THE LORDS found, that Iſabel, being conjunct fiar, had *jus exigendi*, and therefore might warrantably lead the compriſing; which, being led by her and her ſecond huſband, did accreſce to the heir of the firſt marriage, mentioned in the bond: And therefore, ſuſtained the compriſing againſt my Lord Pitſligo, albeit but a ſingular ſucceſſor, likewiſe in the lands. * No 10.

Preſident Falconer, p. 56.

1691. *July* 8. CREDITORS of LANGTON.

OLD Langton, having given a public infeftment to his ſon, for relief of cautionry, not for the payment of creditors, without any enumeration of creditors; it was found, That the creditors have not the privilege and right of the infeftment; ſo that young Langton might prefer ſome; or renounce the whole again to his father; or one creditor might prevent another by diligence; but young Langton being inſolvent, could not grant voluntary rights, in prejudice of anterior diligence. No 11.

Fol. Dic. v. 1. *p.* 2. *Harcarſe, p.* 171.

1696. *January* 24. EARL of CASSILLIS *againſt* MONTGOMERY of Lainſhaw.

No 12.
Found that a perſon forfeited and reſtored, *per modum juſtitiæ*, might uſe any benefit the donator had obtained, during the forfeiture; ſuch as a decree of preference, &c.

PHESDO reported the competition betwixt the Earl of Caſſillis, and James Montgomery of Lainſhaw. The *firſt* point was, Having once produced his tack of the teinds in the proceſs, he might not take it up again when he found the Earl, who had newly raiſed and caſt in a reduction of the ſaid tack, on this head, that it was ſet before a prior one had expired, was going to hold the production ſatisfied.—THE LORDS found a party might take up any writ, (not quarrelled as falſe,) before allegeances were proponed thereon, or litis-conteſtation made in the cauſe. The *next* point was; during Lainſhaw's forfeiture, Strathallan, donator thereto, had obtained a decreet of preference, on Lainſhaw's tack of theſe teinds of Kirkmichell, before Caſſillis's right; and Lainſhaw, now founding on that decreet, as *res judicata*, to exclude Caſſillis; ſtill he alleged Lainſhaw had no right to the ſame, the forfeiture being *funditus*, reſcinded, and all following thereon taken away.—*Anſwered*, That is only ſo far as the reſtored perſons were leſed; but it

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* The ſame caſe is noticed by Lord Fountainhall, vol. 1. p. 262, under date 18th January 1684, thus:—In a caſe between Forbes Lord Pitſligo, and Robert and Alexander Milns; The Lords, *in præſentia*, find in an appriſing, led by Mary Hillſtains, my Lord Harcarſe's mother, on a bond wherein ſhe was only conjunct fiar of the ſum, and her daughter, Mary Hog, was by the bond, *per expreſſum*, fiar, but led by the liferentrix, for the pricipal ſum, as if ſhe had been fiar; That the ſaid appriſing was effectual, and accreſced to the fiar, as if it had been alſo led and deduced at her inſtance, for her intereſt and right of fee; though her name was not in the compriſing, but that the mother's ſecurity became her's, ſeeing ſhe was conjunct fiar, and had power to uplift upon caution.——*Nota*, The Milns being paid off their debt, the benefit of this cauſe was for the behoof of Keith of Ludquhairn.

No 12. were a very ſiniſter interpretation, to make a detorſion, of what is deſigned for a benefit, to my prejudice; for, put the caſe, that the donator had interrupted the preſcription, which was running againſt the rebel, or ſet a profitable tack; would not theſe accreſce to one reſtored, *per modum juſtitiæ?* And, on the 13th of July 1664, between the Earl of Lauderdale and Bigger of Wolmet, (*No* 5. *h. t.*) a certification, obtained by Swinton, when donator, was found to belong to Lauderdale, that he might found on the ſame.—THE LORDS generally inclined to think, the forfeited perſon might uſe any benefit the donator had obtained; even as the improvements of a tutor accreſce to a minor; *meliorem facere poteſt conditionem pupilli ſed non deteriorem;* but, falling to conſider this decreet of preference, they found it not to be a preference in time coming, but only for ſome bygone year's teinds; and found it no ſufficient active title to compete with Caſſillis for ſubſequent years, without the tack itſelf were produced. (*See* PROCESS.)

Fol. Dic. v. 1. *p.* 1. *Fountainhall, v.* 1. *p.* 704.

1702. *November* 25.

BOTHWELL of Glencorſe *againſt* SIR JOHN CLERK of Pennycuick.

No 13.
Found that infeftment of a mill carried the ancient thirlage along with it, as a conſequence, although the purſuer did not connect his right with the party who firſt acquired the thirlage.

BOTHWELL of Glencorſe, purſues a declarator againſt Sir John Clerk of Pennycuick, that his lands of Cooking are thirled to his mill; and craves the bygone abſtractions ſince 1685. *Alleged* for Sir John, That the purſuer had not ſufficient title to ſeek or declare this thirlage; for he produced nothing but a baſe infeftment in the mill, proceeding upon a diſpoſition, contained in his contract of marriage in 1657: and, though he likewiſe produced a feu-charter in 1611, of his mill, from the Lord Salton to one Abernethy, yet he ſhewed no progreſs nor connection from that feuer, Abernethy; and, if he did not derive right from him, he could not claim the multures of the defender's lands of Cooking; unleſs he could, in the *ſecond* place, ſay, that he preſcribed it by forty years peaceable poſſeſſion; any of which, either a connected progreſs, or immemorial preſcription, he was willing to find relevant to infer the aſtriction of his lands to that mill; ſeeing, *tantum præſcriptum eſt quantum poſſeſſum, et non amplius.—Anſwered*, Seeing you can pretend no right to the mill, I need produce no more than to ſhew your lands were once thirled to that mill, (which the charter and ſaſine in 1611 inſtructs,) and that I ſtand infeft therein; and I am not bound to produce a right from Abernethy, or a connected progreſs derived from him; as if I were purſued in a reduction and improbation; but my infeftment in the mill carries the ancient right of thirlage, in conſequence, as a part and pertinent; and, unleſs the defender can ſay, he has preſcribed liberation and immunity, by forty years going to other mills, and abſtracting, and abſtaining from coming to this, he ſays nothing.—*Replied*, Glencorſe having no right, but what his father conveys to him, in his contract of marriage, whereon he is infeft baſe; this can never ſuſtain his title to the multures of the defender's lands, unleſs he ſhew that his father had a