the ground. In Bacon's Abridgment, the right of the landlord is considered as an hypothecation; and in the statute of king William mention is made of a pledge as being the right of the landlord; and yet the king is, by the law of England, preferable to the landlord. In some particulars the landlord's right is greater with us than in England, in others less; yet I still doubt whether such shades of difference should make the king's right less efficient in one part of the united kingdoms than in the other.

HENDERLAND. The right of the landlord in England is old, and obscure in its origin. It has received many alterations, and some of them since the Act of Queen Anne, and has been brought nearer the right of a landlord in Scotland. I incline to follow the course pointed out by Lord Justice-Clerk. Should the Crown be preferred, our heritable rights will be affected; a superior for his feu-duties, an heritable creditor in a poinding of the ground. A pledge cannot be attached by the Crown; and so also is the case as to *special property*. That does not exclude the same sort of thing, passing under another name; for hypothec is a pledge without possession. What has the same effect in the law of Scotland as a pledge may be called a pledge.

On the 29th June 1790, "The Lords preferred the landlord."

Act. R. Dundas. *Alt.* H. Erskine.

Hearing in presence.

Diss. President. *Non liquet*, Gardenston, Monboddo, Rockville.

1790. *July* 10. MARGARET DALZIEL *against* JOHN RICHMOND.

WITNESS.

The evidence of the mother and sister of a pursuer, in a declarator of marriage, inadmissible.

Fac. Coll. X. 288; *Dictionary*, 16,780.

JUSTICE-CLERK. When there is a *penuria testium* as to a fact, the nearest relations may be admitted as witnesses; not so in contracts. Why were there no other witnesses? Indeed there were; but they did not know Richmond. [This simple unadorned sentence is highly rhetorical, and the more so because unadorned.] In such critical cases, parents and near relations are under strong inducements to deviate from truth.

ESKGROVE. In a clandestine marriage there is more occasion for witnesses

than in a regular. In the case of *Malcolm* there was, from the circumstances of the fact, a *penuria testium*.

PRESIDENT. Had the proof been as to a public marriage, there would have been no need for considering the validity of such an objection. Shall more latitude be given in the case of an irregular marriage?

HENDERLAND. As far back as the records of the Commisssary Court go, near relations have been admitted, not to prove the fact of celebration, but to prove circumstances of acknowledgment. A case may be figured when, by the death of witnesses unexceptionable, a regular marriage may be proved by the evidence of a father and mother.

On the 10th July 1790, "The Lords found that the witnesses in question cannot be admitted."

Act. D. Cathcart. *Alt.* W. Stewart.

Reporter, Dreghorn.

1790. *November* 18. The UNIVERSITY of GLASGOW *against* SIR WILLIAM MILLER.

CAUTIONER—PERSONAL AND TRANSMISSIBLE.

A cautionary obligation does not fall by the cautioner's death, but continues upon his heirs.

[*Fac. Coll. X.* 302; *Dict.* 2106.]

JUSTICE-CLERK. A man, becoming cautioner for a factor, binds himself and his heirs: he may, on paying up arrears, liberate himself, and so may his heirs. As to the practice of banks in renewing cautioners, there is good reason for it: the heir may not be so solvent as the original cautioner; and, besides, summary diligence cannot go against the heir of a cautioner.

On the 18th November 1790, "The Lords repelled the defence of the heirs of the cautioners."

Act. A. Rolland. *Alt.* A. Wight.

Reporter, Swinton.
