Lord of the regality; unless he can show where the erection gives him a special right, not only to escheats that should fall thereafter, but to all bygone escheats not yet gifted by the King's Majesty. ANSWERED,—This escheat must fall under his erection, though general; unless they could say gifted before.

Then ALLEGED,—The denunciation was null, because not used at the head burgh of the regality. ANSWERED,—He could not do that, because at that time there was no regality.

Craigie inclined to find he had no right to bygone escheats, except it were expressed in his erection.

Advocates' MS. No. 211, *folio* 103.

1671. *July* 8. Anent PASSIVE TITLES.

ONE being pursued *super titulis passivis* to pay a debt owing by his father, he alleged absolvitor from the titles as heir, successor *tit. lucrativo*, lawfully charged to enter heir, or gestion *pro hærede*, and such like; because he offers him to prove he had an elder brother in life who would only be heir, *et adhuc vivere præsumitur, nisi mors allegetur*. ANSWERED,—They offered to prove he was killed at Chattam.

This was found relevant; and the Lord Craigie declared he needed not adduce witnesses thereon, but that *testimonia* might suffice in this case.

Then craved absolvitor from that vitious intrommitter, because offered to prove there was an executor confirmed; as also absolvitor from that of executor, because they condescended upon another who was executor.

This was found relevant also.

Advocates' MS. No. 212, *folio* 103.

1671. *July* 5, 8, and 11. MAXWELL of Nether Pollock, *against* KIRKCONNELL MAXWELL.

July 5.—KIRKCONNELL MAXWELL being pursued by Maxwell of Nether Pollock upon the passive titles, for payment of a debt owing by his father, and specially on the title of gestion as heir, in so far as he intromitted with the mails and duties of his father's lands; ALLEGED,—That intromission can never infer the passive title of behaviour, because he can ascribe it to a very specious title, viz. to a comprising led against his father, whereof he had acquired the right, and in virtue whereof he intromitted. *Vide infra, June* 1677, *No.* 575, [*Kincaid* against *Gordon, June* 1677.] REPLIED,—This comprising being come in the person of the apparent heir, whether it was led by a conjunct person or no, it must be presumed to have been *in fraudem*, and so will never save from a passive title. DUPLIED,—All that can be subsumed on that act of Parl. 1661, is, that it shall

be leasum to any creditor compriser to redeem it from the apparent heir, upon payment of such sums as he truly depursed therefore; but it is *inauditum* and consonant to no law that an apparent heir intromitting with his predecessor's estate by virtue of a comprising, shall, upon that head, be exposed to all his predecessor's debts; but if they will insist to redeem in the terms of the act of Parliament, they should have an answer.

Halkerton would give them the Lords' answer on it.

Advocates' MS. No. 204, *folio* 102.

July 8.—IN the foresaid cause of Kirkconnell Maxwell's, which *vide supra, No.* 204, the Lords found an apparent heir acquiring the right of a comprising led against his predecessor's estate to be no gestion; whereupon the pursuer offering to redeem the said comprising,—

To which it was ANSWERED, 1*mo*, That this being a comprising led before the act of Parliament, and the right thereof being acquired by him before the making of the said act, it can never fall under the compass thereof; for beside that no act should be extended *ad præterita*, but are made to rule *in casibus futuris*, the said act *per expressum* bears, that whatever apparent heir shall in any time thereafter acquire the right of such comprisings, &c. But, 2*do*, *Esto* it were competent, and after that act, yet it will never be competent *hoc loco*; but they must raise a declarator, wherein it may be found they have right to redeem the said comprising. 3*tio*, They cannot be heard, except they subsume in *terminis* of the act of Parliament that they are comprisers, seeing no others have right to redeem.

REPLIED to this last,—That though the act speaks of creditors comprisers; yet there being that same reason for all creditors, the Lords in equity may extend it; especially considering that the rubric or narrative of that part of the act speaks indistinctly of all creditors.

They were to have the Lords' answer on this last part.

Advocates' MS. No. 210, *folio* 103.

July 11.—IN the case of Kirkconnells, at No. 210, taken to interlocutor, the Lords found, That albeit a personal creditor, who was not a second compriser, could not claim to redeem a prior comprising, the right whereof was now come in the person of the apparent heir, because he had no right to the reversion; yet, that he might offer him to prove, that either the apparent heir had paid no sums of money for that right, or, if he had, the right was now extinct, in so far as he intromitted with as much of the mails and duties of the apprised lands as paid him the sums truly debursed by him; or if there were any part of the said sums yet resting, the said personal creditor might have the liberty to purge the same by paying in the superplus, and so might clear the lands of that encumbrance to the effect he might attain to the mails and duties thereof himself; and this they found they would receive *hoc loco*, and that it needed not a declarator. Yea, some were of the mind, that if he should be found satisfied of the sums really paid him, upon a bill given in by a personal creditor, the Lords would decern him to assign over his right to the said creditor, seeing, in doing thereof, he has no prejudice. My Lord Halkerton also reported, that, (in the question of intromission by an apparent heir with the mails and duties of his father's lands, conform to a comprising whereof he has acquired the right, will infer behaviour yea or no,) the Lords

found it would, if his father, notwithstanding of the said apprising, continued in the possession of his lands to his death, and if the appriser never attained the possession in his lifetime; *sed de hoc multum dubito, nec æquitatem ejus capere possum;* but I think the Lords rather meant it should be a behaviour, if the apparent heir meddled before the establishing a right in his person.

Advocates' MS. No. 213, *folio* 104.

1671. *July* 11. Anent Execution of a Summons.

A MESSENGER'S execution, bearing in the general that he charged the haill within-named persons in the summons, without condescending on their names, will not be sustained, unless he take up his execution, and mend it by inserting *specificè* the names and sirnames of these he charged, and then abide at it.

Advocates' MS. No. 214, *folio* 104.

1671. *July* 5 and 11. Macraw *against* Lord Macdonald.

July 5.—In this action, ALLEGED, 1*mo*, No process; because neither executed personally, nor at his dwelling house. ANSWERED,—Ought to be repelled; because, conform to a warrant and dispensation from the Lords, contained in the summons, he was cited at the market cross of Inverness, as the nearest burgh in the Lowlands, *ob non tutum accessum* that could be had to his dwelling place. REPLIED,—A warrant *non relevat* to sustain such a warning or citation, unless it proceeded on a bill given in to the hail Lords, who, *re cognita*, allowed of the same. (This is the thing the lawyers call *citatio edictalis.)* DUPLIED,—He could never be heard to question his citation, because the sole effect of citation being *ut pars citata certioretur*, it is offered to be proven it came to the defender's notice. Craigie was content to give them the Lords' answer upon this point, whether such warrants behoved to pass on special knowledge of the hail Lords, or if they were sustainable as passing in course.

The Lords found they would sustain them, as they have been used to pass of course in times bygone.

2*do*, ALLEGED,—The citation is not yet lawful, because it bears not a copy to have been left at the said market cross, which is a necessary solemnity, and being omitted vitiates the execution. ANSWERED,—The execution stood good notwithstanding of the said allegeance; because it bears he duly and lawfully charged him; which words, duly and lawfully, presuppose all the requisite formalities to have been used. They were to have the Lords' answer on this also.

The Lords found that they would sustain the execution, if so be the messenger will take it up and mend it by adding these words, that he left a copy of the charge at the said cross, and abide by it.

Advocates' MS. No. 199, *folio* 101.