

party, who knows not of his being tutor, if it will be *vitium reale* against the singular successor, who is not *particeps fraudis*. *De hoc cogitandum*.

VII. A gift of escheat, if it be not declared, at least generally, was found by the Lords not to be sufficient to purge vitious intromission; *ergo, non relevat*, for purging thereof, to say he was rebel, or his escheat is gifted, unless it be farther added that there is a general declarator obtained thereupon.

VIII. If lands holden of a Bishop be resigned, *ad perpetuam remanentiam*, in the Bishop's hands, by the vassal and feuar, it makes it to become a mortification to the diocess and bishopric, and not to become a part of the Bishop's property, so as to transmit it to his heirs and assignees. If he minds to do that, he must interpose a person that must take the disposition in his name for his behoof.

*Advocates' MS. No. 538, folio 274.*

1677. *February 2.* MR JAMES LAUDER *against* THE TENANTS OF COCKBURN'S-PATH.

MR JAMES LAUDER, sheriff-clerk of Hadinton, as having right, by disposition from two sisters heirs-portioners, to an husband-land in Cockburn's-path, pursues the tenants for maills and duties, and Wauchop of Stottinleuch for reduction and improbation of a right he had got to it from the husband of one of these two women, upon this reason: *Imo*, That it was elicited, and called only a factory. *2do*, It being subscribed by two notaries for him, there was the interval of some days between their subscribing, and so was null, since the act must be done *unico contextu*. Farther, the husband's being guilty of adultery, and having confessed it in the kirk-session, that might be the foundation of a criminal process, whereon being convicted, his escheat would fall, and the gift thereof might be taken by Mr James. Yet it was thought the escheat on adultery was not a liferent escheat, which would carry his *jus mariti*, or the courtesy of Scotland, (for here the wife was lately dead, and there having been a living child between them, he had undoubted right to the courtesy,) but only a single escheat.

The tenants' defence against the maills and duties was, They were tenants to another, by payment of maill and duty, and he not called.

This Newton repelled, as competent against a removing, but not an action for maills and duties. What we were most afraid of, was that our right was null, being granted by a woman clad with a husband, and he not consenting; and it is not enough to say she stands in the fee: therefore, Mr James transacted with the husband and Stottinleuch.

*Advocates' MS. No. 539, folio, 274.*