of ward holdings as they stand in his majesty's person, they are a part of his property, and may be meant in that act.

Advocates' MS. No. 360, *folio* 147.

1672. *July.* JACK *against* JACK.

IN an action, Jack against Jack, a father having given a moderate bond of provision to his three younger children, the same was quarrelled upon this ground, that it was subscribed by two notaries, only before three witnesses.

The Lords found the bond null. And when the parties were content to restrict it to L.100, for which one notary and two witnesses were sufficient; the Lords refused the same, because they found it wholly null, *et quod contra legem seu formam juris fit ipso jure nullum est.*

This seems contrary to their very frequent practice, by which they ever allowed restriction to the sum of L.100, conform to that axiom of the law, *utile per inutile non vitiatur.* See Dury, 19 *December* 1629, *Elliot* against *Morton*, where the Lords resolve in all time coming to permit the parties to retrench their bonds. *Vide infra, No.* 398, [*Deans, June* 1673.] This decision agrees with the French arreists; *Mornacius in observationibus ad l.* 29 *D. de legibus, Quia salvis legis verbis ejus mentem circumvenire non licet.* See Mornacius also *ad l.* 38 *D. de pactis.* *Advocates' MS. No.* 362, *folio* 148.

1672. *July.* ESSINTULY *against* ——.

ABOUT this time, in a reduction raised by Essintuly against ——, the Lords found, that a man having granted bond, and paid a part of the sum, if the creditor thereafter assign the whole bond to a third party, who charges for the whole, and gets out caption and takes the debtor, who, though he had paid a good part of the sum to the cedent, yet through necessity, and to relieve himself out of the messenger's hands, gives a bond of corroboration for the whole, as well that which he had paid, as that which was yet resting. The Lords would not reduce the said bond of corroboration, upon this reason, that though he had corroborated the whole, yet truly there was but such a sum resting, and the remainder was paid to the cedent, as his discharges thereof confess: which they would not receive now, because, by his giving the bond he had renounced any defence or allegeance he could found upon these discharges; that he had voluntarily prejudged himself; that the force and fear he was under when he gave the bond, was legal and just, and so could never annul the bond. And this they found, notwithstanding they alleged, that a bond of corroboration was given in farther security, and not to innovate the first bond; and, therefore, whatever may be objected against the first, may also be objected against the bond of corroboration; now the discharges would have undoubtedly defalked the first

bond *pro tanto.* As it was not *metus injustus seu illicitus;* so *ex l.* 13, *p.* 1*mo*, *D. de Injuriis, Executio juris non habet injuriam. Vide supra, No.* 337, [*Macintosh* against *Spalding*, 13*th June*, 1672.] *Petrus Peckius de jure sistendi, capite* 43. *Vide* 27*th July*, 1678. *Advocates' MS. No.* 363, *folio* 148.

1672. *July* 10.

ONE convening the fourth son of his debtor, to pay him a sum owing to him by his father, it was ALLEGED, That no process could be sustained against him, because he was not heir, nor could he be heir. REPLIED, That he had got a patrimony from his father, and so ought to pay this debt *in quantum lucratus est.* DUPLIED, That passive title was never heard of; *2do, Esto,* he were heir of provision, the heirs of line behoved to be discussed ere any process could be got against him. TRIPLIED, He needed not discuss the three elder brothers here, because they were all bankrupts. They were to have the Lords' answer on it.

The Lords refused process with indignation.

Advocates' MS. No. 364, *folio* 148.

1672. *July* 10. Anent CAUTIONRY.

IN the same action it came to be questioned, where a man is inserted in the body of a writ, and designed cautioner, and subscribes only witness; if that writ will bind him as cautioner. It is thought, albeit he has not designed to become caution, yet, in regard he should read the paper whereto he is desired to subscribe as witness, the subscription will bind upon him as cautioner. Yet this seems hard. *Vide infra, No.* 394, [*Rae* against *Glasse, June*, 1673.]

Advocates' MS. No. 365, *folio* 148.

1672. *July* 11. SIR WILLIAM FLEMING *against* ZAIR.

Sir WILLIAM FLEMING, Commissary of Glasgow, pursued a declarator against one Zair, his clerk, to hear and see it found and declared, that by the instructions given to the commissaries *in anno* 1666, the profits of all summons, sentences, transumpts, registrations, confirmations of the seal and signet, and all other such benefit, shall be divided thus, two parts to the commissaries, and one third part to the clerk.

The Lords declared conform to the instructions.

Which decision has awakened the commissaries of Edinburgh to fly to and get