custom of coming to this mill, following upon an act of Court astricting them thereto, which is a legal compulsitor, will never be reputed a voluntary act, but must be presumed to be in obedience to that legal compulsitor.

The Lords sustained the act and possession following thereon.

Advocates' MS. No. 171, *folio* 98.

1671. *June* 14. Anent ADJUDICATIONS.

FOUND that as it is a nullity in a comprising to be led against one that stands not infeft; so *pari ratione,* adjudication must be null if deduced upon a renunciation of one who is lawfully charged to enter heir to him who cannot be instructed ever to have been infeft.

Advocates' MS. No. 172, *folio* 98.

1671. *June* 14. COUNT and RECKONING at the instance of an apparent heir.

AN apparent heir having intented a summons of exhibition *ad deliberandum,* as also a declarator of the extinction of an apprising, led many years ago, by intromission with the mails and duties within the years of the legal, which last would resolve in a count and reckoning, it was ALLEGED,—That such an action could never be sustained at an apparent heir's instance, and that it was altogether a novelty. ANSWERED,—That whatever was the reason for sustaining exhibitions *ad deliberandum* at the apparent heir's instance, the same very reason militated here for the sustaining this action of count and reckoning, because *non constat nisi ex eventu litis num hæreditas erit damnosa necne;* and for the objecting it is a novelty, that is altogether false, seeing Durie has some practiques of it either the very same or very contingent. *See Dury,* 16*th March,* 1637, ***Home*** against ***Blackader;*** *25th February,* 1637, ***Hepburn.*** *Vide contrarium* 16*th March,* 1637, ***Edmondstone;*** *item* 11*th February,* 1635, ***Muire.***

The Lords ordained the practiques to be produced, and inclined exceedingly to sustain the summons.

Advocates' MS. No. 173, *folio* 98.

1671. *June* 14. LORD LOVAT and LORD KINTAILL *against* The LORD MACDONALD.

THIS was an action for count and reckoning upon the act of Parliament 1661, against a proper wadsetter, for repayment of the superplus of the mails and duties of the lands given in wadset, more than will perfect the annualrent of the sum whereon the wadset is made redeemable. This was a piece of land wadset near

seven score years ago, by one of my Lord Lovat's predecessors, to whom he instructs himself to be heir by progress, by production of retours lying in the process; and the right of this reversion he had assigned to my Lord Kintaill, Seaforth's eldest son; whereupon arose the first dilator, no process at Kintaill's instance, because no assignation produced.

