should slay, wound, or otherwise invade the defender during the time of the dependence of their action, should tine his cause, without any other probation save of the riot, and this whether he did it himself or others by his red or counsel; but *ita est,* this pursuer had suborned persons to beat and hurt him, who had accordingly executed the orders given them. It was ANSWERED he behoved to say his blood was shed.

The Lords found he needed not, because the act is conceived *alternativè,* if he either wound to the effusion of blood, or they invade one another in any sort whereon they could be criminally accused.

2*do,* ANSWERED, the subordination and mandate was only probable by the pursuer's oath and not by witnesses. REPLIED, though in *civilibus* a mandate was only probable *scripto vel juramento,* yet they having replied that he was art and part, and that it was done *ejus ope et consilio;* as probation by witnesses of this would be admitted in a criminal pursuit before the Justices, and would import conviction, so the same probation may be used here. *Vide supra, No.* 162, [*Lord Advocate* against *Robertsones, 9th March* 1671.]

They were to have the Lords' answer, whether his order could be proven otherwise than by his own oath. See this case fully in the informations.

Advocates' MS. No. 295, folio 123.

1672. *January* 16. MR. WILLIAM BEATON, Advocate, *against* SCOT.

IT was about this time controverted whether or not a base infeftment, clad with possession for years or terms before the rebellion of the granter, will exclude the donatar to his escheat. It seemed to many as *juris indubitati* that it would; yet the Lords demurred thereon, and ordained practiques to be adduced *hinc inde;* (because, forsooth, my Lord Stair in his book prefers the donatar very dogmatically and magisterially.) And it makes me call to mind *John Scot's* case against one *Hog,* on the 15*th of January* 1666, wherein the Lords found a base infeftment of warrandice not clad with possession save what he had of the principal lands, preferable to a posterior public infeftment in the same warrandice lands, clad with thirty or forty years possession.

Advocates' MS. No. 292, § 2. *folio* 123.

1672. *January* 16.—In the competition *supra* at *No.* 292, betwixt a base infeftment clad with possession before the denunciation, and the donatar to the said superior, granter of the infeftment, his escheat: the Lords at last found the base infeftment preferable, and that in respect of a practique following on a full debate in the time of the English.

This was well decided, in my judgment, else where a nobleman or gentleman having vassals holding of him, unconfirmed by the immediate superior, went to the horn, and his liferent is gifted, the mails and duties of the whole vassals' lands, though alienated, if they be not confirmed, should belong to the donatar. See the informations of this beside me. *Vide infra, No.* 413, [*Tenants of Bathgate* against *Crawfurd, July* 1673.] *Vide* Dury, 19*th March*

1633. *Renton cont. Blacader.* *Vide* Hadinton, *at the 9th of December* 1609, *Spotswood* and *the L. of Westforton.*

Advocates' MS. No. 297, *folio* 123.

1671 and 1672. The EARL of SUTHERLAND *against* The EARLS of ERROLL and MARSHELL.

1671. *July* 7.—THERE is a declarator raised at the instance of the Earl of Sutherland against the Earls of Erroll and Marshell, for declaring that the precedency both in Parliament, Council, and other places, belongs to him; together with an improbation of all such writs as any way may instruct their antiquity beyond his, &c.

Advocates' MS. No. 206, *folio* 103.

November 24. — The haill terms of the improbation mentioned *supra* at *No.* 206, at Sutherland's instance against Erroll and Marshell, for the precedency, being run, certification was this day granted against all patents of honour, or other writs whatsoever, granted to the said Earls, which can any ways instruct their precedency, because they were not produced; but for any other writs that could adminicle the same or collaterally speak of the said Earls, belonging to other persons, refuses certification against these. But thought the said Earls *qua* Constable and *qua* Marshell to have the place, at least will not dispute thereon, because Sutherland's summons is not against them *qua tales* but only as Earls: so that this contest was only for the Ladies their place; for the Constabulary and Marischalate being personal dignities, their Ladies take no place thereby; but the Countess of Sutherland (if he be an older Earl) will take the place of them. It was judged a new practique to admit certification against patents; which are in public custody, and that the surest and most noble of all others, *viz.* the records of Parliament.

Advocates' MS. No. 271, *folio* 115.

1672. *January* 16.—My Lord Erroll's procurators having stopped the certification granted *supra* at *No.* 271, against all patents of honour, or other writs granted immediately and directly to himself and his predecessors, Earls of Erroll, in so far as they could instruct precedency before Sutherland; and they being of new heard upon that point, it was ALLEGED for Erroll, that no certification could be admitted, because patents of honour were not the subject matter of improbations nor certifications, unless the pursuer laid claim to the defender's title of honour, whereby he and his predecessors are created or designed Earls of Erroll, which is not the case. And in an improbation the defender's and pursuer's rights and interests must be *in eodem subjecto*, which is not here; the pursuer's title of honour and the defender's being things quite different, and which may both subsist as *res mere disparatæ*. And in an improbation the pursuer and defender must both be pretenders to dominion in the thing concerning which improbation is moved; as for instance, in improbation of rights of lands the pursuer must libel he stands infeft in these lands, and the defender's rights called for must be rights of in-