riage, which could not extend to thir rests, being assigned to Mr James Melvil before.

The Lords, by plurality, found the Duchess had not a sufficient title to pursue, without the concourse of my Lord Cornwallis's representatives. And, though the Duchess's daughter, by him, was his nearest of kin, yet this opens a door to his creditors to claim all these bygone rents, if Mr James's assignation fall.

On the 6th July 1704, the Duchess appealed, against this and the other interlocutors, to Parliament. *Vol. II. Page 232.*

November 15.—The Duchess of Buccleugh gives in a bill against the Earls of Melvil and Leven, reclaiming against an interlocutor, finding they are not obliged to depone anent, or exhibit the papers contained in, the 4th article of the condescendence; and though she had (as mentioned *supra*, 22d June 1704,) appealed from the Lords to the Parliament, yet her lawyers did now judicially declare they passed from it *quoad* this article.

It was CONTENDED for the two Earls,—That however appellants have been hitherto allowed to pass from their appeals *re integra*, while there was nothing done in it by the superior court appealed to, yet the Duchess had tabled and brought in her affair to the Parliament, and received interlocutors there, which made such a *litis pendentia* as there was no returning back again to the session; neither could the Lords now sustain themselves competent judges to the process now tabled and depending before the Parliament. Put the case that one should advocate a cause from the Sheriff to the Lords, and, after debate and interlocutor, being dissatisfied, should lift his process, and go back again to the Sheriff, would the Lords permit this? Even so, *a pari*, the Parliament is as far above the session as they are above the sheriff.

ANSWERED for the Duchess,—That there was no litiscontestation made, or relevancy discussed before the Parliament, but only a dilatory defence, rejecting the execution of citation against Mr James Melvil; and, before litiscontestation, any party may lift their process.

The Lords, finding the case new, resolved to proceed deliberately, and hear the parties; for, though Mr Higgens and others had passed from their appeals, yet that was where the Parliament had not yet dipped in the business; and, by the 2d Act, Parliament 1695, the exception of prejudiciality seems to commence when the citation is called and sustained by the Parliament: and this inconvenience of prolonging pleas was obvious, that though the Duchess passed from this appeal, yet, if her Grace thought herself lesed by any new interlocutor of the Lords, she might appeal *de novo*, and so *duretur progressus in infinitum*, unless she renounced all future appeals. Next, it deserves inspection, how far her passing from one article, and adhering to her protest for remedy of law *quoad* the rest, is receivable; and if it can be divided, so that a part of the process shall lie before the Parliament, and another part of it may, by the appellant, be brought back to the Session, without a special remit from the Parliament.

Vol. II. Page 239.

1704. *November* 25. The TOWN of CULROSS *against* ERSKINE of BALGOWNY

THE Lords advised the probation led in the mutual declarators of property

and commonty raised by the Town of Culross on the one part, and Erskine of Balgowny, and other adjacent heritors, on the other part. The abbot and convent of the monastery of Culross being proprietors of the muir, they, by their charter, disponed to the magistrates and community of the burgh of Culross, the servitude of pasturage in the said muir: after this right, they feu out several parcels of their land *cum communi pastura in dicta mora.* The Town craving their right to that muir to be declared, as long anterior to any feus given by the commendator and convent to other vassals, and that these subsequent feus could not prejudge or diminish the fund for their pasturage, long before the monks being denuded in their favour:

ALLEGED for Balgowny, and the other adjacent heritors,—That the prior and convent, as they gave you a servitude in that muir, so at the same time they retained sundry lands in property still in their own hands; so it cannot be presumed but they retained a proportion of the muir effeiring to the lands they kept, notwithstanding the gift they had conferred on the Town; and, having since feued out these lands, they must have the same interest and share in the muir that their author, the convent, had.

