This being taken to interlocutor, the Lords allowed the reason to be proven in the foresaid manner condescended upon, and found it was his own oath took away the bond, (and not witnesses,) if he once acknowledged the cause of the granting thereof not to have been for borrowed money as it purported; for then *ex officio*, they ordained the writer and witnesses mentioned in the bond, to be examined before answer, anent what they heard or knew, the time of the subscribing, to have been the cause why Brown the suspender gave this 300 merks bond to Laurie the charger, and if it was for a remain of tocher. See for this case, *supra*, November, 1673, [Syme *against* Inglis,] No. 429, and the two citations from Dury there.

On the 6th of June, 1677, the Lords having advised Laurie's oath with the testimonies of the witnesses in the bond, they found Brown's reason of reduction not proven thereby, and therefore assoilyied, and found the letters on the bond orderly proceeded at Laurie's instance. *Advocates' MS. No.* 470, *folio* 243.

1677. *June* 9. ANENT PROOF OF BASTARDY.

JAMES BROWN, Advocate, had this case debated. One is ALLEGED to be a bastard; and for proving of it, a seasine of his is produced, wherein the notary designs him *filius naturalis* of such a man. They were to have the Lords' answer, if this was sufficient to prove bastardy *in re antiqua*. It may be, the notary thought the word *naturalis* good enough Latin to signify and design a lawful son, and opposed it only *filio adoptivo*, as sometimes it is done in law. I scarce think it a sufficient probation alone, though it may pass for an adminicle.

Advocates' MS. No. 567, *folio* 284.

1677. *June* 9. GUTHRIES *against* the LAIRD of GUTHRY.

IN the action, Guthries in Arbroath *contra* the Laird of Guthry, it was FOUND,

1*mo*, One that stands infeft only in an annualrent furth of lands, cannot pursue a reduction of rights of the property, as of a comprising, or wadset, or irredeemable disposition of that land.

2*do*, That an annualrenter cannot properly pursue an action for maills and duties, but only its natural action of poinding the ground, unless the annualrenter has used arrestment in the tenants' hand, and then he may pursue maills and duties, or rather to make them forthcoming. See this remarked *alibi*, in the fifth leaf of my manuscript of Miscellaneous Law Observations.

3*tio*, Though in the dispositive part there be three sundry annualrents mentioned and disponed; yet if the seasine at the clause about the act of tradition of earth and stone and a penny, bear only infeftment to have been given of one of the annualrents, through the omission and informality of the notary, they will get poinding of the ground for no more but that one annualrent expressed, till they take a new seasine for the rest.

4to, The benefit of a possessory judgment, is sometimes a good defence against maills and duties, but not against an infeftment of annualrent; though it will hinder and stop the tenants from being decerned in maills and duties, yet it will not stay the ground from being poinded. See the information of this cause beside me. See thir parties, *8th November,* 1679, [Dictionary, page 9069;] *item,* [*Boog* against *Muir,* 30*th July,* 1679.] *Vide infra,* [No. 579,] *Sir John Scot's* case, [*June,* 1677.]

Advocates' MS. No. 568, *folio* 284.

1677. *June* 13. BAILIE *against* GORDON.

ONE gets a wadset in 1643, from the Marquis of Huntly, of three chalder of feu-duties, payable to the said Marquis, (which is *feudifirma feudifirmarum,* discharged in the King's property, act in 1597,) redeemable on 4000 merks, and holden base of himself. (See this in the other MS. 15th November, 1677, page 4.) The wadset is granted to the mother in life-rent, and to her son in fee. The mother having married a second husband, and so, *jure mariti,* he having right to the life-rent, he buys also the right of the fee from her son the fiar, and gets a disposition thereof. Within two months after this, the son who was fiar, (notwithstanding the alienation he had made of it,) does fraudulently infeft his own wife in the right of that wadset, she not being *fraudis particeps.* Within a month after her right, he who had acquired the right of fee from the son, confirms it, and so makes it public, and cleds it with possession. After this, a competition arising betwixt him and the relict of the son,

She ALLEGED her right though posterior was preferable, because her husband's possession was her possession, and she could not *per rerum naturam,* possess otherwise, *vivo marito,* but *jure constituti, et fictione unitatis,* and in his right; and her right was a month anterior to his confirmation, and so she was first clad with possession. ANSWERED, her right could not be reputed clad by her husband's possession, since he had none, being merely fiar, and his mother (whose right the husband had) being liferenter. REPLIED, her husband's right of fee was clad with possession, by his mother's possession, through the reservation of the liferent to her, and consequently the wife's right (which was derived from her husband,) must be reputed as clad with her mother-in-law's possession.

Though this seemed very metaphysical, and made a *progressus in ficta possessione,* and was *fictio fictionis;* (which some reprobate; yet see Hotoman, *in Quæstionibus Illustribus,* and my summary of him;) yet the Lords inclined to have sustained it, to prefer the relict before the other anterior right.

Advocates' MS. No. 569, *folio* 284.

1677. *June* 13. ANENT INFERIOR JUDGES.

I THINK no inferior judge competent to actions of declarators, of commission, of