1671 and 1672. The EARL OF ARGYLE *against* The LAIRD OF M'NAUGHTON.

February 13, 1671. THIS is a declarator of property of the forest or mountain of Benbowie. Against which, ALLEGED, for M'Naughton,—That the same was properly his, lying within the bosom of his lands, environed thereby at three corners, and lying open only at one; it was also contained in some of his seasines; he had been in possession of it these hundred of years, by all deeds and acts of possession and property, and by debarring the pursuer from the same.

ANSWERED,—That any acts of possession he had, were only as subforester to him, and so can never be relevant to infer property; whereas the Earl possessed by all acts of dominion that can be condescended on. And it were a strange thing in the Highlands to hear any doubt who were heritor of that forest, since it was never controverted there but it is the Earl's; and he has slain 150 deer in it at a time, and has interrupted any possession the defender had. *Item*, there is quinquennial possession retoured, anterior to the forfaulture; which is enough to the king and his donatar, by act of Parliament.

They being both alike pregnant in their allegeances, there is a mutual probation appointed them *hinc inde*, for leading witnesses upon their possession.

They will both get witnesses enough, to prove what they please.

Advocates' MS. No. 131, *folio* 90.

June 25, 1672. THE Lords having considered the probation used in the action marked *supra*, at No. 131, betwixt the Earl of Argyle and the Laird of M'Naughton, they find the forest contended for, to be a part of my Lord Argyle's property, and therefore decern M'Naughton to remove therefrom.

Every one foresaw this would be the state of that action, considering the pursuer's probable interest in the President. *Advocates' MS. No.* 348, *folio* 136.

1672. *June* 25. SEATON of Gairleton *against* The DAUGHTERS of SIR ROBERT SEATON of Windygaule.

UMQUHILE Sir Robert Seaton of Windygaule having made an excambion with his brother, the Earl of Winton, whereby in lieu of his lands, he got an heritable right in my Lord Dumfries his lands; to which sums, Gairleton, as heir, laying claim, compearance was made for Sir Robert's sisters, who alleged the said sums behoved to belong to them, who would be his executors in law, because made moveable by Sir Robert in his lifetime, in so far as he required them and charged the debtors with horning, *quo facto animum declaravit.*

Against which it was ALLEGED,—That the same ought to be repelled, in regard they offered them to prove that it was never his intention to transmit this sum to his executors by the said charge; seeing *esto* he had got it, he intended *simul et semel*, to have wared it on land. He was frequently heard say his sisters should never have a penny of his means; yea they themselves in their ordinary discourse, boast, that good providence has thrown that in their lap which their brother never designed for them. That the bond charged on, was but a bond of cor-

roboration of an heritable security; and so, as an accessory, *debet sequi naturam principalis*, and not turn moveable but by a requisition, which they cannot show.

Notwithstanding of all which pregnant qualifications of his *propositum et animus*, they found the sum, as moveable, to belong to the sisters, who were executors.

This was judged hard; only Gairleton had the misfortune to be generally ill-loved, and the ladies found favour with my Lord Chancellor, who is an enemy to none of that sex if they be handsome.

Then Gairleton offered to improve the executions of the charge of horning, hoping that it might be found that the messenger had not two witnesses with him at the time he gave it.

Advocates' MS. No. 349, *folio* 136.

1672. *January* 25, and *June* 26. The EARL OF QUEENSBERRY *against* The DUKE OF BUCCLEUCH.

January 25. SCOT of Newton, Chamberlain, holding some lands ward of the Earl of Queensberry, and others likewise ward of the Duke of Buccleuch, and the marriage existing, it fell to be debated which of the two was the oldest superior, to whom in law the marriage will be due. It was not controverted but before the Earl of Bothwell's forfaulture he was the oldest superior; but the question ran on this:—Bothwell was forfaulted; and because this gentleman was not confirmed *quoad* that land he held of him, his land fell also under the compass of the forfaulture. Buccleuch gets the gift of Bothwell's forfaulture, as also of this gentleman, who giving him back his lands, retained the superiority; whereon it was alleged that though the *feudum* held of old of Bothwell, and *eo nomine* he was the oldest superior; yet the *feudum antiquum* was extinguished by the forfaulture, and the new gift from his Majesty, or Buccleuch, was *novum feudum*, and to be reckoned allenarly from the date of the new charter, and so Drumlanrick was now the oldest superior.

This cause was well reasoned and illustrated from many similes taken out of the feudal law; which see in the informations beside me. *De quæstione, an feudum post feloniam commissam restitutum* be *novum* or *antiquum, vide Matthæum de Afflictis, ad rubricam* 14, *libri* 2 *Feudorum*, No. 7, p. 327.

Advocates' MS. No. 312, *folio* 127.

June 26. THE Lords coming to advise the process marked *supra*, about Chamberlain Newton's marriage, at No. 312, they found, if seasine had followed upon that charter mentioned in the informations, then that the marriage would have belonged to Bothwell, as to the oldest superior; but since the vassal had not made use of that right, but taken a new one, which made it *novum feudum* in his person, and possessed by it, they found Queensberry the oldest superior, and therefore adjudged the casualty of the marriage to him.

Advocates' MS. No. 350, *folio* 136.