1671. *June* 30. JOHN SYM *against* HELEN HAMILTON and CLEILLAND.

IN John Sym's business against Helen Hamilton and Cleilland, the Lords refused to repone them against a decreet, though given in absence, unless they could sufficiently purge their contumacy, albeit they offered to pay large expenses to the charger, and all his other damage; and that because there was no reduction. It was only in a matter of 50 merks. The Lords used not to be so nice in reponing against such decreets, especially all charges being refunded.

Advocates' MS. No. 194, *folio* 101.

1671. *July* 1. LORD LAUDERDALE and the KING'S ADVOCATE, *against* JAMES TENNENT and WILLIAM BROWN.

THERE is an improbation intented at the instance of my Lord Lauderdale as secretary and the King's advocate, against James Tennent and one William Brown, for improving the signet of a horning as false, counterfeit, and feigned, it not having been presented on the day it bears to have been signeted; neither is there any minute of it in their register; nor is it John Robisone's hand writing. William Brown is made assignee to the charge, and he compears and abides at it in thir terms, not that he will assert the truth of its signeting, but only as to him, *et modum quo ad eum pervenit, viz.* that it was delivered to him so signeted; that it was written in Mr. Archibald Nisbet's chamber; that it was taken out there unsigneted by John Lockhart of Bar, (who seems to have been the counterfeiter of it,) and then delivered by him signeted, to one Crawfurd a messenger, who delivered it to this Brown assignee. This deposition was subscribed by him and my Lord Gosfuird.

Advocates' MS. No. 195, *folio* 101.

This following decision was so found, contrary, to the express words of the act of Parliament; because, forsooth my Lord Advocate asserted the meaning of the Parliament to have been so at the time it was made.

1671. *July* 4. LAIRD of BALFOUR *against* LORD AIRLIE.

THE Lords *in presentia* found, that the computation in comprisings *ad hunc effectum*, to know whether they be within year and day of the first effectual comprising, (which is the standard to all the lave,) must be reckoned from the date

of the said first comprising, and not from the date of the infeftment following thereupon, though it may be alleged that by the very words of the act of Parliament in 1661, it is not an effectual comprising till seasine follow thereon, at least a charge against the superior; [28*th January* 1671,] *vide supra numerum* 116. 2*do*, That the bringing in of creditors within year and day is most favourable, and *favores sunt ampliandi, vide 27th July*, 1678. This was betwixt the Laird of Balfour and my Lord Airlie.

Advocates' MS. No. 196, *folio* 101.

1671. *June* 30, and *July* 5. Anent Discussion.

June 30.—Arelict being pursued as executrix to her husband, who was cautioner for a curator in the act of curatory. Alleged, 1*mo*, That her husband being but a cautioner for a curator, the most that was granted against him by law was a subsidiary action, the principal being first discussed; which method they had not observed, *ergo*. To this it was answered, That he had convened the principal and obtained a decreet against him. Replied, A decreet is not sufficient discussion without horning, denunciation, poinding for moveables, and apprising for heritage. Duplied, Though that was ordinarily requisite, yet a decreet was sufficient here, in regard the principal was notoriously bankrupt the time of the decreet; and it cannot be condescended on that, either at that time, or before, he had any goods or gear; *quorsum* then should we do farther diligence?

My Lord Gosford would not find a decreet sufficient discussion, unless he would say he was notourly bankrupt, either because he had a *bonorum*, or because he was at that time lying registrate at the horne, and so the king's rebell at whatsoever persons' instance, and though the year and day was not run. If this only makes a bankrupt *non est certi juris*. *Vide infra, No.* 281, [*Eleis and Wishaw, 5th December* 1671.]

2*do*, Alleged,—That as executrix to her husband, she could never be liable to fulfil any of his obligements or debts, because she was confirmed executrix as creditrix to her husband upon her contract of marriage, and so was not countable to any other for her intromission. Replied, If she had confirmed no more than what precisely paid herself, then he confessed she could be liable to none; but the truth is, she being creditrix only for L.1400, she had confirmed near L.3000 of her husband's goods, and so must be countable to him for the superplus. Duplied, If she have uplifted any more than what paid herself, then it is just she should count therefore: but *ita est* she has meddled with no more, (whatever she confirmed,) than what paid herself, and all that in law or reason she can be decerned to do, is *cedere actionem*. Triplied, An executor creditor confirming more than his sum, ought and should do diligence to recover the whole, else he might suffer the superplus to perish, and none else could have a title to intromit therewith, which were a very dangerous preparative.

Gosford inclined to find them bound no farther but to assign the action; yet on Mr. David Falconer's consigning an amand, he gave him the Lords' answer. *Vide* 20*th November* 1678, *Lundy and Wishaw. Vide supra, No.* 181.

Advocates' MS. No. 191, *folio* 101.