1677. *June*. JOHN KINCAID *against* GORDON of Aberzeldie.

MR JOHN KINCAID, advocate, pursues Gordon of Aberzeldie upon the passive titles, (see the preceding number, sections 5, 6, 7, and 8,) for payment of a debt owing by his father; and for purging his intromission with the rents of lands. He having produced a tolerance from the donatar to the liferent, the tolerance was offered to be improven. Whereon Aberzeldy took it up, and the Lords allowed him to pass from it; (which is strange, and may encourage all falsehood;) and to propone a new dressed defence, viz. that the escheat was gifted and declared. Which they found relevant, *per se,* to purge the passive title of vitious intromitter, he being singly countable to the donatar; and so would not burden him to subsume that he bruiked and possessed by his tolerance and licence. *2do,* He defended himself upon a comprising of his father's lands, which he had acquired, and so was a singular successor. Mr John Kincaid offered to redeem him, conform to the 62d act of Parliament in 1661, between debtor and creditor.

ANSWERED,—Mr John was only a personal creditor, and so by the act of Parliament 1661, had no interest to redeem, the act only allowing that benefit to posterior apprisers.

REPLIED,—A personal creditor may as well redeem from an apparent heir buying in rights on his predecessor's estate, as he may reduce deeds *ex capite inhibitionis,* or *ex capite lecti ægritudinis,* though he establish no real right in his person. However, as it is safest, so it is very easy for the personal creditor, who as yet, hath neither adjudged, nor apprised, to make up a real right in his person, by adjudication or apprising, and that will give him an undoubted interest to redeem the apparent heir. *Vide supra, 5th July,* 1671, *Kirkconnell,* No. 204. Only the order of redemption must be used within ten years after the heir has acquired the right of apprising or adjudication in his person, or in another's to his behoof, (for thus requires the act 1661;) and not at any time within ten years after the legal of the said apprisings is expired, though it should be longer since the apparent heir had purchased it; as some, by mistake, would have it to be.

Advocates' MS. No. 575, folio 286.

1677. *June* 19. MACMINE *against* NEWLANDS.

IN the suspension, Macmine *contra* Newlands, Halton turned a decreet of the Sheriff of Dumfries to a libel, because the decreet at the compearance did not bear that the procurator had a warrant and mandate from the client employer to compear; especially, it being confessed in the decreet, that the defender was then in England, at Carlylle. But this was pretty hard; for there is not a decreet of twenty that mentions and bears a warrant; and though these inferior procurators [happen] to have one, yet it needs not be mentioned and inserted; and in the reduction of the decreet only the warrant may be called for, and production thereof forced, and if it be not produced, the decreet, *quoad* the compearance, will fall.

2do, Esto it had been a decreet in absence, every such decreet is not to be in-

stantly turned to a libel. *Vide infra, 8th November*, 1677, *Grant* and *Cuthbert*, No. 648 ; *infra*, No. 663, *27th November*, 1677, *Corson* and *Maxwell*.

Advocates' MS. No. 576, *folio* 286.

REMARKS ON SUNDRY POINTS OF LAW.

I.—Anent Found Treasure.

It was started amongst the advocates, If *Thesauri reperti, quorum non cognoscitur ob temporis vetustatem dominus*, be *inter regalia;* for, by the Roman law, they were divided *inter repertorem et dominum fundi*, § 39, *Institut. de rerum divisione et acquirendo rerum dominio.* But with us, there is no doubt but mines of gold and silver they belong to the King, by the 12th act, Parliament 1424 ; and Craig, *Feudorum libro primo, Diegesi ultima, pagina* 119. (*Vide infra, July*, 1677, *Duke of York* and *Argile*, No. 625.) And the customs of most nations have now also adjudged them as *bona vacantia caduca et* ἀδέσποτα to the sovereign power. See Sixtinus *de Regalibus*, and all the Feudalists, upon the *Titulus Feudorum, Quæ sunt regalia*, and particularly Matthæus *de Afflictis* there. As to minerals, the 27th act of the Parliament 1649, to encourage heritors to seek them, restricted the King's part to a tenth ; now, that Parliament being rescinded, the King's right as to the whole returns again.

II.—Anent the Borgh or Caution of Haimhald.

It was at this time queried, if the borgh or caution of haimhald, and vindication of goods, particularly horses bought in a market, was only *cautio judicio sisti*, to present the seller, or also *judicatum solvi*, to pay and undergo *totum litis eventum*. It was thought to import both. See Stair's System, tit. 12, *Of Real Rights, in fine*.

III.—Anent False Writs.

