[See the subsequent parts of the report of this case, Dict. p. 16679 and 10274.]

1676. *December* 7. The TOWNS of GLASGOW and DUMBARTON *against* Sir JOHN SHAW of Greenock and Others.

THE Lords this day advised the declarator pursued by the towns of Glasgow and Dumbarton against Sir John Shaw of Greenock, and other neighbouring gentlemen, and sustained it thus,—That none but royal burghs had power to import wine, brandy, salt, and other staple commodities, mentioned in the act of Parliament in 1672; and repelled the defence founded on that act of Parliament, as to the salt and brandies not being included therein; and as if the burghs of regality and barony had liberty to import salt, because it conduces for the manufactory of fishes, and curing them; and found the importer incurred not the confiscation of his moveables, but only the thing imported was confiscated: and, within their own bounds, gave them power of seizure; and, elsewhere, gave them liberty to pursue the forefaulture of the goods, though they be sold.

Quærebatur—If the freeman of one burgh royal had liberty to trade in another, for then he might palliate unfreemen's goods. See King David's charter to the burghs of Scotland, in 1364. *Vide supra*, January, 1670, M. Mowat *against* Town of Lithgow, No. 106.

Advocates' MS. No. 515, *folio* 267.

1676. *December 9th.* ARTHUR HUTTON *against* ARTHUR HAMILTON.

ARTHUR HUTTON, burgess of Hamilton, pursues Mr Arthur Hamilton for 1000 merks, contained in a bond, wherein his father was cautioner. His defence was *exceptio litiscontestatæ;* in so far as the defender's father being charged on that bond, he had suspended upon this reason, that the debt was discharged and innovated by a posterior transaction and agreement between the pursuer and the principal debtor, whereby he had renounced the cautioners, and taken him solely to the principal: and which reason being admitted as relevant, a day was assigned for proving it, and an act of litiscontestation extracted thereon; but, *medio tempore,* the suspender dying, the affair lies over, and cannot be otherwise insisted on now but by transferring that act.

And so my Lord Halton found the act of litiscontestation in that suspension behoved to be the rule transferred and insisted in, unless we reduced it, or the agreement between the principal debtor and us, upon the irritancy and failyie.

Advocates' MS. No. 516, *folio* 268.

I.—Anent Persons at the Horn.

The producing of a horning will not debar a witness from deponing, especially if it be only a civil rebellion; because he comes not voluntarily, but by command of a judge, and is not to depone for any advantage to himself. But what if the horning be for a criminal cause? *Vel est crimen quod infamat vel non.* A pursuer *non habet persona standi in judicio,* if he be at the horn; but it must be objected. This found by the Lords on the 21st *June,* 1610, *Scot* and *Scot.* But as to defenders, it is most hard to hinder them *a se defendendo* by horning: as the Lords found in July, 1676; see it *alibi. Vide supra,* it mentioned, No. 501, § 18. What if a horning of King Charles the First's time be produced against a man to debar him *ab agendo?* You will not get caption on it, because *mortuo mandatore expirat mandatum.*

II.—Anent the Expiry of Procuratories of Resignation.

A man dispones lands, and grants a procuratory for resigning; the receiver dies, his son is served heir; *Quæritur,* If resignation can be made on the procuratory granted to his father, since *hæres est una et eadem persona in jure cum defuncto,* and the granter is living, and so *per mandatis mortem non expirat,* and that the procuratory bears to him, his heirs and assignees. It seems *tutius* to pursue the granter to renew the procuratory.

III.—Anent Legatars.

If a person be legating, and resolves to prefer one legatar to another, and to bring him in with preference next his creditors, he has no more ado but to deliver *rem legatam,* before his death, or make it *speciale legatum* out of such debts, which will affect these sums, or appoint, *per enixam suæ voluntatis testationem,* it be paid *primo loco,* before the rest.

IV.—Anent a Liferentrix's Right to Coal.

A liferentrix of lands will have right to a going coal, *quoad usum necessarium tantum;* see Craig, Feudorum, p. 189. The superior wardator has the same power; see Craig, p. 288, and my Lord Craigie's Collection, folio 180. But what if the fiar omit to work the coal? She may raise a declarator to hear and see him decerned to work it, or that the Lords may liquidate and modify a sum yearly in place of her damage; or else that she may have liberty to work it for her own use, defraying always the expense off the first end of the price, and she being countable for the superplus, if any be, to the fiar.

V.—Anent Confirmation of Executors.

The Lords, *in anno* 1662, in the case of one Bell, in Glasgow, found *jus sanguinis,* in an executor transmitted without confirmation, which was never so decided formerly. See it in Stair's Decisions, *ordine temporis, apud me.*

VI.—Anent Payment in Fungibles.

A tenant suspends against his master's assignee, and against a creditor of his master arresting the farms in his hands, on double poinding. After debate, the assignee is preferred. The tenant offers to pay him *ipsa corpora*, the bolls for victual; being *res fungibilis, tota species debetur, et una defungitur vice alterius;* and as to intrinsic value, one boll is as good as another commonly.

Answered,—He is not obliged to take the victual, but he must have the fiars then, because it sold at double rate. The tenant says, I could not keep the victual, it might have spoiled. I could not give it to you, because your right was *sub judice*, and I acted *tanquam bonus paterfamilias fecisset in re sua.*

Replied,—Offers to prove you made use of it, and got such and such prices for it, wherein he was but a factor *et negotiorum gestor*, and so must be liable to me for the price you received.

I think the reply relevant, the tenant being *in lucro captando*, and the creditor *in damno vitando.*

VII.—Anent Poinding of Tenants' Corn.

To poind tenants' corns proves oft times disadvantageous to the creditor poinder, for he can readily get no other to apprise them on the ground of the land, or even at the Market-cross, but other tenants or country people, who fearing it may be their own case, hold with them of their own rank, and will commonly swear there are 20 bolls of corn in a stack where there are scarce 12. It is surest for a master, where his tenant falls weak, to intromit with all, and be countable for the superplus.

VIII.—1676. *December.*—William Borthwick *against* ———

A person employs William Borthwick, the chirurgeon, to cure another; he pursues him for the cure; he depones he did bid him do it, but when it was half done, he declared he would not be bound for it, since the man had disobliged him, and so craved to be assoilyied. I think this was not *renuntiatio tempestiva et re integra*, as must be in all mandates and societies, and it is such a thing as cannot be divided, and the surgeon *susceptum perficere munus tenetur*, both for his own credit and the person's health.

IX.—Anent Witnesses disowning their Subscriptions.

If witnesses, either to a subscription, or in any legal execution, or led for probation on a process, shall either openly at table, or before witnesses, or by a written declaration under their hand, disown their subscriptions, or their being received, used, or desired to be witnesses to that execution, or shall tell what they are to say, it is the relevant objection against them, called in law *proditio testimonii*, and will cast them as suspect, if it be known; and therefore their declaration must not be made use of in public, but they may be examined on the matter without relation thereto.

Advocates' MS. No. 517, *folio* 268.