The Lords thought the Town's right not exclusive of the other adjacent vassals of the abbacy, but doubted of its extent,—whether it was only a right to graze their beasts with which they laboured their common-good or borough-acres; or if it was leisome for every burgess to put in his cows or sheep therein. And though this last was contended to be the general practice of royal boroughs who had muirs adjacent, yet it did not seem to quadrate with the common principles of law, whereby *jus pascendi* is not a personal servitude, but a predial, and so there must be a *prædium dominans* to which it serves; and that can be no other but their borough-lands; and if they be allowed to put in what number of beasts they please, it was easy for them so to overburden the muir as wholly to exhaust it, and make it unprofitable to the other vassals of the abbacy, who were of two kinds:—some had a constitution in writ, by a charter and seasine, of a servitude in this muir; others only claimed it as part and pertinent of their lands, and joined prescription to perfect it. And one of the feuars, called Sands, founding on his charter, bearing *cum communi pastura in dicta mora*, it was

OBJECTED, That, though it expressed the muir, yet it was not in the dispositive clause, but only in the *tenendas et habendas*; which was but reputed an extension of style, and never conveyed a right, nor was ever repeated or regarded in a service and retour.

ANSWERED,—In charters from the Crown, the *tenendas*, though never so ample, conferred no right, and oft-times mentioned things that were not in the feu, as mills, fishings, &c. where there was no such thing; but, in rights from subaltern superiors, (who looked more narrowly to what they gave,) the *tenendas* was as material a clause as any other in the charter, as Craig alleges, and contained their tailyies and substitutions of old.

The Lords observed Sands' right was but upon his own resignation; therefore, before answer, what should be the import of the *tenendas*, they ordained him to produce the original feu, to see how the muir was given there.

Then the Lords proceeded to advise the testimonies of the witnesses adduced by the heritors, to prove immemorial possession of pasturage, and casting feal and divot; and the probation likewise led by the Town to prove their interrupting.

Balgowny and others proved forty and fifty years' possession: The Town again proved as clearly, That every year they are in use to ride the marches of that muir, and to hound, chase, and drive away all the beasts they find upon it, except their own.

Against the Town's interruptions, it was OBJECTED; 1*mo*. They were only proven by their own burgesses, who were parties interested, and could tine and win in the cause; 2*do*, Their title was as proprietors of the muir; and that not being proven, their interruptions wanted a warrant, and so were illegal; 3*tio*, Such a tumultuary cavalcade of driving away all the cattle they met that day in the muir, is but a mockery, and cannot interrupt Balgowny's prescribed possession, unless they can particularly condescend aud prove that some of the goods then driven off were his; for, what if he had none that day in the muir?

ANSWERED,—The parties in this process were the Magistrates, and none of them were adduced as witnesses; and it was undeniable but burgesses were habile witnesses *in causa communitatis*, else it were impossible to get such matters of fact proven. To the *second*,—One who interrupts is not obliged to bring his title with him; and if he proceed on a wrong mistaken right, yet, if he have another real title in his person, such as a right of servitude or pasturage, the interruption stands good, and may be ascribed to either. And for the *third*,—*Qui omne dicit is nihil excipit:* He who drove all but his own, must be understood to do it *ex animo* to interrupt the possession of all other pretenders, whether their goods be there at the time or not.

The Lords repelled the objections, and found the interruption proven, without burdening the Town to prove that Balgowny and the other vassals' goods were specially there at the time, and driven off the muir; or that the peats cutted and carried away belonged to them, and were casten by them particularly.

See Stair, 14*th November* 1662, *Nicolson;* and 21*st June* 1667, *Watson;* for as *res sua nemini servit*, so that maxim, *unaquæque gleba* is affected with the servitude, must be understood *civiliter*, and not strictly *et judaice*.

Vol. II. Page 242.

1704. *November* 28. WILLIAM LAUDER of WINEPARK *against* His LAWYERS.

WILLIAM Lauder of Winepark gave in a bill, representing, That, in the suspension he had depending, against the Earl of Lauderdale, about the charter of his lands, his advocates declined to appear for him; therefore craved the Lords would appoint them to plead his cause.

The Lords considered that lawyers could not be forced to manage a cause, if they truly thought it unjust; according to Accursius his lines, cited in our 125th Act of Parliament 1429, ILLUD JURETUR QUOD LIS SIBI JUSTA VIDETUR; but they not only behoved to give their oath of calumny on it, but also might be obliged to propone defences *in jure*, leaving their import to the Lords.

It was remembered, that, in King Charles I.'s reign, Bastwick and Prinne being convened in the Star-chamber, for slanderous pamphlets against Doctor Laud, Archbishop of Canterbury, the English historians blame some of their lawyers for deserting them after they had engaged, being afraid of the Archbishop's power and displeasure.

Vol. II. Page 243.