Where one is assigned to a bond, or succeeds as heir to it, or adjudges it, or confirms it *qua* creditor, or otherwise, and the bond is offered to be improven as false and feinyied; *quærebatur*,—at this time, in the case of *Hamilton of Monkland*, If an heir or other successor, (who may be *ignarus omnis fraudis*,) be obliged to abide at it, or pass from it; since the 22d Act in 1621 makes naked using of a false writ falsehood. Though it seems hard to tie them under the peril as *falsarii*, since they may be very probably ignorant of it. Yet falsehood should never be got punished, if heirs, assignees, and all users were not obliged to bide by it ; for how easy were it for a father to forge a bond and leave it in his charter-kist, and his heir without any hazard then might use it ; or for a man to assign it, and the assignee to insist for the money. This would open a large door to knavery, which is grown too bold already. Yet Dury, at the *5th of February*, 1635, *Ker* contra *Forsyth of Dykes*, shews the Lords then demurred upon it.

Sir George Lockhart affirms, assignees and other singular successors are not tied

in law to abide at the truth of the writ, but only that it was truly delivered to them; unless there were eminent presumptions of the assignee's accession. Some think, if the cedent be living, the assignee is also thus far obliged to produce him to abide at the truth of the deed; but not if he be deceased. See *14th November*, 1678, *Arbuthnot* and *Lady Knox*.

IV. There was a discharge, bearing to be dated in 1674, and the blank is scored; *Quæritur*—If it will be null as *falsum in data*. See Craig, p. 156; see largely, *supra*, *George Home* and *Brown's* case in *November*, 1672, No. 375. The other offered to prove it was truly done in 1677. I think this is relevant and sufficient.

V. What if improbation be raised of a writ, and it was registrate, and the party has done his utmost diligence to get the principal, and cannot find it? *Quæritur*—If certification will be granted against it, if it bear not to have been registrate in the registers 1606 and 1622, and those other that were lost and cast away? For if it was registrate in these years no certification will be granted. I think the Clerk-Register and his servants should be liable for it, since he gave an extract of it; else his servants might for hire give up principal bonds. Where none will abide by a writ, it will be got improven; but, *quæritur*, May not the user and producer of it be punished, though for fear he passes from it. I think he should, if it was in his own name; if either he have assigned it, or charged on it, or otherwise used it; conform to the 22d act in 1621.

VI. In an improbation against writs as false, it is a good defence to say, I cannot produce the principals to you, because I offer me to prove they were given up and delivered to yourself upon transaction and payment.

VII.—Anent Exhibitions.

Some think it fit to libel exhibitions as largely as improbations, and leave it to the defender to restrict the pursuer's interest, as to writs granted by any of his predecessors to whom he may succeed *jure sanguinis*.

VIII.—Anent Summonses of Wakening and Transference.

Summons of wakenings and transferrings are permitted to be inrolled as of the date of the old process or summons; and so come in summarily and presently, to be called before many other processes in time raised before them.

IX.—Anent Actions of proving the Tenor.

On the 23d of July, 1673, in a suspension John Smart *contra* Sibilla Ewing and William Thomsone, vintner, her husband, the Lords found a decreet for proving the tenor of a bond, before the Sheriffs of Edinburgh, not warrantable, these actions only being competent before themselves, (see the act Parliament 1672, anent the regulations of the Session, act ;) and therefore turned the Sheriff's decreet into a libel; but allowed John Smart to fortify it by adducing farther witnesses than was formerly led, to adminiculate the tenor of the writ craved to be made up.

X.—Anent the requisite Number of Witnesses to Seasines.

It was inquired, If two witnesses inserted was a sufficient number in a seasine, seeing *locutio pluralis indefinita duorum numero contenta est; L.* 12, *D. de Testibus;* or if there must at least be four witnesses: as Craig requires, p. 182. (I have seen some Lords, in their own opinion, repel this nullity of a seasine's wanting four witnesses, and think that two witnesses are in law sufficient thereto.) The fourth act, Parliament 1584, speaks only of a lawful number of witnesses, and defines not how many. See the marginal laws and citations there. Only, our custom seems to require, *ad minimum,* four; because in all writs not subscribed by parties but by notaries, four witnesses, by the 80th act in 1579, are requisite. But that act relates only to writs which need the subscription of parties; and where they cannot do it, introduces the subscription of two notaries for them, in all matters of importance, as a solemnity to supply the parties' own subscription : but seasines are not of this kind, else they should need two notaries also. Which was, indeed, once required by an act of Parliament, but was afterwards abrogated and went in desuetude. In strict form, I think a seasine wanting four witnesses should be null.

XI.—Anent the Attestation of Seasines.

In the time of the English usurpation, the judges then, in a case of Sir John Scot's, found a seasine null that wanted the formal attest of the notary, "*Et ego vero.*" Yet, in some old Practicks, particularly in Hadington, *25th July,* 1623, *Lord Ramsay,* I remember the Lords have sustained them, because *in facto antiquo;* but in that practique of Hadington's I find the Lords did not sustain such a seasine for a sufficient title. *Vide supra, No.* 568, *9th June,* 1677, *Guthries; item, 23d December,* 1680, *Lamerton.*

XII.—Anent the Competition between the Master and the Tenant's Creditors.

