I heard Sir George Lockhart brisk to the King's Advocate, who was defending what the Lords had done in this case.

Advocates' MS. No. 438, *folio* 231.

1674. *January.* Captain JOHN HOME of Plendergaist *against* HOME of Linthill.

UPON a bill given in by Captain John Home of Plendergaist *against* Home of Linthill, the Lords ordained Linthill summarily to depone anent the receipt of 2000 merks from one Home lately dead, without giving any receipt or discharge of it. Which was inveighed at, as what rendered all summonses needless, where I am to prove a thing by the party's oath; for that privileged way of tabling matters was hitherto only known and practised against agents or members of the session: yet with the Emperor Antonius, *Licet non facile aliquid est mutandum de solemnibus, tam enubi æquitas poscit subveniendum est,* l. 7. D. *de In Integrum Restitutionibus.* But at this time the humours of people were so disposed to cavil, by an overboiling passion and thirst after a redress of grievances, (the story whereof, see *alibi,*) that scarce anything could escape censure.

Advocates' MS. No. 439, *folio* 231.

1674. *February.* MAYNE *against* HAMILTON of Baderston.

IN the suspension, Hamilton of Baderston *against* Mayne, one of the reasons being, that the sum charged for was arrested in his hand at the instance of a third party,—which was not offered to be proven by the messenger's copy, as it ought to be, but by the charger's oath of knowledge that the said sum was arrested in his hands by, &c.—it was contended, it was not so probable, but only *scripto;* no more than such judicial and legal instruments could be proven by witnesses: *argum. legis,* act 95, Parliament 1579, where the tenor of letters of horning, and their executions, are ordained allenarly, for the future, to be proven by writ.

Advocates' MS. No. 440. *folio* 231.

1674. *February.* The DUKE and DUCHESS of HAMILTON *against* GAWIN LOUDON.

IN an action pursued by the Duke and Duchess of Hamilton *against* Mr Gawin Loudon, as representing his father, who was one of the chamberlains of that estate, and had not made faithful count and reckoning; it was objected against the Duke's

active title, that he had no sufficient interest; producing allenarly the commissary's license to pursue, without a decreet dative; for, though he was not obliged to confirm it till he saw if it was recoverable or desperate, yet he ought at least to be decerned in executor to Duke William.

I think this inchoat title was not sufficient to sustain his interest; and the offering to produce it *cum processu* should not serve the turn. Hence a compriser, pursuing an improbation of the rights of the lands, shall infeft himself after the summons of improbation, (for improbation of the right of lands cannot be pursued but by one that is infeft, and so it must be otherwise in improbation of bonds,) it will not accresse, or convalesce, or retrotract; but that summons will be casten. Hence a man pursuing for himself, and as assignee, the summons was casten on informality; because the assignation was found to be subscribed of a date posterior to the date of the summons; for the President called this *filius ante patrem.* It was decided in a case in 1669. Yet see Dury, 20th March, 1623, Heirs-of-line of the Lord Yester *against* the Lord Buccleuch. *Vide infra, num.* 574, § 9. [June, 1677.] See Dury, 4th February, 1630, Earl of Kinghorne. See the case of an inchoat title, and an apparent heir's calling for exhibition of moveable bonds, in the pursuit at the instance of Patrick Fyffe's bairns, mentioned *alibi* in a book containing miscellaneous observes. *Vide infra,* July, 1676, Laird of Drumailzear *against* his brother, the Earl of Twedale, No. 490.

Advocates' MS. No. 441. *folio* 231.

1674. *February.* ROBERT DOUGLAS, minister of Bothwell, *against* HAMILTON of Parkhead.

MR ROBERT DOUGLAS, minister at Bothwell, charges Hamilton of Parkhead on a bond for 300 merks. Amongst the reasons of suspension this was one, that the extract of the bond produced was not probative, being only registrate in the town-court books of Renfrew, within which town or its jurisdiction he never lived; and though a decreet of registration of a bond was a decreet of consent, yet if it was given by an incompetent judge it was null. (*Vide infra,* July, 1667, No. 610.)

ANSWERED,—The suspender had renounced the *competentia et exceptio fori,* by agreeing in the clause of registration, that it should be registrate in the books of Council and Session, or any other Judge's competent within the kingdom.

REPLIED,—That still he behoved to be competent.

The Lords passed over the irregularity of the registration.*

Advocates' MS. No. 442. *folio* 231.

* But, in form, the least they can ordain is, that the principal bond be produced *cum processu;* which I have seen done.