ander Arbuthnet's information contra *Colonel Hary Barclay;* see *Lutfuit* and *Corser's* information. *Vide supra, June* 26, 1678, [*Birnies* against *Morray,*] *No.* 580. See Schotani *Examen Juridicum, ad Tit. de Donationibus inter virum et uxorem.* See the same decided in Dury, *December* 21, 1638, *Craigmillar* contra *Chalmers.* See Craig, pag. 97 and 341. *Advocates' MS. No.* 607, *folio* 293.

1677. *July* 21. SIR ROBERT PRESTON'S RELICT *against* His ELDEST SON.

IN a cause of Bothwell, relict of Sir Robert Preston, against Sir Robert's eldest son: Forret inclined that though a bond of provision by a father to his children, was not a delivered evident in the father's lifetime; yet he being tutor and administrator of law to his own bairns, might keep their writs, and that could not hinder execution on them after his decease, though they bore no clause dispensing with the not delivery, and that these bairns were provided to 10,000 merks already, by their mother's contract of marriage, and this was an additional provision of 10,000 merks more.

See Dury, 11*th November* 1624, *Wallace of Ellersly.*

Advocates' MS. No. 611, *folio* 294

1677. *July* 21. BRUCE of Bordy *against* KEIRIE, and CALLANDER.

BRUCE of Bordy pursues one Keirie, chamberlain to the Earl of Mar, and one Callander, for a spulyie and ejection: ALLEGING, that they entered to the land *privata authoritate,* and not *via juris; et non est singulis concedendum quod per prætorem seu magistratum expediri debeat, L.* 176, *D. de Regulis Juris.*

ANSWERED, Bordy sold them the seed, *et omnia sua instrumenta rustica agriculturæ: quorsum hoc et cui bono,* if it was not an allowance to possess the land, which he could not do himself, being then in prison? and this being *presumptio juris,* must be sufficient to liberate them, since *causa quævis, etiam fatua,* is good enough to purge a spuilyie, &c.—*Infra, No.* 642, [Historical volume, *Young* against *Hope 3d October,* 1677.] *Advocates' MS. No.* 612, *folio* 294.

1677. *July* 21. COLONEL HENRY BARCLAY *against* ALEXANDER ARBUTHNOT of Knox.

ALEXANDER ARBUTHNOT of Knox, being charged upon a bond granted by him to Colonel Hary Barclay, to make the evidents of the lands of Knox forthcoming, when he should necessarily have to do therewith; suspended on this reason, that the colonel sought them merely out of malice to vex the suspender, and it may be to destroy the writs; and they could not condescend on any rational

or necessary use they had to do with the writs, when they were exhibited, as the bond required. They jangled long that they needed not, and Alexander pursuing a declarator of recognition, they had cause to crave a sight of the writs to know how the lands held.

The Lords found they behoved to condescend on some use: and as to that pretence of the declarator, we answered,—Alexander was necessitated to take the gift of that recognition; because being incurred by the colonel's own deed, he was aiming to have been made donatar thereto, and so have swept away the estate from Alexander; in respect whereof, he could never doubt but there was a recognition committed. *Advocates' MS. No.* 613, *folio* 294.

1677. *February* 20, *and July* 12. The EARL of ROTHES *against* LORD MELVILLE, and his SECOND SON.

February 20.—THIS day the Earl of Rothes, Chancellor, (Sir William Bruce's name is in the gift of nonentry,) gained his action against my Lord Melville and his second son. The Lords found Melvill's son could not be served heir of tailyie to the last Countess of Leven, during the possibility of a second son of my Lord Chancellor's body, (for the devil must bide his day,) and prefer Sir William Bruce's gift.

Thereafter, on the 26*th of February*, on a bill given in by Melville, and a debate following thereon, representing that they could not prefer Sir William's gift, since there was not a *verus contradictor in campo*, without which, the process would be utterly null and void; Melville was not, for he had no member of the tailyie; his son was minor, and might say next day his father had collused, and so *res inter alios acta* could not prejudge him.* The Chancellor had taken much pains to have out his decreet, extracted, (the 24 hours after the reading in the minute book, and 12 hours after the giving out of the scroll to the adverse party being past,) before this bill came in, but Mr Alexander Gibsone, clerk, with much rudeness and passion refused it; undoubtedly he was authorised so to do by the President, else one so timorous as he had not done it. However, the Lords this day take back what they gave, and some of them who were clear for him the time before, as Argyle, &c. change on him. Halton stood firm to him. The Lords resolved to leave a buckle loose for overawing him and keeping him quiet, betwixt and June; they reserved always to debate upon the gifts in the special declarator, (which they minded to intent before the sheriffs where the lands lie,) whether it be a nonentry in the King's hands, or if it be lying *in hæreditate jacente*. Which is a most ridiculous fancy, there being no *hæreditas jacens* known by the law of Scotland, but in favours of creditors when apparent heirs renounce; and there is none in the feudal law, where the King must always have a vassal. He was forced to take his decreet with this clog at the tail of it, and extract it with that quality, because they would not give it him otherwise. They aim at a sequestration of the rents in a third party's hands during the dependance, and possibility of a second son, and Melvill's second son's seclusion;

* *Lex* 30, § 1, *D. De acquirenda et amittenda hæreditate* makes for this case. *Proximus hæres a partu qui in utero esse creditur hæreditatem adire nequit quamdiu incertum est an nascatur nascive possit qui in utero est.* See Bronchorstius *ad legem* 187 *D. De Regulis Juris.*