

moving, the sheriff having been charged on 15 days to do his office, and refusing, letters of ejection were got forth; which at last he obeyed.

On the 1st of August, 1677, Alexander Arbuthnot obtained past at Exchequer a signature of resignation and confirmation of his base infeftment in the lands of Tullois; and Straiton of Laureston seeking, at the same time, a confirmation of the base right of the lands of Knox, granted by Colonel Henry to Margaret Straiton, his lady, and sister to the said Laureston;—it was waved, in regard double confirmations are forbidden by law, viz. the 66th Act of the Parliament in 1578; and double dispositions are declared stellionate, by the 102d Act, Parliament 1540. *Vide supra* in *February* 1677, No. 550, § 3, and in *June* last, *numero* 571. See the large informations upon all thir affairs of Knox and Colonel Hary Barclay, beside me.

Advocates' MS. No. 622, folio 296.

December 14.—Alexander Arbuthnot of Knox pursues a declarator of recognition of the lands of Knox, as donatar, against Colonel Hary Barclay and Margaret Straiton, his spouse. *Primo*, It was DENIED the lands held ward. ANSWERED,—*Imo*, Ward is presumed, unless another holding be instructed. *2do*, We produced Colonel Hary's own charter bearing ward. This allegiance was repelled.

Then they ALLEGED,—That the disposition whereupon the alienation and recognition was alleged to have been incurred, was not absolute but conditional to his wife, failyieing of children procreated betwixt them; so that the fee and property were not immediately transmitted and devolved, but suspended during the dependance of that condition; and such an alienation neither imported contempt nor recognition.

ANSWERED,—This downright choked the principles of the feudal law, by which such rights, under conditions, did not salve the forefaulture; as was evident from Craig, *Feud.* p. 344, and from Stairs, in his System, *titulo* Of Extinction of Fees, p. 375. And this allegiance was already repelled in the case of *Cranburne* and *Carnegie*. See Craigie's Collection, *verbo* Recognition, *folio* 134.

The Lords fearing that, if this recognition were declared, the donatar would sweep the relict (for Colonel Harry died during the dependance,) quite out of her jointure; they first prevailed with him to give a declaration, that this recognition should not prejudice the provision settled on her by her contract matrimonial; after which, the Lords found recognition was incurred by that disposition, though conditional.

The relict's procurators dealt likewise to have what her husband had provided her to *stante matrimonio*, secured and reserved to her; but that was refused. See the information in this cause.

Advocates' MS. No. 687, folio 312.

See the remaining parts of the report of this case, Dictionary, pages 13,160, 13,389, 6,761; *et infra*, 15, December 1680.

1677. *December* 15. DAUGHTERS of SIR THOMAS NICOLSONE and their Husbands *against* SIR JOHN NICOLSONE.

THE cause between Sir John Nicolsone and the Daughters of Sir Thomas Nicolsone of the first marriage, and Eleis of Southsyde, Scot of Malleny, &c. their Husbands, came to be decided: wherein Sir John was found liable to them

in £20,000 Scots, as heir of tailyie of Colbrandspath. See the case and decision *alibi*.
Advocates' MS. No. 688, folio 313.

1677. *December.*

ANENT EXECUTORS.

It was inquired if an oath, given by an executor upon the inventory of the testament, where he has either omitted things knowingly and fraudulently, or given them up on oath to a notorious less value, will infer perjury, seeing this would involve many in Scotland.
Advocates' MS. No. 689, folio 313.

1677. *December 15.* MR JAMES LAUDER *against* ONE of the TENANTS of BERFOOT.

MR James Lauder, as factor constituted by the Lords of Session to uplift the rents of Berfoot for the behoof of the lady's creditors, having charged one of the tenants upon a decret in absence; he suspended, ALLEGING,—By a tack, he was only liable in such a duty.

ANSWERED,—That tack was only set to him by collusion, by David Boyd, seeking to intrude himself in possession; and it being with diminution of the former rent, and he only one creditor, he could not prejudge the rest.

Glendoick repelled the reason, in respect of the answer, and found the letters orderly proceeded against the said tenants, called Storie and Bairnsfather, for the old duty.
Advocates' MS. No. 690, folio 313.

1677. *December 15.* MR THOMAS GORDON *against* JOHN STRAITON.

JOHN Straiton is pursued for a horse stolen out of the park, at the instance of Mr Thomas Gordon, the writer, as the owner.

ALLEGED,—He must be assoilyied, unless some *culpa* be qualified against him.
 ANSWERED,—He was *in culpa*, because there was a slop made in the park-dike, out at which horses might be taken away easily.

REPLIED,—*Non relevat* to make him liable; because, *Imo*, He intimated to them, after that slop was made, that their horses should thereafter be on the inputter's peril. See the title *D. Nautæ, Caupones, Stabularii*, and the lawyers there. *2do*, That slop was not made by him, but by public authority, for carrying stones to the abbey, which he might not resist. *3tio*, He did all *quod in se erat*, for he set a guard at that slop.

DUPLIED,—Intimation *non relevat*, since *res non erat integra*; and it was *intempestiva*. *2do*, The supervenient authority is nothing to the inputters. *3tio*, Offers to prove they came and took instruments there were none watching at the slop.

TRIPLIED,—All he was obliged to do, was to set men there; he could not