under the Act of Grace, and therefore assoilyied. *Vide* the information in it. *Vide supra, num.* 667, [*November* 1677.] *Advocates' MS. No.* 715, *folio* 317.

1678. *January* 29. The TAILORS of EDINBURGH *against* NICOL HARDY.

THE Tailors of Edinburgh obtain a decreet of neighbourhood, as to their land in the Cowgate, against Nicol Hardy, writer to the signet; who presents a bill of suspension, bearing, that his brewhouse and building was conform to a contract betwixt his father and the incorporation in 1642, and betwixt himself and them in October last.

The Lords ordained Harcous to visit the ground and report; who did so, and settled them in sundry of the controverted points, and ordained Nicol to rectify some parts of his building. And there was an ambiguous clause in the last agreement, that he should raise it no higher than the present building. See the informations of it beside me. *Advocates' MS. No.* 716, *folio* 317.

1678. *January* 29. AGNES WILKY, Relict of Henry Morisone, *against* CHRISTIAN MORISONE and GEORGE STUART her Husband.

AGNES Wilky, relict of Mr Henry Morisone, writer, obtains a decreet against Christian Morisone, sister and heir to the said Henry, for implement of her jointure, and against George Stuart of Auldhame, advocate, her husband, for his interest; and thereon charges and denounces them both. Then, Christian dying, Agnes pursues George Stuart for payment. The Lords, on my Lord Pitmedden's report, found George, the husband, was not liable, except only *in subsidium*, in case payment be not recovered of the heir of the wife; and that the heir of line to Christian behoved first to be discussed, and so gave him *beneficium ordinis discussionis.*

Then Agnes gave in a bill, craving the interlocutor might be re-considered, and George at least might be principally and immediately liable *in quantum* he was *lucratus* by the marriage. This day the Lords refused this bill.

Mr Francis Montgommery was just stated in the like case, in a pursuit moved against him by the Lord Melvill.

There was another point debated in the said Agnes her process. She was provided to an annualrent of 400 merks furth of a tenement, which the heir caused to take down as ruinous; she contended he behoved either to rebuild it or be personally liable. The Lords ordained both parties to adduce probation anent the condition the houses were in the time of the contract of marriage; and if what the heir did was incumbent for a provident man, or if he willingly took down the houses when there was no necessity for the same.

The said Agnes, in the foresaid bill, urged the Lords' answer *in jure* upon the point; but they refused it. See the copy of the bill beside me. *Vide* Dury, 17*th January* 1622, *Hamilton* and *Sinclair ; 5th July* 1623, *Brown* and *Wright.* *Advocates' MS. No.* 717, *folio* 317.

1678. *January.*—About the same time, the following cases fell to be debated and decided, which I shall only touch here, and refer to the Information for farther understanding thereof:—

I.—Campbell and Menzies *against* William Naper of Wright's-Houses.

William Naper of Wright's-houses, being charged on his bond by Campbell and Menzies her spouse and their assignee, suspends on compensation. Alleged, It was taken away by a discharge. Answered,—The clause was only general, and did not extend to such cases. The Lords (Glendoick being reporter) found the discharge met not. *See Sir A. Ramsay's case* with *Francis Kinloch, supra. See* 14*th December* 1678, *thir parties.*

II.—Alexander Todridge *against* Patrick Androw of Barborland.

Alexander Todridge, tacksman of the King's Park of Halirudhouse, pursues Patrick Androw of Barborland for the damage done to him by the said Patrick's dog, in worrying his lambs and sheep, after he had intimated to him his scaith; like the case of the pushing ox in the 2d of Exodus. Alleged,—He had killed him, and so could seek no farther amends: besides, by the chapter of the statutes of King , he who kills his neighbour's mastiff ought to keep his midding for year and day. Besides, he cannot now *noxæ dedere,* which was permitted, as appears by the Title, *Si quadrupes pauperiem fecerit.* Answered,—Alexander did not shoot him till he had twice or thrice intimated to the defender to keep in his dog; but he maliciously would not do it, and so that cannot excuse him from the damage done. Glendoick, notwithstanding of this, found him liable for what scaith he had done after intimation made.

