the like; and they imagine it will be 1000 merks a year in their ways, because at present their clerk gets more than they get all.

Advocates' MS. No. 366, *folio* 148.

1672. *June* 26, and *July* 11. ELIZABETH LUNDY *against* The EXECUTORS of LUNDY of Spitle.

June 26, 1672.—LUNDY of Stratharly, marries his sister upon Lundy of Spitle: in the contract of marriage there is a clause, that in case the woman dies without heirs of the marriage, then, and in that case, L.2000 paid by her brother for her in name of tocher, shall return again to her brother, his heirs and assignees, or else the equal half of the moveables it shall happen him and her (viz. the two married persons) to have the time of her decease. The woman dies without children of the marriage, whereupon Stratharly, having long ago paid the tocher, assigns the contract to Elizabeth Lundie his daughter, who pursues a declarator, that the case wherein it was provided and agreed that the tocher should return, has existed, and therefore concludes repayment and repetition of the tocher.

Against which it was ALLEGED, that, by the contract, there was something more required to make the tocher return to the wife's brother beside her dying without issue, viz. that her husband outlive her; so that there are in effect two conditions annexed to the provision anent the returning of the tocher: 1*mo*, That there be no children; 2*do*, That she die before her husband. Though the first existed, the second did not; but, to the contrary, she survived her husband many years. And that this is the whole scope of the contract, the true interest of the parties, and the real meaning of these words in the last clause anent the half of the moveables: and to interpret it otherwise were neither just nor equal; for what could be more contrary to sense or reason than for a woman to brook and liferent her husband's whole estate, and yet his executors to be liable in refusion of the tocher? does not this choke that rule of natural equity, *Qui habet incommodum debet et habere commodum?* See the debate more fully in the informations.

The Lords found, that the tocher was not to return *in eum solum casum*, whereby the wife should die without issue, but also *in casum* that she died before her husband: which not existing by the parties' meaning, (as the Lords explained it,) repetition ceased, and therefore the defenders were assoilyied.

A man who considers the cause narrowly, would think it very clearly favouring the pursuit, and the allegeances on the contrary to be in comparison only *leves vanæ et inanes conjecturæ:* but *standum est judicio dominorum*, who have thought otherways. *Vide supra, No.* 321. *in fine*, [*Laird of Balnamoon against Macintosh, 9th February* 1672.] *Advocates' MS. No.* 351, *folio* 136.

1672. *July* 11.—In the action, marked *supra*, betwixt Hamilton and Lundie, at the No. 351, the pursuer having produced a letter under the said Lundie of Spitle his hand, whereby, according to the agreement contained in the contract

of marriage, he declares the tocher shall be repaid, if there exist no bairns of the marriage; the Lords, upon this, found his intention has been to pay back the tocher in that sole case of not existence of children, and therefore sustained the declarator. *Advocates' MS. No.* 367, *folio* 148.

1672. *July.* MARGARET GRAY and DAVID SCOT her Spouse, *against* JOHN GRAY and his CREDITORS.

ABOUT the same time, in a reduction, pursued at the instance of Margaret Gray and David Scot her spouse, against John Gray, father to the said Margaret, and the said John his creditors, the following case happened: Michell Gibsone dispones some tenements of lands to Catharine Gibsone his daughter, and to Jo. Gray her husband, his son-in-law, in liferent, and to the bairns of the marriage procreated betwixt them; which failyieing, to the said Jo. Gray the husband, his heirs and assignees. Catharine dies, leaving only one daughter behind her, called Margaret Gray; who is taken away while she is scarce twelve years old, by David Scot, servant to Walter Pringle, advocate, and married on him without her father's consent; who immediately serves his wife heir, in the foresaid tenements, to her goodsire Michell Gibsone, and intents a reduction of the disposition made to the father, as done *in lecto.*

Against which it was ALLEGED, that such actions are only competent to the heir of the granter, and that only when they are to his prejudice; but *ita est,* this pursuer, the time of the granting the disposition quarrelled, was neither heir nor apparent heir to her goodsire the disponer, her mother being on life; neither was the deed to the heir's prejudice, but rather in her favours, it reserving her liferent thereof; neither did ever the heir quarrel it, or show any dissatisfaction at it either by word or writ, in her lifetime.

The Lords FOUND the pursuer had interest to reduce, albeit she was neither heir nor apparent heir the time of the granting the said right, but immediate heir by progress. As also the reason being proven, they did reduce the disposition in so far as by the termination the father was constituted fiar; but sustained it *quoad* his liferent, because *in omni eventu* he would have had right to that; for *esto* there had not been a disposition, but he had served his wife heir to her father in these tenements, he would then have had right to the liferent by the courtesy of Scotland, she being heretrix. See the information beside me. *Vide supra,* 11*th December,* 1669, *Shaw and Handyside* against *Calderwood.*

Advocates' MS. No. 369, *folio* 149.

1672. *July.* GEORGE SUITTY *against* ROBERT BELL.

IN the same month of July 1672, in an action pursued before the Bailies of Edinburgh, by George Suitty against Robert Bell, (but which was truly managed