1677. *January*. ANENT DECREETS OF CONSTITUTION.

IT was questioned about this time, if I needed to have a previous decreet for constituting the debt against the heir, where I mind to lead an adjudication of his predecessor's lands, where the heir is already served and retoured, and has already acknowledged the debt. It was alleged, none of thir could be the ground of a summary charge against the heir, without a decreet. Yet the Lords leapt over this point of form, and sustained it as a sufficient ground of an adjudication, and ordained it to stand for a rule in all time coming.

Advocates' MS. No. 537, § 2, *folio* 273.

1677. *January*. ANENT THE CLERKS OF SESSION.

SOME of the Clerks of Session, or their servants, have, in the scrolls of decreets of adjudication, conform to the act in 1672, when the party exhibited not the writs, adjudged the haill lands, and a fifth part more; by an absurd inadvertency that a fifth part more is only due where such a quantity of lands is only adjudged as is effeiring to the debt owing.

Advocates' MS. No. 537, § 3, *folio* 274.

1677. *January*. ANENT DESTINATION OF LANDS.

AN heretrix of lands takes new infeftment to her husband and self in liferent, and to the bairns of the marriage, without saying in fee; and which failyieing, the one half to the husband's heirs, and the other half to the wife's heirs; *Quæritur*, there being a son of the marriage, if he be heir of the whole lands? I think he is, because it was only *error et omissio scriptoris*. There is *minus dictum, et plus cogitatum menteque retentum.*

Advocates' MS. No. 537, § 4, *folio* 274.

1677. *January*. LORD BAMFF *against* The LAIRD OF ROSA-SOLIS.

IN that intricate cause pursued this session by the Lord Bamff against the Laird of Rosa-Solis, the Lords laid little weight upon Bamff's letters to all and sundry, declaring that Where he had bought such a man's lands, and was to pay such a price, therefore, and on that reason, had subscribed blank bonds to that value, and declared he should be debtor to any whose names should be filled up in these blank bonds. He thereafter having acquired the gift of the liferent escheat of the seller of the lands, these bonds were found to fall under escheat, albeit he was bound by his let-

ter in manner foresaid; unless the creditors whose names were now filled up in the bonds, would prove their names were filled up therein before general declarator. See the act of sederunt anent blank bonds, made in 1666, mentioned in Sir George Lockhart's Compend of Durie's Practicks, *verbo* Bonds, *in ipso fine*, immediately before the word "Brughs." As to the insignificancy of holograph letters, see Durie, 14th February, 1627, Pyronon and Ramsay.

Advocates' MS. No. 538, § 1, *folio* 274.

II. By the law of England, the King can do no wrong; that is one of their maxims; and therefore he cannot be pursued in any court. But to put wrong out of his reverence, they do not allow him a power either to judge alone, or to execute the law alone, without his magistrates and judges, for he can neither give sentence nor imprison.

III. In England, he who is mute and stands silent, and neither pleads guilty nor not guilty, is pressed to death with weights, called, in their Norman jargon, *mort forte et dure*, and has no other water to drink but the gutter running by the Tower of London; and thus saves his estate to his posterity, if it be a crime that would have tainted the blood and forefaulted his lands. Which privilege of contumacy seems unreasonable. With us, traitors may be forefaulted in absence, yea, after their death, by two express acts of Parliament, the one in 1540, the other in 1669.

IV. A nobleman's daughter, in the custom of England, marrying a gentleman, retains her former rank and dignity; but loses it if she marries a nobleman, for then she takes place conform to his quality and degree; *tunc sequitur illius conditionem, radiisque splendet maritalibus*:—*Quæritur*, If it will be so in Scotland? See observes on this in my remarks *ad annum* 1670, on the act of regulations of the session. One of Duke William Hamilton's daughters being first married on the Lord Kilmawers, and now on the Laird of Robertland, by a special patent from his Majesty, (who is *omnis nobilitatis fons et honoris*,) retains the place due to her birth.

V. I heard Sir G. Lockhart affirm, that, by the law of England, tutors are not accountable for their intromission, but are like superiors in a ward; they make the haill fruits their own, giving the minor a competent aliment and allowance forth of the same. Which, if true, (for I doubt exceedingly,) is a most unreasonable law, and downright contrary to the nature and design of tutories, which is for the weal of the pupil, and not of the tutor. See Stair's System, *titulo* 14, Superiority, § 22, p. 257. Yet where the King nominates a tutor to an idiot or furious person, or in such like occasion and caducity, the haill profits go with the tutory, except an aliment, &c.

VI. I think a tutor with us cannot buy a right affecting his minor pupil's lands, but it must be presumed to be for the minor's behoof, and accresce to him. See Craig and Durie's Practiques for this. See 20th November, 1678, *Wishaw* and *Lundie*. *Vide infra*, No. 709. But the difficulty will grow if the tutor sell it to a third

party, who knows not of his being tutor, if it will be *vitium reale* against the singular successor, who is not *particeps fraudis. De hoc cogitandum.*

VII. A gift of escheat, if it be not declared, at least generally, was found by the Lords not to be sufficient to purge vitious intromission; *ergo, non relevat,* for purging thereof, to say he was rebel, or his escheat is gifted, unless it be farther added that there is a general declarator obtained thereupon.

VIII. If lands holden of a Bishop be resigned, *ad perpetuam remanentiam,* in the Bishop's hands, by the vassal and feuar, it makes it to become a mortification to the diocess and bishopric, and not to become a part of the Bishop's property, so as to transmit it to his heirs and assignees. If he minds to do that, he must interpose a person that must take the disposition in his name for his behoof.

Advocates' MS. No. 538, *folio* 274.

1677. *February* 2. MR JAMES LAUDER *against* THE TENANTS OF COCKBURN'S-PATH.

MR JAMES LAUDER, sheriff-clerk of Hadinton, as having right, by disposition from two sisters heirs-portioners, to an husband-land in Cockburn's-path, pursues the tenants for maills and duties, and Wauchop of Stottincleuch for reduction and improbation of a right he had got to it from the husband of one of these two women, upon this reason: 1*mo,* That it was elicited, and called only a factory. 2*do,* It being subscribed by two notaries for him, there was the interval of some days between their subscribing, and so was null, since the act must be done *unico contextu.* Farther, the husband's being guilty of adultery, and having confessed it in the kirk-session, that might be the foundation of a criminal process, whereon being convicted, his escheat would fall, and the gift thereof might be taken by Mr James. Yet it was thought the escheat on adultery was not a liferent escheat, which would carry his *jus mariti,* or the courtesy of Scotland, (for here the wife was lately dead, and there having been a living child between them, he had undoubted right to the courtesy,) but only a single escheat.

The tenants' defence against the maills and duties was, They were tenants to another, by payment of maill and duty, and he not called.

This Newton repelled, as competent against a removing, but not an action for maills and duties. What we were most afraid of, was that our right was null, being granted by a woman clad with a husband, and he not consenting; and it is not enough to say she stands in the fee: therefore, Mr James transacted with the husband and Stottincleuch.

Advocates' MS. No. 539, *folio,* 274.