ANSWERED,—They insisted then for my Lord Lovat. Then ALLEGED, no process at Lovat's instance, because the method prescribed by the said act of Parliament, whereon the summons is founded, was not kept, in so far the debtors thereby are ordained to offer sufficient security to the wadsetter, for payment to him of his annualrent during the not redemption, before the creditor-wadsetter be obliged to renounce his possession; or if he choose rather to retain the possession, then to restrict himself to the annualrent of his money, and be accountable to the debtor for the superplus; but *ita est* this was not used; *ergo*, he cannot count for the superplus; and as to that pretended instrument whereby, in 1661, M'Donald is required to renounce his possession of the said wadset lands, it is so defective, and so full of nullities, that no weight imaginable can be laid thereon; for *1mo*, It makes no mention of any procuratory produced from my Lord Lovat. *2do*, It is made at his dwelling-house; whereas it is offered to be proven, that at the time of the date of the instrument he was out of the country, and so it should have been done by letters of supplement. *3tio*, There is no security offered, but allenarly a bond subscribed by this Lord Lovat and his curators, (for he was then minor;) which was nowise sufficient security, which is mentioned in the act of Parliament, being in effect no more nor what he had before, seeing this Lord Lovat was heir to his predecessors, and so, *eo nomine*, was bound to him already; neither will any man in sense or reason esteem a minor's bond, with consent of his curators, (being subject to revocation and nullity on that head,) sufficient security. *4to*, The said instrument is yet null, in so far as it not only requires my Lord M'Donald to quit the possession of the wadset lands, but even to quit his real wadset right itself, expressly contrary both to mind and tenor of the said act of Parliament. *5to*, *Esto* he were liable to count for the superplus, yet in effect there would be none; seeing, by the same act of Parliament, all losses and public burdens, as quarterings, cesses, waste lands, depredations, &c. which the wadsetter-creditor can instruct he has sustained, must be allowed to him; which being allowed, there will be no remainder, because it is notour how great a sufferer the defender in the late civil commotions was. The first two of consent went to interlocutor. To the *third* it was answered, that there needed not sufficient caution to be offered, but *quævis interpellatio satisfacit actui*, since it requires only caution in the general, without condescending. *Item*, The said act 1661 being a correctory law, it should not be ampliated in these things, wherein it is exorbitant from the common law. *2do*, His own bond was very good surety, seeing he offered to infeft him in five or six score of chalders of victual he had beside. To this it was answered, This yet made no security, because it was all apprised from him. *Vide 7th Feb.* 1679. To the *fourth*; It must be imputed to the ignorance of the notary, and so must not prejudge me. To the *fifth*, M'Donald must condescend upon such losses, in the terms of the act of Parliament, as, *communibus annis*, made him that he received not the annualrent of his money, else he says nothing; but for this wadset, the same is so advantageous, that when his just losses that he can qualify are allowed him, there will be a considerable excrescence above the annualrent, as it is restricted by law to six *per cent.*

For the first two points, the same being reported, the Lords found, that the instrument was not sustainable, unless the pursuers would produce a procuratory granted to the requirer for that effect; as also, offer them to prove that the time of the said instrument he was within the country, seeing, if he had been furth thereof, he should have raised letters of supplement.

Advocates' MS. No. 174, *folio* 99.

1671. *June* 16. THOMAS CRAWFURD, merchant, *against* JAMES HALIBURTON, sometime of Innerleith.

IN this action, FOUND that the reason of interdiction could not be received by way of exception, suspension, or reply, against a bond pursued or charged upon, but only by way of action of reduction. Also found, that an interdiction *sine causæ cognitione*, whether the party interdicted be *satis rei suæ providus* yea or no, is very quarrellable, as tending to defraud the king's lieges thereby. (See *Durie, 7th July* 1625, ——— against *Shaw.*) *3tio*, Found that an interdiction was a preservative from dilapidation of the heritage only, and nowise hindered a creditor contractor after the same to use what personal execution he pleased, nor to affect his moveables by poinding, arrestment, or otherwise; in this being altogether like an inhibition, which holds fast the heritage; but though there were a thousand inhibitions before my debt, they will not debar me from personal execution, nor from paying myself by his moveables the best way I can; neither is the case of a person interdicted the same with the case of a minor granting bond to his enorme lesion, (though it was alleged to be the same,) who, upon minority and lesion, can annul the bond as to all intents and purposes, so that no execution, neither personal nor real, neither against moveables nor heritage, remains; *ergo*, the same must be in an interdiction. 1*mo*, This is to dispute against principles never so much as controverted before. Next, the reason why a minor gets a total restitution against deeds done by him in his minority inconsiderately, and to his prejudice, is because of an express law so commanding, which fails in the case of an interdiction. The bond charged upon was granted by the defender to Francis Cathcart, one of his interdictors, and was assigned by him to this pursuer, which I think lessens the faith of the *bond exceedingly;* yea, I am of the mind that such bonds should not at all be tolerated. See Craig, page 106, complaining exceedingly.

Advocates' MS. No. 175, *folio* 99.

1671. *June* 16. JOHN BROWN, Factor in Edinburgh, *against* THOMAS SOMERVELL there.

THIS is an action pursued before the Town Court. Sir David Inglis in Bordeaux, draws a bill upon Mr. Somervell of 5 or 600 franks, payable to John Brown. This bill being presented was accepted; yet being pursued for the money before the