Then alleged,—Alexander must prove he worried each individual libelled, since other dogs might do it as well as he. Answered,—That was impossible *in facto latente;* but the probation behoved to be somewhat privileged here like to a spuilyie: if he proved that it was seen kill some and grapple with others, it is to be presumed *quoad* the rest, unless they will positively offer to prove they were killed by other dogs. Glendoick repelled the allegeance, in respect of this answer.

III.—Marshell and Mathers *against* John Mayne.

In the suspension, Marshell and Mathers against John Mayne, one inferior judge cannot grant letters of supplement for charging persons within their jurisdiction to compear before another inferior court, but such letters must be directed by the Lords. *Item,* the party in whose hands the arrestment is laid on, cannot allege the debt is paid, for that is *jus tertii* to him. See Dury, 21*st December* 1621, *Hamilton.* And if the party called for his interest allege it is suspended, he must repeat his reasons of suspension instantly by way of defence. It is relevant to allege the affair is submitted, and a decreet-arbitral

pronounced thereon; but *quæritur* if the judges arbitrators may be examined thereon, since he should prove *scripto vel juramento.*

IV.—Jo. Webster *against* Margaret Hay, Lady Kettleston.

Jo. Webster's decreet against Margaret Hay, Lady Kettleston, for an account, to herself and daughters, of tailor-work, turned by Forret into a libel, in a suspension: 1*mo,* Because an error in the calculation of the sums; 2*do,* The daughters were not *ab initio* called, but by an act *ex post facto,* and only holden as confessed upon the furnishing and quantities; 3*tio,* Some of the account prescribed *quoad modum probandi,* being without three years; 4*to,* Some of it furnished in the husband and father's time, and so could not affect them, unless they were proven to represent him.

V.—Todd *against* Young.

The mutual suspensions and charges betwixt Tod, the skipper, and Young, his prentice, upon the indentures, resolved in an act of joint probation that the prentice offered his service and was refused; and the other, that after that he required him.

VI.—Mr David Home and Barbara Weir *against* Mary Greirsone.

In the action Mr David Home and Barbara Weir, his spouse, against Mary Greirsone, relict of Robert Herries; found vitious intromission of one that is dead, cannot be proven after his decease, so as to import a passive title. See Stair's System, *titulo* 31, *pagina* 629, in the case of *Wilkiesone,* decided in 1666. *Item,* A tenant having paid a promiscuous duty to his master, both for stock and teind, and got his discharge; that, it seems, ought to liberate him, at the hands of the titular of the teinds, especially *post magnum temporis intervallum.*

VII.—Marion Comblin *against* William Corbie.

In the reduction pursued by Marion Comblin against William Corbie, in Dumfreis, a charge to enter heir was quarrelled as null; because it neither bore that the party was cited personally, nor at their dwelling-place; but they slipt it up, and mended it, and offered to abide at it.

VIII.—Mr James Ramsay, Bishop of Dumblain, *against* Sir John Forbes of Monymusk and Others.

In the improbation pursued by Mr James Ramsay, Bishop of Dumblain, against Sir John Forbes of Monymusk, and many other Vassals; his gift in general, to the obventions of the bishopric, was found a sufficient active title to pursue on.

IX.—Anna Helena Scot and Edmiston of Duntraith, her Husband, *against* Sir A. Ramsay.

Sir A. Ramsay being pursued by Anna Helena Scot and Edmiston of Dun-

traith, her husband, as she who stands infeft in the Mains of Waughton, for reduction of the rights he had thereon, and for proving the same to be paid: the Lords appointed a count and reckoning amongst the parties, and nominated Colinton auditor, (it being his tour that week,) and assigned the pursuers a day for proving a true rental of the Mains. We gave in a bill for Sir A., craving a joint probation of the rent; but the Lords refused it. There were two points they aimed to debate; but the Lords waved them, and referred them to the auditor: the first was, That Sir Andrew and his authors might count for the haill rent, whether they got it or not, since he ought and should have intromitted, others being debarred by them,—as has been decided in first apprisers,—at least they were obliged to intromit so far as fully paid them their annualrents; so that they can allege no annualrents to be resting. The second was,—That, for sundry of these preferable rights, they had infeftments out of other subject matters, as the lands of Balgon, &c.; or were paid by possessing or selling lands by virtue of apprisings, &c.; and they behoved, either to betake them to these rights, and not prejudge maliciously the pursuer's access to the lands wherein she stands infeft, or else assign them for her relief.

X.—Mr Charles Home *against* The Bailies of Edinburgh.