A master, to whom two years' rent is owing, seizing upon his tenant's goods, must ascribe it to pay him his privileged year, for which the law gives him a tacit hypothec, and not the former year, in prejudice of the tenant's other creditors; beyond whom as to the preceding year he has no prelation. This resembles the *actio de peculio, de in rem verso, et actio tributoria,* in the Roman law. *Quatenus erat in peculio,* the master was preferred to all creditors; but, farther, *in aliis bonis,* he came in but *pro rata* with the rest.

Advocates' MS. No. 578, *folio* 286.

1677. *June.* I.—Anent Abstracted Multures.

In a suspension raised by Powburne and Scotistoun, for their tenants, against Sir David Carnegie of Pittarrow's decreet of abstracted multures from his mill of Conveth; Sir George Lockhart thought, in regard there was a term assigned to prove

the quantities of the abstracted multures, and the same was offered to be proven by the defenders' oaths, and a day being taken by their advocate to produce them for that effect, they could not now be reponed to their oaths, the term being circumduced, and the decreet extracted. Yet, on the payment of the expense of the decreet, the Lords sometimes will repone them against such circumductions.

II.—Anent Assizes.

In the Sheriff-Court of Edinburgh, they try not bloods by an assize, but by probation of witnesses; and are both judges to the probation and relevancy themselves. And really the form by assizes is now superfluous, and it were better all were committed to the judge, and inquests were totally abolished, as they are in many cases wherein they took place of old; as Skeen, *verbo* Breve, tells. See Dury, *26th November*, 1633, *Lindsay.*

III.—Anent Escheat.

If one be denounced at the Market Cross, where his lands lie, or himself dwells, and there registrate, a relaxation at Edinburgh (the lands not lying within that Sheriffdom,) will not hinder the liferent escheat from falling. See the 75th act, Parliament 1579; see *alibi*, an observe, in a MS. little book, upon what denunciations escheat will follow, and what not.

IV.—Anent Removings.

Though one be not infeft, the time of a warning to remove used by him, yet if he infeft himself before the term, it sustains the warning. But I have heard some allege, that the Lords once found an infeftment taken after the term to which the warning was used, only before the raising the summons of removing, sufficient to validate the warning. Which were a strange practique. See Dury, 29*th July*, 1625, *Earl of Winton* against *Tenants. Vide supra*, No. 574, § 9, [*June*, 1677.] *Vide* 19*th February*, 1679, *Jack.*

V.—James Brown *against* Lord Arbuthnet.

In *anno* 1663, the following case fell to be debated. James Brown, advocate, having married one of the two heirs-portioners of Keith of Peattie, which two daughters had in their minority disponed these lands for a competent adequate price to the Lord Arbuthnet; yet James raises a reduction of the disposition, 1*mo*, because done by minors, pupils, before their age of 12, and who are presumed in law *nec nolle nec velle habere; 2do*, with consent of their mother as tutrix, who could not then be their tutrix, being remarried, *cum ad secundas convolasset nuptias; 3tio*, it wanted a decreet of a judge, finding the alienation necessary. Answered, they could never be reponed, because they could never qualify lesion, since the price was adequate and full, and *in rem versum.*

Arbuthnet, to compense this pursuit of James Brown's, he deals with the Earl of Marshall, of whom the lands of Petty held ward, (the said Keith being a cadet,) and obtains from him a gift of the heirs-portioners their ward and marriage; and pursuing for the liquidation of the avail, all the defence James Brown had, was, that

their father died in the king's service, being blown up at Dunglas, and so by act of Parliament in 1640, act 30, no marriage was due. ANSWERED, the said act is only temporary. *2do,* They were not *in procinctu et expeditione,* and so cannot claim this privilege. *3tio,* It was a casual accident, and not done by the enemy. *4to,* Peaty was neither an officer nor soldier in the army then, but merely present on another occasion,—courting a wife. *Vide* 21st *February,* 1671, in *Hadden's* case, anent being killed in the king's service; it is No. 137. *Item,* James Brown ALLEGED, the Earl of Marshall, superior, had consented to the marriage, and subscribed witness in the contract, and so no marriage due. REPLIED, *1mo,* Marshall was circumvened. *2do,* It was after he had gifted the casualty, and so was denuded. The Lords repelled the allegeance. See Stair's System mentioning this, *titulo* Superiority, *in fine, pagina mihi* 268.

This affair was not decided but agreed, and James Brown took the 8000 merks that remained in Arbuthnot's hand as his wife's part, and half of the price; and ratified the disposition.

VI.—ANENT TOCHER.

