1677. *June.* THOMAS DALMAHOY *against* The EARL of CALENDER.

THE Earl of Calendar being made donatar to the escheat of Thomas Dalmahoy, Esquire, who married the Dutchess Dowager of Hamilton, mother to the Ladies Calendar, Southesk, Blair, Robertland; and having empowered Mr John Eleis, elder, with a factory thereanent; (See his process with Southesk, *supra*, No. 507:) Mr Dalmahoy raised a reduction of the horning and gift: 1*mo*, because his interest when denounced was only *jure mariti*, and that his interest the time of the gift was ceased by the dutchess' decease. This the Lords repelled, in regard it was offered to be proven he was *locupletior factus*, and so behoved to be liable *in quantum lucratus*.

The 2d reason was, that the denunciation was abusive, because at the time the dutchess was debtor to them in a legacy of L.500 Sterling, left them by their father. ANSWERED, that was left them for aliment, and she alimented them conform, and so fulfilled the legacy *in forma specifica*. REPLIED, then it was a compensation the time of the denunciation, and so extinguished the debt *ipso jure*, and made the denunciation null. The Lords inclined upon this to find the denunciation null. *Advocates' MS. No.* 574, § 1, *folio* 285.

1677. *June.* ANENT REGALITIES.

IT is alleged by some, that regalities have power of repledgiation in civil things, as well as in criminals. Others deny it. The towns of Dumbar and Hadington have clear clauses in their charters, exeming their burgesses from the sheriff, and empowering them in all causes to repledge from him; see them, *supra*, No. 551, § 4. Yet the regality of Kirkliston, now disponed by my Lord Winton to Hoptoun, claims the casualities of single escheats; see Hadington, 26*th February*, 1622 and *Earl of Winton*. *Advocates' MS. No.* 574, § 2, *folio* 285.

1675. EDMISTON *against* JO. RODGER.

THEY tell of a case in 1675, between one Edmiston, and one Jo. Rodger, the agent. A debtor and two cautioners having granted bond for a sum of money; the bond contained a clause of relief from the principal to the two cautioners, but no clause of relief amongst the two cautioners themselves. One of the cautioners being distressed for the whole, pays it, and takes an assignation in a blank person's name, and thereafter fills up a confident's name therein; who, pursuing the concautioner for the haill, he suspended on this reason, that he was only liable for the half, and the debt being paid by the concautioner's means, he behooved to defaulk the one half and allow it. ANSWERED, there being no clause of relief between the cautioners, the one is not bound to relieve the other. The Lords found the clause of mutual relief among the concautioners *quod inerat de jure*, and they were bound

to defaize their own parts one to another *pro rata portione*, though there was no clause, paction, or obligement tying them thereto. I think this would not hold in the civil law, and was a stretch thereof, and dissonant to its principles. In June, 1677, the same case occurred to be disputed again. *Vide February*, 1680.

Advocates' MS. No. 574, § 3, *folio* 285.

Anent Testaments and Inventories.

If a creditor give up a person as his debtor, in his testament, in such a particular sum, if a greater sum be found to be in the debtor's bond, it seems to be *legatum liberationis pro reliquo*; and which legacy will sustain in so far as amounts to the dead's part of the moveables, and no farther. See Balfour's Practicks, *titulo* 19, *Of Payment, numero* 7. See *alibi*, this remarked at large in other papers; *Vide supra, numero* 421, *November*, 1673, *Sir James Douglas* against *Hayston*. *Vide Gudelinum de jure novissimo, libro* 2, *cap.* 9, *pag.* 62.

1677. *June.*—A man with his own hand, at his marriage writes an inventory of all the goods, and inventory of his house, and subscribes it; and among other articles he sets down a mazer cup of Mævius. The writer dying, and Mævius also being dead, the executors of Mævius pursue the executors of the writer of the inventory, for delivery of that cup. *Quæritur*, 1*mo*, if this will be a sufficient constitution of the debt, viz. his declaration in that inventory, since the expression is ambiguous, and may be expounded, The cup I bought or got from Mævius; yet in strict propriety of speech, it imports the cup belonging to Mævius. It may be lent to me, or consigned and depositate in my hands *custodiæ causa*: only the placing it in the inventory of his own goods, the diuturnity of time, and the silence, do much fortify the possession, and weaken the claimer's right. Yea, even an inventory given up by a party at his death, in his testament, does not so prove but it may be questioned by creditors, as short given up, or undervalued; like our datives *ad omissa*, or *male appretiata*. *Vide, Novellam* 48, *de Jurejurando a moriente præstito super mensuram suæ substantiæ*, and Gothofred's notes there.

In the abovementioned pursuit by Mævius's executors, the inventory being questioned as holograph, and the subscription denied, the judge repelled this, without putting them to adminiculate the verity of the subscription, because it consisted in his own private knowledge that that was his hand write, which he knew very well.

This seems to have been evil determined, for he should not decide *secundum privatam scientiam*, but, *secundum allegata et probata*:—*eleganter Vinnius, ad* § *Institut. de Officio judicis. Vide immediate supra, numero* 573.

Advocates' MS. No. 574, § 4, *folio* 285.

1677. *June.* William Syme *against* Hamilton of Bardowie.

William Syme, as assignee constituted to a bond owing by Hamilton of Bardowie, pursues Bardowie's son upon the passive titles. He alleged absolvitor from the passive title, as vitious intromittor with his moveable goods and gear; because