were tenants of the lands of Allantonhauch, the same being exacted from them for the cess due forth of these lands: it was ALLEGED, That the defender was noways liable in that debt, because he had an elder brother, viz. Robert Hamilton of Monkland, who was heir general or heir of line to his father, and so behoved both to be convened and discussed before any heir of conquest, provision, or of the second marriage, such as this defender is.

To which it was REPLIED,—That though *regulariter*, the heir of line must be first discussed, yet there was no necessity of using that order of discussing here, because this defender succeeding as heir to the very lands wherefore this cess was paid, and upon account whereof this debt was contracted, and it being exacted then from the tenants as *debitum fundi*, it were but just they should have the same privilege in the repetition whereof, and be put to know none save the possessor of the land, especially he succeeding thereto as heir.

My Lord Craigie refused to sustain process against this defender, till the heir of line were first discussed, notwithstanding of all the specialities in the case; and called to mind, that in an action betwixt the Duke of Lennox and his sister, the Lords ordained the heir of line to be first discussed: albeit it was alleged, that the debt acclaimed was contracted upon the account of those lands to which the heir of provision (whom they were insisting against) had succeeded.

Advocates' MS. No. 354, *folio* 146.

1672. *June* 26. Anent WITNESSES' EXPENSES.

The Lords have laid down a certain rule for witnesses' expenses in all time coming, whether they be adduced in causes civil or criminal; viz. they have modified to each footman two groats *per diem;* and to every horseman four groats.

See in January 1679, in George Young's case. *Sneidivin, ad parag.* 24 *and* 25, *Institut. de actionibus, pag.* 1426.

Carolus quintus, Imperator, appoints *octo cruciferos* for a witness's expense *per diem.*

Advocates' MS. No. 355, *folio* 146.

1672. *July* 2. Anent REDUCTION EX CAPITE INHIBITIONIS.

Quæritur, if a man who pursues to have deeds reduced, *ex capite Inhibitionis,* or such like, be obliged to call in his process the granter of the said deeds, sought to be reduced, and he being dead, his representatives: seeing if the deeds be annulled, the granter stands bound in warrandice, and so is concerned that they be not reduced; and also he may be able to say many things against that creditor who pursues the reduction, that may be noways consistent in the defender's knowledge.

I think it safest the author be called, just as the principal debtor must be called

in an action to make forthcoming. But that is absolutely necessary in a forthcoming, yet I think it not so here.

Advocates' MS. No. 356, *folio* 146.

1672. *July* 2. Anent PROCURATORIES of RESIGNATION.

Quæritur, A father, by contract of marriage, dispones lands to his son, and the heirs of his body, and grants a procuratory of resignation, for infefting his son and the heirs therein: the son dies, and never any resignation made: he leaves a child behind him, which child is served heir to his father: the question is whether (the goodsire, granter of the procuratory of resignation, being still on life,) resignation may not be summarily made in favours of that child, as well as if by name and sirname he had been mentioned in the procuratory; seeing by an inquest of sworn men, he is cognosced and declared to be the son and heir of that man to whom and whose heirs the procuratory was granted.

Sir George Lockhart and sundry were of opinion, there needed no action, but that the service was equivalent to an assignation to the procuratory, in which case resignation might be made summarily.

Advocates' MS. No. 357, *folio* 146.

1672. *July* 5. JACOB JAMART *against* HARRY JOSSIE.

Jacob Jamart pursuing Harry Jossie, for sundry sums he had paid for him as cautioner: It was alleged for the defender, that by the police and practique of Bordeaux, * the major part of one's creditors (which goes either by the sums or the number,) having accepted a cession from their debtor of all his goods, they give him a supercedere and *rescriptum moratorium;* and what they do in this sort binds all the rest, and they are obliged to stand to it, and the goods are divided amongst them all *pro rata;* that conform to this police, he had made a cession; and therefore craved, that according to the custom of Bordeaux, Jamart might make a proportional part of whatever he shall recover by virtue of this sentence furthcoming to his other creditors in Bordeaux, and that the Lords would divide it amongst them. The Lords would not regard the customs of another kingdom, nor decide conform thereto, (seeing they in the same manner rejected ours, and by acts of parliament we are ordained expressly to be governed by the king's laws, and not by the statutes and customs of any other realm;) and thought the desire of the defender was as unreasonable as if one should say, if a Frenchman had got a bond of a Scotsman, past twenty-one years, but within twenty-five, and did pur-

* And this was also the common law, *l.* 7. *in fine, l.* 8. 9. and 10. *D. de Pactis. Vide Schotanum, ad d. T. de Pactis,* who shows the customs of Germany and Holland have receded from this now. *Vide omnino l. ultimam C. Qui bonis cedere possunt. Contrarium definivit Senatus Burdegalensis ejus quod hic allegatur; ut videre licet apud Autumnum, in Censura sua Gallica ad l.* 8. *D. de Pactis.*