he offers him to prove there is an executor confirmed before the intention of this cause. 2*do*, Absolvitor from the passive title, as intromittor with the maills and duties of his father's lands; because offers to prove his father was denuded of the fee of these lands in his favour.

Thir defences were found relevant to purge thir odious titles. But as to the alternative, *successor titulo lucrativo post contractum debitum*, it would not do against it. *Vide infra*, No. 575, [*June*, 1677, *Kincaid* against *Gordon*.]

Advocates' MS. No. 574, § 5, *folio* 285.

BOSWELL *against* BOSWELL.

IN a pursuit *in anno* 1662, Boswell in Kinghorn, *contra* Boswell, (whereof I have seen the decreet,) it was ALLEGED for the defender, No process against him as successor *titulo lucrativo post contractum debitum*, because he offered him to prove, though he was apparent and nearest heir, yet the disposition was not merely gratuitous and destitute of all onerous cause; but he had these lands disponed to him for sums of money he either had paid, or was obliged to pay, near the half of the worth of the lands, if not more: and so it is to be called an onerous cause more than a lucrative, since the onerous cause predomines, *et unumquodque denominatur a majore et famosiore parte*: it is more onerous than lucrative. ANSWERED, to make it relevant they ought to say not only onerous but adequate, else it is still lucrative.—And so the Lords find to this effect, to make up what is wanting of the price. And so they ordained Sir A. Seaton, of Pitmedden, in his plea with the daughters of Blair, to allege an adequate full price, as ordinarly then given in the country. *Vide supra*, No. 538, *in margine*, [28*th January*, 1677.] See this marked beside me *alibi*, in some small alphabetical practiques since the King's restoration, *voce successor lucrative*.

Now the Lords liberate from this passive title, if he have paid 9 parts of 12, of the price. See 29*th November*, 1678, *Hagins* against *Maxwell*.

Advocates' MS. No. 574, § 6, *folio* 286.

1677. *June*. ANENT VITIOUS INTROMISSION.

I. IF a stranger shall meddle and intromit with the moveable heirship, it will bind no passive title on him, as the intromission with the moveable goods would do; because heirship is of the nature of heritage, in which no passive titles quadrate against any but those who are *alioqui successuri*. But the stranger's intromission will bind him to simple restitution, and infer vitious intromission, but no passive title. *Advocates' MS. No.* 574, § 7, *folio* 286.

II. One is convened as vitious intromitter with the goods and gear of such a man, and it is libelled, that that man vitiously intromitted with the goods and gear of another person, whom they instruct to have been their debtor by bond or decreet.

The Lords will not allow the probation of this progress, or to prove, after a man's decease, that he intromitted without a title; because if he had been convened in his own lifetime, and questioned, he might have purged the intromission, and ascribed it to some title, which none else now knows; besides this passive title of vitious intromission *sapit naturam delicti*, it is penal; *morte extinguitur, nec transit in hæredes, nisi ejus dolo lucrum ad eum perventum sit, vel lis cum defuncto contesta fuerit;* by which *perpetuatur actio.* And this the Lords decided justly in the case of *Wilkieson*, in 1666. See it in Stair's System, tit. 31, Of Vitious Intromission, *num. ult.* and my Annotations on it there.

Advocates' MS. No. 574, § 8, *folio* 286.

1677. *June.* ——— *against* WILLIAM BRODIE.

ONE pursuing as heir served and retoured, and no retour being produced, Mr William Bailie alleged, no process, because the active title not produced. Halton repelled it. Mr William huffed at the novity, and offered a dollar for the Lords' answer. The Lords, to save Halton's credit, in June, 1677, permitted a pursuer to produce a retour as his *active* title, *cum processu.* Which was to evert all form. And yet Halton was pleased with the report, to give Mr Bailie a rebuke. *Vide supra,* No. 441, [*Duke of Hamilton* against *Loudon, February,* 1674;] and 490, [*Hay* against *Earl of Twedale, July,* 1676;] *infra,* 579, § 4, [*June,* 1677.] Yea, a seasine alone was not found a sufficient title in a reduction of heritable rights without the charter, but the Lords will allow it whiles to be produced *cum processu.*

Advocates' MS. No. 574, § 9, *folio* 286.

1677. *June.* ANENT LYING OUT UNENTERED.

A MAN is married on a woman that is apparent heir to lands, either burgage or without burgh. She, to defraud her husband either of the *jus mariti* or the courtesy, lies out and will not enter. *Quæritur, quid juris,* Is there no remedy in law to force a malicious woman to do what is just? Sir George Lockhart thought, the husband by his marriage, had a rational and well founded interest whereon to compel her to enter; only the law had not provided for that case, not being frequent nor *casus cogitatus.* Yet it had supplied the ordinary case where apparent heirs lay out to prejudge creditors, by charging them to enter heir within 40 days, conform to the 104th act Parliament 1540. See my marginal notes on it. That the husband was *quodammodo* a creditor, and *ex æquitate prætoria* the method of that act might be extended to him, and the defect made up, that the wife *ex suo dolo non lucretur,*— neither prejudge his *jus maritale* nor *curiale.*

Advocates' MS. No. 574, § 10, *folio* 286.