The Bailies of Edinburgh having fined Mr Charles Home, brother to the Earl of Home, in £50 Scots, for beating one Johnstoun; he suspended,—That the decreet was in absence, he not being personally apprehended, and so was not liable to their jurisdiction; since *locus delicti* makes a *forum competens*, and founds a jurisdiction there, providing the delinquent be attached and apprehended; otherwise sheriffs, justices of peace, bailies of burghs, &c., cannot judge in absence, except those who were their own citizens, and dwelt within their territories. Castlehill inclined to sustain this.

2do Alleged,—The fine was exorbitant, and above their power. *Vide supra, 8th November* 1676, [*Abernethy* against *Bailies of Leith,* No. 505.]

Advocates' MS. No. 718, *folio* 317.

There were, at this same time, sundry actions depending, wherein I was concerned, that had interlocutors passed in them; of which I shall only mention the parties' names here, and refer to the informations beside me.

There was a pursuit by Francis Laurie, &c., against Thomas Brown; *item*, against Elizabeth Gibsone; upon the passive titles, to count and reckon for their father and husband's proportional part of the excise of the brewing; as to which they were in a society and copartners.

There was an action of the same nature pursued by one Pollock (who was assisted by Mr George Campbell in it,) against Thomas Robertsone.

The said Thomas was likewise concerned in another process, betwixt Borlands and his brother; wherein they offered to prove Thomas his infeftment in their lands of the King's Stables at the Westport, was satisfied.

Item, John Boswell's action against William Cunninghame, in Lington of Abbotshall, and his wife.

Item, My Lord Cardross and his Lady's advocation against Robert Campbell, apothecary, about his infeftment in the thirteen oxengates of land in Strathbrock, formerly belonging to Mr William Oliphant and Blackcraig. Of which, see Dury, 1631,

Item, Sir John Harper against Inglis of Murdiston.

Item, Brown of Nunton against the Town of Kirkcubright; for whom this allegeance was sustained,—They stand infeft, *cum piscationibus* in general, without mentioning *salmonum;* and, by virtue therefore, in forty years' peaceable possession of salmon-fishing; which, albeit *inter regalia*, yet this was enough for a burgh-royal. See Stair's System, page 231. See Dury, *26th March* 1628, *Maxwell.* See, *7th December* 1678, thir same parties.

Item, The Lords of Session refused an aliment to the heir of Kingston, furth of his father's estate, during the dependance of his reduction, founded on his uncle Archibald Douglas of Whittinghame's tailyies; and rejected his bill.

Advocates' MS. No. 718, *folio* 317.

1676, 1677, *and* 1678. SIR JOHN SETON of GAIRLETON *against* GEORGE SETON of BARNS.

1676. *July*.—SIR John Seaton of Gairleton convenes George Seaton of Barns before the Secret Council, for oppression and riot, in casting down a dry-stone dyke Gairleton was building on the march betwixt them, for taking in a park.

Barnes ALLEGED he had done no wrong; because he had encroached upon his land, and was going to enhance, appropriate, and inclose a well, which not only served his beasts, but also made a mill he had to go, with some derived help. *2do*,—He had used civil and legal interruptions, *per novi operis nuntiationem super damno infecto, quod nondum quidem factum est, sed fieri timetur*; (see these titles D. and C.;) and they not desisting nor finding caution, he might stop *per viam facti.* Yet see *Joannes Vandus, libro 2, Quæstio* 30; who says, it must be *authore prætore. Vide supra*, in the case of *Kirknes*, No. 475, [*June* 1676.]

And whereas he pretends he had power, by the 17th Act of Parliament 1669, to keep his dyke straight, to take somewhat of the adjacent neighbour's lands,

It is ANSWERED, *1mo*,—That is for encouragement of parking; but this cannot be called a park. *2do*,—Since he has appealed to that Act of Parliament he must stand to it. It appoints the same to be done at the sight of the sheriff, and not *privata authoritate.* See the rest in the Informations.

The difference was settled by the mediation of my Lord Dundonald; and it was but reason it should be so: for as Abraham said, in a like contest about a well, to Lot,—"Why should we contend together, for we are brethren."

Advocates' MS. No. 485, *folio* 250.

1677. *February*.—In the declarator pursued by Seton of Barnes *against* Seton of Garleton, anent his right to the aqueduct of his well, &c. Garleton