thought a right of patronage and presentation of a minister might lie under the same exception; 5*to*, They found Reidy's gift not null on the 69th act 1587, that the giving away the King's privileges or casualities in bulk is expressly prohibited; for they thought, the King might lawfully annex the presentation of the macers to the judicatory of the Session for ever; and if so, why not to one man, which, though inconvenient, yet showed the alienation of it from the crown was not unlawful? 6*to*, It was stated whether Reidy's gift was null upon the 44th act 1455, discharging any offices to be given out in fee and heritage, in any time coming. This was found to be the tenderest point of all; for on the one hand, to find that act of Parliament in desuetude, was to encourage Kings and their Ministers of State to give away and dilapidate all offices, and turn them to be heritable to families or lands: On the other side, to sustain that act as *in viridi observantia* was to alarm the nation, and unhinge all their securities of the heritable offices, which many of them enjoyed. Some were for making a distinction between these that were clad with possession, and this which was only *in adipiscenda possessione*; yet this was still dangerous, for Queensberry, Duke of Gordon, and many others, that had got heritable rights of regalities, which either were not confirmed in Parliament, or were not yet roborate with 40 years possession since their date; and even the old ones might be quarrelled, and the prescription alleged to be interrupted by the edictal citations, the King's revocations, minority, absence when banished, and many other pretences; therefore, to shun all those dangers, the Lords fell upon this expedient, that this nullity was not receivable by way of exception against Reidy's gift, but only in a reduction, when the King's Advocate, authorized by his Majesty's warrant, insisted in the same; whereupon Reidy's gift was preferred; and John Adam componed with William Innes, who was formerly presented, and having paid 2200 merks to Reidy, he was admitted macer.

Fol. Dic. v. 1. *p.* 235. *Fountainhall, v.* 1. *p.* 543. & 553.

1731. *June* 25. Lord Dun *against* Town of Montrose.

No 3. In a declarator of a right of constabulary, at the instance of Erskine of Dun against the Town of Montrose, it was *objected*, That the said right of constabulary was null by the 44th act, Parliament 1455, declaring, that no office in time to come should be given in fee and heritage.—It was *answered*, The act was gone into desuetude, which the Lords found. *See* Appendix.

Fol. Dic. v. 1. *p.* 235.