if it would not be a good reason for reduction of the arrestment for any farther sums than what are expressed in the copy; and whether the copy or the execution would rule one another here? I think the copy; for I put the case, the person in whose hands the arrestment was laid paid the superplus to his creditor; sure it would be very lawful for him to do it, since it was not arrested; and yet this could not be if the execution were the rule; but if they be yet in the debtor's hands unpayed, I think the Lords will make the execution the rule, unless he offer to prove it.

Advocates' MS. No. 170, *folio* 98.

1671. *June* 13 and 14. FORREST *against* CLEILLAND and OTHERS.

June 13.—This is an action for abstracted multures. ALLEGED for Cleilland, —No process against him and his tenants, because he was never thirled to the pursuer's mill. ANSWERED,—Ought to be repelled, because *in anno* 1619, (the mill then belonging to the Earl of Lauderdale,) Cleilland's lands, with the consent of the possessors and tenants, were thirled by an act of the Baron's Court. REPLIED, —Whatever act was then made, it cannot prejudge him now, in respect thereafter he got from the said Earl a feu charter of the said lands, which charter bore an express clause *cum molendinis et multuris;* by which deed he was clearly liberated, and the servitude of thirlage discharged. DUPLIED,—That *in anno* 1619, when the thirlage was constituted by an act of Court, the Earl was heritor both of the mill and of this piece land now belonging to Cleilland. Some time after he feued the mill to this pursuer's predecessor, with its haill thirlage; then he feued out that piece land now bruiked by Cleilland; will any say, that a charter given by him *cum molendinis et multuris* will take away the prior thirlage in prejudice of me, who, before that charter, had acquired the heritable right of the mill? and though the same person that constitutes the thirlage grants also this charter, viz. the Earl of Lauderdale; yet he gives it not till after he is denuded of the mill, at which time he has no power to grant it. It is out of question but an express or tacit discharge of thirlage by him who constituted the thirlage, (he being still in that same capacity,) will be sufficient; but that is not our case. However, to exeem all scruple, it is offered to be proven, that this defender has been, past memory of man, he and his predecessors, in use to come to this mill by virtue of that act of thirlage. This was sustained as relevant.

Advocates' MS. No. 169, *folio* 98.

June 14.—In the said action it was farther ALLEGED, that the act of the Baron Court being only the deed of the clerk, who needs not so much as be a common notary, could never be a sufficient constitution of his lands being thirled; seeing the assertion of a notary, if the party be not also subscribing, will not bind a man above L.100 Scots; whereas this is a matter hugely above that value. ANSWERED, —Ought to be repelled, in respect of his immemorial possession since the said act. REPLIED,—Possession can never fortify the said act; seeing whatever use and custom they have been in of coming to this mill, the same was altogether voluntary, and so cannot tie them now unless they please. DUPLIED,—Their

custom of coming to this mill, following upon an act of Court astricting them thereto, which is a legal compulsitor, will never be reputed a voluntary act, but must be presumed to be in obedience to that legal compulsitor.

The Lords sustained the act and possession following thereon.

Advocates' MS. No. 171, *folio* 98.

1671. *June* 14. Anent ADJUDICATIONS.

FOUND that as it is a nullity in a comprising to be led against one that stands not infeft; so *pari ratione,* adjudication must be null if deduced upon a renunciation of one who is lawfully charged to enter heir to him who cannot be instructed ever to have been infeft.

Advocates' MS. No. 172, *folio* 98.

1671. *June* 14. COUNT and RECKONING at the instance of an apparent heir.

AN apparent heir having intented a summons of exhibition *ad deliberandum,* as also a declarator of the extinction of an apprising, led many years ago, by intromission with the mails and duties within the years of the legal, which last would resolve in a count and reckoning, it was ALLEGED,—That such an action could never be sustained at an apparent heir's instance, and that it was altogether a novelty. ANSWERED,—That whatever was the reason for sustaining exhibitions *ad deliberandum* at the apparent heir's instance, the same very reason militated here for the sustaining this action of count and reckoning, because *non constat nisi ex eventu litis num hæreditas erit damnosa necne;* and for the objecting it is a novelty, that is altogether false, seeing Durie has some practiques of it either the very same or very contingent. *See Dury,* 16*th March,* 1637, ***Home*** against ***Blackader;*** *25th February,* 1637, ***Hepburn.*** *Vide contrarium* 16*th March,* 1637, ***Edmondstone;*** *item* 11*th February,* 1635, ***Muire.***

The Lords ordained the practiques to be produced, and inclined exceedingly to sustain the summons.

Advocates' MS. No. 173, *folio* 98.

1671. *June* 14. LORD LOVAT and LORD KINTAILL *against* The LORD MACDONALD.

THIS was an action for count and reckoning upon the act of Parliament 1661, against a proper wadsetter, for repayment of the superplus of the mails and duties of the lands given in wadset, more than will perfect the annualrent of the sum whereon the wadset is made redeemable. This was a piece of land wadset near