bond *pro tanto.* As it was not *metus injustus seu illicitus;* so *ex l.* 13, *p.* 1*mo*, *D. de Injuriis, Executio juris non habet injuriam. Vide supra, No.* 337, [*Macintosh* against *Spalding*, 13*th June*, 1672.] *Petrus Peckius de jure sistendi, capite* 43. *Vide* 27*th July*, 1678. *Advocates' MS. No.* 363, *folio* 148.

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1672. *July* 10.

ONE convening the fourth son of his debtor, to pay him a sum owing to him by his father, it was ALLEGED, That no process could be sustained against him, because he was not heir, nor could he be heir. REPLIED, That he had got a patrimony from his father, and so ought to pay this debt *in quantum lucratus est.* DUPLIED, That passive title was never heard of; *2do, Esto,* he were heir of provision, the heirs of line behoved to be discussed ere any process could be got against him. TRIPLIED, He needed not discuss the three elder brothers here, because they were all bankrupts. They were to have the Lords' answer on it.

The Lords refused process with indignation.

*Advocates' MS. No.* 364, *folio* 148.

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1672. *July* 10. Anent CAUTIONRY.

IN the same action it came to be questioned, where a man is inserted in the body of a writ, and designed cautioner, and subscribes only witness; if that writ will bind him as cautioner. It is thought, albeit he has not designed to become caution, yet, in regard he should read the paper whereto he is desired to subscribe as witness, the subscription will bind upon him as cautioner. Yet this seems hard. *Vide infra, No.* 394, [*Rae* against *Glasse, June*, 1673.]

*Advocates' MS. No.* 365, *folio* 148.

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1672. *July* 11. SIR WILLIAM FLEMING *against* ZAIR.

Sir WILLIAM FLEMING, Commissary of Glasgow, pursued a declarator against one Zair, his clerk, to hear and see it found and declared, that by the instructions given to the commissaries *in anno* 1666, the profits of all summons, sentences, transumpts, registrations, confirmations of the seal and signet, and all other such benefit, shall be divided thus, two parts to the commissaries, and one third part to the clerk.

The Lords declared conform to the instructions.

Which decision has awakened the commissaries of Edinburgh to fly to and get

the like; and they imagine it will be 1000 merks a year in their ways, because at present their clerk gets more than they get all.

*Advocates' MS. No.* 366, *folio* 148.

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1672. *June* 26, and *July* 11. ELIZABETH LUNDY *against* The EXECUTORS of LUNDY of Spitle.

*June* 26, 1672.—LUNDY of Stratharly, marries his sister upon Lundy of Spitle: in the contract of marriage there is a clause, that in case the woman dies without heirs of the marriage, then, and in that case, L.2000 paid by her brother for her in name of tocher, shall return again to her brother, his heirs and assignees, or else the equal half of the moveables it shall happen him and her (viz. the two married persons) to have the time of her decease. The woman dies without children of the marriage, whereupon Stratharly, having long ago paid the tocher, assigns the contract to Elizabeth Lundie his daughter, who pursues a declarator, that the case wherein it was provided and agreed that the tocher should return, has existed, and therefore concludes repayment and repetition of the tocher.

Against which it was ALLEGED, that, by the contract, there was something more required to make the tocher return to the wife's brother beside her dying without issue, viz. that her husband outlive her; so that there are in effect two conditions annexed to the provision anent the returning of the tocher: 1*mo*, That there be no children; 2*do*, That she die before her husband. Though the first existed, the second did not; but, to the contrary, she survived her husband many years. And that this is the whole scope of the contract, the true interest of the parties, and the real meaning of these words in the last clause anent the half of the moveables: and to interpret it otherwise were neither just nor equal; for what could be more contrary to sense or reason than for a woman to brook and liferent her husband's whole estate, and yet his executors to be liable in refusion of the tocher? does not this choke that rule of natural equity, *Qui habet incommodum debet et habere commodum?* See the debate more fully in the informations.

The Lords found, that the tocher was not to return *in eum solum casum*, whereby the wife should die without issue, but also *in casum* that she died before her husband: which not existing by the parties' meaning, (as the Lords explained it,) repetition ceased, and therefore the defenders were assoilyied.

A man who considers the cause narrowly, would think it very clearly favouring the pursuit, and the allegeances on the contrary to be in comparison only *leves vanæ et inanes conjecturæ:* but *standum est judicio dominorum*, who have thought otherways. *Vide supra, No.* 321. *in fine*, [*Laird of Balnamoon against Macintosh, 9th February* 1672.] *Advocates' MS. No.* 351, *folio* 136.

1672. *July* 11.—In the action, marked *supra*, betwixt Hamilton and Lundie, at the No. 351, the pursuer having produced a letter under the said Lundie of Spitle his hand, whereby, according to the agreement contained in the contract