ligement to infeft; which, though it had carried, yet it could never have defended, because no seasine was ever taken thereon.

DUPLIED,—This relict can never be heard to quarrel the right alleged on, because she has homologated the same, in so far as she received the tack-duty of sundry years bygone, and so has acknowledged the tack. *2do*, It is a formal enough tack; and for the pretence that it wants an ish, the same ought to be repelled, because it has a most expressive ish, viz. when the sum shall be paid; and offered to adduce sundry practiques where this was sustained, and namely, one *in terminis* out of Dury, on the *25th of January* 1625, betwixt *Ronald* and *Strang*.

TRIPLIED,—The pretended homologation is ridiculous, seeing it imports a deed of one's own; and none can homologate the deed of another unless he represent that other; now there was no deed of the relict's here that she could homologate, the tack being set by her husband, (if so be it be one,) and she being no party therein. As to that part of the duply alleging the tack to be valid, and to have an ish, because it bears aye and while the money be repaid, and the practiques for the same, Triplies, They have contrary practiques more pregnant; for, *first*, they have five to one; *2do*, They have a late one, viz. in 1664. As for Dury, he is clear in the *12th of July* 1621, *Laird of Muckhall*.

The Lords did not determine this point about the validity of the tack, because they found the writ a wadset, and so null *quoad* the relict, because not made real by infeftment.

Ex multitudine authorum quod melius et æquius est non est judicandum, cum possit unius et deterioris sententia alias omnes superare; Justinianus, *in constitut. de conceptione Digest.* Yet in Italy, where they judge by the opinion of the doctors, he who brings maniest, providing they be classic, wins the cause.

Advocates' MS. No. 276, *folio* 117.

1671. *December* 1.

THE Sheriff of Stirling having granted a precept for arresting a sum in the hands of , who dwelt within the bounds, and this precept being executed against him, personally apprehended, but within another sheriffdom, it was much questioned if the arrestment was validly executed, seeing it was *extra districtum seu territorium*, and so should have been done by letters of supplement; for an execution at the dwelling-house, in this case suffices not. I think it was illegally done.

Advocates' MS. No. 277, *folio* 117.

1671. *December* 5. MR. ARCHIBALD STEWART *against* WIELAND.

MR. ARCHIBALD STEWART, son to the Countess of Murray, alleging and suspecting one Wieland, a servant of his mother's, to be an ill instrument betwixt

his mother and him, causes him at a time grant a bond obliging himself, under the pain of 1000 merks, to remove from the countess her service at Martinmas last. He being charged upon this bond to pay the penalties, the poor man deals to get a suspension; and the Ordinary hearing the parties upon the bill, Wieland craved the charge might be suspended, because he would not dip upon the way of extorting the bond from him, but offered present obedience and implement thereof.

To which it was ANSWERED, He had incurred the penalty, and could not offer obedience now; seeing he had staid in the house ten days after the term at which he obliged himself to remove, and yet haunted the house to the charger's prejudice.

REPLIED, Ten days was *modica mora*, wherein *non est prejudicium;* that such obligements are not to be taken *judaice* but κατα επιεικειαν; that his going to the house since deserved no censure, being a part of that freedom competent to all the lieges of going where they please, especially seeing he serves no more there.

The Ordinary inclined to find the charge calumnious. Yet the Lords in presence found he should pay the penalty of the bond, if he had contravened the tenor of it.

Advocates' MS. No. 280, *folio* 117.

1671. *December* 5. MR. JOHN ELEIS, elder, *against* WISHAW.

THIS day I understood of a practique found some space ago by the Lords, betwixt Mr. John Eleis, elder, and Wishaw, about an inhibition, the style whereof expressly bears that the party inhibited grant no renunciation of rights to his debtors. Notwithstanding whereof the Lords found, where a person inhibited had a wadset-right in a man's hands, the wadset giver might pay the money, and take a renunciation from his creditor, who stands inhibited at the instance of his creditor again, notwithstanding the inhibition, which reaches not to that case, since the way to affect that wadset is only a comprising. Siclike it is only *stilus curiæ*, where the inhibition bears that he dispose upon none of his moveable goods and gear; whereas an inhibition is only for heritage. *Quæritur*, If inhibition will reach against a bond bearing annualrent payable to heirs and assignees, (secluding executors,) for such bonds by act of Parliament in 1661, are declared to be heritable; if they be, then I think the inhibition will not extend to them, unless it be published at the market-cross of the head burgh of the shire where the debtors by the said bond live. *Quæritur*, If a man inhibited may assign an heritable sum for payment of a debt contracted by him *ante inhibitionem*, or if the said assignation will fall *ex capite inhibitionis*. It seems he may, because a man inhibited may pay a debt, though it be heritable. *Ergo*, he likewise may assign for payment, especially where it depends upon a cause *ab ante*. Though it may be answered, the reason why such payment comes not to be questioned, is because of its latency, by which it comes not to the inhibiter's knowledge. Yet if the debtor be bankrupt, then, by the 18th act of Parliament in 1621, he cannot gratify his