WHERE a tocher is promised and conditioned to be paid in a contract matrimonial, and the father-in-law payer, either of the same date or thereafter, takes from his son-in-law a discharge of it, as in *Hepburne* and *Seton's* case, in Dury, 15*th January,* 1634; (*Vide infra,* No. 582, *Currie* and *Oliphant.* See 8*th January,* 1679. *Arbuthnot* and *the Lady Knox.* See Antonii Fabri *Codex, libro* 5, *titulo* 9, *definitione* 11, *in notis.*) Or where a woman or her friends are induced to marry a man upon the sight of bonds given to the man, containing sums of money, by his friends, and whereof he has given either a discharge or backbond; so that the bond was merely given to deceive; as M'Corcadell's brother did with Mr James Mirk, in feinyieing his brother's subscription to a bond: (See *supra, July,* 1670, No. 98;) the Lords reject these pactions as fraudulent and disingenuous, *et contra fidem tabularum nuptialium;* as Sir George M'Keinzie, in his observes on the act of Parliament anent bankrupts, page 61, in the case of *Donald Fuller* and *Hendersone,* shews. Annæus Robertus, with a torrent of eloquence and learning, informs us, *cap. 2do, libri* 1, *rerum judicatarum,* they are reprobated by solemn decisions in France.

VII.—ANENT MESSENGERS.

JAMES DUMBAR, the messenger, is convened by one who had employed him to pay a debt, *super hoc medio,* that he undertook to apprehend such a man by a caption; that he had him in his custody and power, and yet dismissed him, and suffered him to escape; who ought to be as well liable as he who deforces a messenger, *et eximit debitorem ab officialis familia. Vide* Dury, 25*th July,* 1633, *Mitchell* and *Law; vide supra, February,* 1673, No. 386. It was pretended, that the Lyon and his heralds, by the act, Parliament 1672, were judges *in prima instantia* to him. But I think that jurisdiction is not privative of the Lords.

VIII.—ANENT PRESUMPTIONS OF PAYMENT.

THREE consecutive discharges import liberation of all preceding years; but three

years discharged *uno ore*, in one discharge, does not; because three deliberate acts are such a pregnant and repeated deed, as oblivion can scarce be presumed in it: which may easily fall out and be huddled up in one act; for *actus geminatus* has privileges in law to enforce knowledge on the doer. Yet if a man has been in possession of lands for twenty years together, and pursues for a year before the twenty, (This was occasioned by Sir John Whytfoord of Milneton's charging William Martyn upon his tack. See the information of it beside me.) he will not be excluded on this presumption that he is paid of that year; for that were to introduce a vicennial twenty years prescription for such rents, which our law knows not. Bu what if he possessed for years before and years after, and crave a year in the middle *quid juris? annon extrema ibi probant media?* I think, in apprisings, it would; because they are obliged to do diligence, that con-creditors be not debarred and prejudged, or else tell what impedes them; but an annualrenter, who has got a locality, seems not to be so obliged.

IX.—Anent Feu-Duty.

In lands worth L.40 Scots by year, the feu-duty payable furth thereof being L.8 Scots, there being a liferenter on the land, the superior for twenty years together exacts no feu-duty, for personal respect he bears to the liferentrix, knowing it is *debitum fundi*, and any time, within forty years, he may poind the ground for them, and exact them; and, therefore, suffers the liferentrix to possess all. The heritor, who is fiar, or an appriser, observing this, finds it will, at the long run, absorb the value of the land, and evict the property, demands what course he shall take to obviate it. Either he may charge the superior to enter him, if he be an appriser or adjudger, and it is like he will suspend on the not-payment of the bygone feu-duties; or, since this is not so sure, he may raise a declarator against the superior and liferentrix, to hear and see it found and declared, that either he ought to give a discharge of all these feu-duties, or exact them of the liferentrix, or declare he shall not burden and affect the fee of the lands therewith after the liferentrix [her] decease, else it would give way to a fraudulent design to absorb the fee.

X.—Anent Jedges.

In a case of Dougall of Nunlands, Francis Kinloch, Dean of Guild of Edinburgh, having given a jedge of a cellar in Leith, the Lords, in *June* last, 1677, suspended the said decreet simply, as unjustly done, after visitation made by some of their number.

XI.—Anent Lands lying Run-rig.

Where lands lie run-rig, and belong to sundry proprietors, you will not get any one of them forced to divide except they please. What if it be in a commonty, or amongst heirs-portioners, who succeed to each fur *in solidum* only? *Concursu partes faciunt?* May not one provoke another *ad divisionem*, since *communio est discordiarum mater?* See Craig, *Feudorum*, pages 194 and 195. There was a process of division between Monteith of Caribber and Doctor Sibbald. *Vide supra, 17th June*, 1670, *Watsone of Pathhead* and *his Feuars*. It is No. 20.

Advocates' MS. No. 579, folio 287.