and as he has *commodum*, so he grudges not to take the *incommodum* with it. And this is now above all controversy, the Lords having found in this same very declarator of the Earl of Hadington's gift, and in a pursuit by Provost Gilbert Gray against the said Earl, for payment to him of some sums justly addebted to him by the defunct, (both which *vide apud me* in my collection out of the register of decreets; the one is at the 21st January, 1664, and the other at the 20th January, 1665,) that the donatar in such cases must be liable to all the lawful creditors of the defunct; especially considering that the said Earl, author to thir pursuers in their right, either by his back-bond, or by an act and ordinance of Exchequer, was bound to satisfy the defunct's creditors by assigning them to so much of the bastard's estate as would do the same; only the Lords declared he should not be liable *ultra vires hæreditatis*, and that his own estate should be free thereof.

DUPLIED,—It is confest, the Lords after very contentious debate in that cause, did find that a donatar of this kind must pay debt *secundum vires hæreditatis*; so that it would be very relevant to elide this pursuit, if Salton had any bond or other liquid debt owing to him by the said defunct Gray, whereon he sought compensation; but it is altogether against law and reason that he should seek to compense his own clear liquid bond with such illiquid facts, *de quibus non constat* whether they incumber the land or no; so that all that in form and justice can be done here is to decern the bond to be put to execution, reserving to Salton his declarator against the pursuers, for fulfilling to him the deeds wherein Gray stood bound to him, and which he would make to be the pretence of a retention; and to purge the lands of the said inhibitions and apprisings.

To which it was TRIPLIED,—The pursuers in no reason can be in a better case than the defunct Gray would have been in; but *ita est* he would have been forced to perform these obligements ere he could have sought this money; *ergo*, next they have a declarator depending for fulfilling these obligements granted by the defunct.

The Lords found the pursuers behoved to fulfil the defunct's deeds ere they could obtain sentence on this bond; whereupon a day was assigned them for doing thereof.*

Advocates' MS. No. 168, *folio* 98.

1671. *June* 13. Anent the EXECUTION of an ARRESTMENT.

A MESSENGER employed to use an arrestment, in the subscribed copy he gives to the party in whose hands he lays the arrestment, mentions only 1000 merks; in the execution he gives to the party at whose instance the arrestment is made, he sets down 2000 merks less or more arrested by him in such a man's hands. Seeing there is here a discrepancy between the copy and the execution; *quæritur*,

* *At bona cum sua quodammodo causa a fisco sunt vindicanda l.* 17, *p.* 5*to. D. ad Senatusconsultum Trebellianum. Vide infra, No.* 288, and Vandus there cited. *Vide* Craig, *page* 255; *and* Harprechtum *ad principium Tituli Institutionum, de hæreditatibus quæ ab intestato, numero* 510.

if it would not be a good reason for reduction of the arrestment for any farther sums than what are expressed in the copy; and whether the copy or the execution would rule one another here? I think the copy; for I put the case, the person in whose hands the arrestment was laid paid the superplus to his creditor; sure it would be very lawful for him to do it, since it was not arrested; and yet this could not be if the execution were the rule; but if they be yet in the debtor's hands unpayed, I think the Lords will make the execution the rule, unless he offer to prove it.

Advocates' MS. No. 170, *folio* 98.

1671. *June* 13 and 14. FORREST *against* CLEILLAND and OTHERS.

June 13.—This is an action for abstracted multures. ALLEGED for Cleilland, —No process against him and his tenants, because he was never thirled to the pursuer's mill. ANSWERED,—Ought to be repelled, because *in anno* 1619, (the mill then belonging to the Earl of Lauderdale,) Cleilland's lands, with the consent of the possessors and tenants, were thirled by an act of the Baron's Court. REPLIED, —Whatever act was then made, it cannot prejudge him now, in respect thereafter he got from the said Earl a feu charter of the said lands, which charter bore an express clause *cum molendinis et multuris;* by which deed he was clearly liberated, and the servitude of thirlage discharged. DUPLIED,—That *in anno* 1619, when the thirlage was constituted by an act of Court, the Earl was heritor both of the mill and of this piece land now belonging to Cleilland. Some time after he feued the mill to this pursuer's predecessor, with its haill thirlage; then he feued out that piece land now bruiked by Cleilland; will any say, that a charter given by him *cum molendinis et multuris* will take away the prior thirlage in prejudice of me, who, before that charter, had acquired the heritable right of the mill? and though the same person that constitutes the thirlage grants also this charter, viz. the Earl of Lauderdale; yet he gives it not till after he is denuded of the mill, at which time he has no power to grant it. It is out of question but an express or tacit discharge of thirlage by him who constituted the thirlage, (he being still in that same capacity,) will be sufficient; but that is not our case. However, to exeem all scruple, it is offered to be proven, that this defender has been, past memory of man, he and his predecessors, in use to come to this mill by virtue of that act of thirlage. This was sustained as relevant.

Advocates' MS. No. 169, *folio* 98.

June 14.—In the said action it was farther ALLEGED, that the act of the Baron Court being only the deed of the clerk, who needs not so much as be a common notary, could never be a sufficient constitution of his lands being thirled; seeing the assertion of a notary, if the party be not also subscribing, will not bind a man above L.100 Scots; whereas this is a matter hugely above that value. ANSWERED, —Ought to be repelled, in respect of his immemorial possession since the said act. REPLIED,—Possession can never fortify the said act; seeing whatever use and custom they have been in of coming to this mill, the same was altogether voluntary, and so cannot tie them now unless they please. DUPLIED,—Their