1678. *January.* Town of Abirdene *against* some of their Burgesses.

In the case of the Town of Abirdene with some of their Burgesses, it was queried if towns had power to stent, since that seemed only to be the power of King and Parliament. Yet the Lords found they had, both in regard of their possession and use to do it, and that there were some acts about it. *Vide supra, December* 1672, No. 381, *Town of Invernesse* and *Forbes of Culloden.* See *20th November* 1678, *Wishaw* and *Lundie.*

Advocates' MS. No. 709, § 3, *folio* 316.

1678. *January.* Anent Provisions in lieu of Terce.

A woman, in her contract of marriage, accepts a jointure in satisfaction of terce and third, or any thing she could crave. She dying before her husband, *quæritur* if that generality of the clause will exclude her executors from the *communio bonorum*; for it seems only to provide *in unicum istum casum* that she survive the husband. Lawyers differ on it. This clause uses to be conceived more amply now, whereby she is made to accept the liferent provision, in satisfaction of terce, third, or all other part, either of moveables or heritage due by the law or custom, which either she could crave by her husband's predeceasing, or that her executors could crave, if she happen to decease before her husband. *Advocates' MS. No.* 709, § 4, *folio* 316.

1678. *January.* Anent Succession in Bonds.

A man takes a bond, payable to himself and his heirs, secluding his executors. *Quæritur*, if this will fall to the heir of line or heir of conquest. See Stair's System, *titulo* Succession.

Advocates' MS. No. 709, § 5, *folio* 316.

1678. *January.* Kinloch *against* Kinloch.

There is a first contract of marriage, providing a sum to the heirs or bairns of the marriage: there were procreated of that marriage a son and a daughter. The Lords found both the son and the daughter might be served heirs of provision of the marriage; which was thought strange. The parties were *Kinloch* against *Kinloch.* It was made a query to the Lords. Sir George Lockhart was of opinion that the legal way was to serve the son, or if there had been more sons, the eldest heir in the whole; and he, then, would have been liable, *actione personali*, to the rest, for their equal shares and proportions; though, it may be, it was not the meaning nor intention of the parties contractors that they should succeed all alike, or be all of them at the expense of serving heirs. Yet there

were two decisions conform to this before, *viz.* 17th *February* 1663, *Hay* against *Morison;* and 10*th July* 1677, *Carnegie and Smith* and *Mr Thomas Baird.* *Advocates' MS. No.* 709, § 6, *folio* 316.

1678. *January* 17. SIBBALD of KAIR *against* FALCONER of GLENFARQUHAR and GUTHRIES.

IN an exhibition pursued by Sibbald of Kair against Falconer of Glenfarquhar, and Guthries, of some writs; in regard the defenders Guthries were not personally apprehended on the second summons, therefore the Lords found their procurator was not obliged to take a day to produce them, to depone anent the having of the papers called for, since they could not be holden as confessed; albeit it was alleged, that they lurked and kept themselves out of the way of purpose, or for fear of caption. *Advocates' MS. No.* 710, *folio* 316.

1678. *January* 18. JAMES DEANS *against* SIR WILLIAM PURVES.

THERE was a competition between James Deans, in the Canogate, and Sir William Purves, solicitor, anent the right to a sixteenth part of a ship which belonged to Francis Aird. Sir William claimed right, as donatar to Francis Aird's single and liferent escheat, and whereon he had obtained a decreet of general declarator. James Deans his right was an assignation from Francis, and intimated; who alleged Sir William's decreet was in absence and null; because every such declarator has two conclusions: one that the party was rebel, and orderly denounced; the *second,* that the pursuer was donatar to that casualty of rebellion. Now, though this second was proven in his decreet, by production of his gift mentioned therein, yet he had produced no hornings therein, though the gift narrated three; and so the decreet was intrinsically null, for lack of probation of the first point.

ANSWERED 1*mo,*—It was but *vitium transcriptoris;* he would mend it, and abide at it; for the hornings were as truly then produced as his gift was. But, 2*do, Esto* he had no declarator, he must be preferred to James Deans, because the common author, Aird, was denounced before the making of that assignation; and so, there being a *jus quæsitum* to the fisk, he could do no act in prejudice thereof.

REPLIED,—We must first see the hornings, to object against them; for they may have nullities and informalities. Newton ordained us to see the hornings.

2*do,* REPLIED,—That James Deans his assignation and intimation being before Sir William's gift of escheat and declarator, though it be posterior to the denunciation itself, it must be preferred; as was found in Dury, 20*th November* 1623, *Hamilton.*

DUPLIED,—The assignation in that practick was not altogether voluntary, but in obedience to a caption. 2*do,* The Lords have clearly decided since this case, and preferred the donatar wherever the assignation is after the denunciation; and particularly in the case of *William Veitch* and *Peter Pallat:* where