

kept not his own house, and yet gave her no competency to live upon, &c. The Lords ordained him to be cited by a macer, and referred it to Castlehill to hear them, who agreed them together. *Advocates' MS. No. 550, § 4, folio 277.*

1677. *February 24.*

— against JOHN LAW.

JOHN LAW, goldsmith in Edinburgh, having arrested a country gentleman within Edinburgh, to find caution as law will, for the price of victual assigned to him; the Lords, upon a bill of complaint made to them, annulled the caution, because of the late act of Parliament in 1672, anent arrestments within burgh.

*Advocates' MS. No. 552, folio 278.*

1677. *February.*

REMARKS ON SUNDRY POINTS OF LAW.

I. HOME of Linthill suspended his minister of Eimouth, Mr Gilbert Innes's general letters, and offered him the worst victual, yea which grew on other lands he had, not lying within that parish. Certainly the Lords will not allow this, but ordain him to give neither the best nor worst. Some venture to give the lame to God, and what will not pay the master's farm shall pay the stipend.

II. I have heard that axiom of law, *Dispositio hominis facit cessare provisionem legis*, as in *testamentaria tutela et successio* preferred to the *legitima*, &c. called in question; for if it were not the will of the law that validated the man's disposition, it would not subsist; it would have no preference: so it is still *legis dispositio adjuvans et concomitans*, that gives it strength: and so *dispositio hominis non facit cessare dispositionem legis*, for the law could prohibit that act which it permits, and overrule it. Yea, in the case of usury, or renouncing the benefit of the acts against it, *pactio hominis non tollit legem*; nor in a husband ordaining his wife to continue tutrix to his bairns, *etiam si ad secundas convolaverit nuptias*, it will not be supported by law: then law predomines over paction, *et pactis privatorum nequit derogari juri publico. L. 39, D. de Pactis. Vide supra, numero 160, [July, 1671.]* Yet this is only a sophism, for though the law interposes, yet it is only remotely, *permittendo*; the immediate and near influencing cause is the will of the party, and so in many cases, *dispositio hominis facit cessare provisionem legis*. See for this rule, Cujace *ad tit. 30, libri 5, C. de Legitima Tutela; et legem 130 D. de Verborum Significatione, ibique Alciatus et Wissembach.*

III. The Sheriff's fiars are mainly set for this design, to regulate the prices of undelivered bolls by the tenant to their master, to make them liable in that price; yet some masters do, by act of Court, bind their tenants in payment of higher prices than the fiars, in case of failie of delivery, as 20s. more, *nomine pœnæ*. The Exchequer fialls are set for the King's vassals, who pay in their feu-duties to them as the King's Commissioners, and if it be within L.10, to the Sheriff, by the regulations

of Exchequer made in 1672, act. Their prices are usually set very easy, just as the town of Edinburgh commonly deals with their vassals. This year, 1677, the wheat paid into the Exchequer is estimated to L.5 the boll, the bear to L.4, and the oats to L.3.

IV. Before the year 1646, a suspension of a debt or decreet or registrate bond, stopped both personal and real execution till it was discussed; now it impedes not real execution, except it expressly bear it, which is not frequent. *Vide supra*, 22d February, 1671, numero 141.

V. I find, by an act of the town-council of Edinburgh, dated 23d February, 1591, all that have either given over their houses within burgh, or have been warned by chalking the doors, must flit within 14 days after the term of Whitsunday, &c. (now custom seems to extend it to 40 days;) after which they are said to be so closed within terms that the landlord is not obliged to accept of the keys, but may cause them pay the next term's maill; yet see Durie, 20th July, 1633, Brown *contra* Maxwells; and the violent profits for sitting within burghs is declared to be the double maill. See Stair's System, *Titulo*, *Of Tacks and Removings*, § .

VI. In a contract-matrimonial, the husband provides the tocher and a sum added to it to himself and wife in liferent, and to the heirs of the marriage in fee, and for his performance finds a cautioner. This cautioner being pursued, offers to fulfil to the relict: but for the heir, says he cannot, because as heir he is bound to relieve and warrant him against his cautionary for his father: and *quem de evictione tenet actio eundem agentem repellit exceptio; frustra petis quod mox es restitutus; et confusione tollitur obligatio*, being both debtor and creditor. If the provision had been made to bairns, it may be it would have made some difference. See this decided, *infra*, 23d November, 1677, *Kennoway*. *Vide supra*, February, 1674, *Dumfermling* and *Calender*, No. 445, and the cases there cited: particularly Dury, 27th January, 1630, *Turnbull*: and 22d February, 1656, *Lady Lanton contra Rollo*.

*Advocates' MS. No. 555, folio 279.*

1677. February. ——— against THE EARL OF CAITHNESS.

*Eodem tempore*.—HE who assumed the title of Earl of Caithness, as nearest contingent in blood, was, by a proclamation, inhibited to take the said style, or the lieges to give it him, on this pretence, that both the estate, honour, and dignity, were resigned in the King's hands in the last Earl's time. And though some doubt of the resigning of honours, yet Sir George Lockhart thinks a man may, in prejudice of his heirs, resign the very title, and surrender and abandon it, *ad perpetuam remanentiam*, in the King's hands, which will extinguish it and consolidate it with the fountain of honour: for our feus are *feuda conditionata*, not the *feuda gentilitia ex pacto et providentia* mentioned in the feudal law, where a man could not resign or abandon the fee without the advice and consent *proximorum agnatorum*, and if he had done it, they had *jus retractus* within such a time; see Craig, *De Jure Protimeseas*. With us a man *in liege poustie* may prejudice his heirs, and give it