1677. *December.*—A NAKED appriser not infeft, some think, has interest to propone improbation of a disposition of the apprised lands, whereupon infeftment has actually followed. *Vide infra,* [No. 720, 2d February, 1678,] *Cochrane of Ruchsolls* against *Cathcart.* *Advocates' MS. No.* 681, *folio* 312.

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1677. *December.*—THE town of Edinburgh using quartering upon the deficients in the excise of the ale brewed, Mr George Campbell, and some other brewers at the Yard-heads of Leith, presented a bill of suspension; alleging, by the act of Parliament, 1661, anent the excise, they have no power to quarter, but only to use such like execution as they have against them who pay their common-good, viz. imprisoning. The Lords waved to decide it, and advised the town of Edinburgh to agree. *Advocates' MS. No.* 682. *folio* 312.

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1677. *December.* The TOWN OF EDINBURGH *against* The TOWN OF ABERDENE, &c.

THE town of Edinburgh having charged, by George Blair, their factor, both the towne of Aberdene, and the fishers at Glasgow and Greenock, upon their gift from the King of marking and jadging all their barrels. Alleged against, 1*mo,* They want a decreet conform. 2*do,* It is prescribed, and in desuetude; and Edinburgh never attained possession by virtue of it. 3*tio,* The Royal Fishing Company exacts the same duties from them, and they cannot pay to both. 4*to,* for Aberdene alleged, By the 141st act, Parliament 1584, they have a right to it themselves; and it is contained in all their infeftments since. See the answers to thir, both in the information against the magistrates of Aberdene, and in the information against the fishers in Greinock, &c. *Advocates' MS. No.* 683, *folio* 312.

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1677. *December* 13.—IN an advocation, presented by James Lockhart of Cleghorne, of an action pursued before the Bailies of Edinburgh by Alexander Young, merchant there, against Patrick Vausse, keeper of the tolbooth of Edinburgh, for giving up 100 merks, consigned by the said James for getting one Vernor liberated, it came to be debated, since Vernor was incarcerated only on a warding, whether such prisoners may be liberated without a formal charge to set at liberty, since the act of sederunt dated the day of , 1675, provides, where any are incarcerated by captions, it shall not be lawful to set them at liberty without such a charge; and if there be any *ratio disparitatis* between them. See the information of it beside me. *Advocates' MS. No.* 684, *folio* 312.

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1677. *December* 13.—IN a suspension, Monteath against Jean Stitts, ALLEGED, No process; because the charger was out of the country, and no procuratory pro-

duced from her. Answered, 1*mo*, A dilator not verified; 2*do*, If needful, before extract, a mandate should be produced.—Repelled the dilator. Here it was a fine for a contumely and verbal injury; and it was debated, if *veritas convitii excusat a calumnia*, and if it was relevant to offer to prove it, since *non intererat rei publicæ* to be discovered. But this is argued fully *supra*, in July, 1673, [No. 414,] *Fork* against *Fyffe*. *Advocates' MS. No.* 685, *folio* 312.

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1677. *December* 14. JOHN DAES *against* Mr JAMES DAES, his Brother.

MR JOHN DAES having charged Mr James Daes, advocate, his brother, upon his bond of provision for 6000 merks, Mr James raised suspension and reduction on this reason, that he granted the said bond, as its narrative proved, *intuitu*, and in contemplation of a disposition their father had given him of his heritable and moveable estate, reserving his own liferent; and yet Mr John, the charger, had got the most of these moveables disponed to Mr James: and so he behoved to have retention of this bond of provision, *condictione, ob causam datorum causa non secuta*, there being a συναλλαγμα, and a mutual obligation, where the one was the *causa finalis* of the other, and he could not perform unless he had got wherewith. ANSWERED, *Condictio causa dati* was mistaken: since he was not the person who had disponed the heritable and moveable estate to Mr James, his want thereof could not compense Mr John's portion, that being *inter diversas personas*. Yet the Lords found Mr John Daes, the charger, could not have both the sums contained in the bond, and also the moveables; but if he take himself to the bond, the disposition of the moveables must be imputed in part of the bond, in regard the bond is given in satisfaction of his portion natural.

Then ALLEGED for the charger,—That none of the moveables he had got could be ascribed to deduce off any part of his bond; because it was offered to be proven, that they were none of those moveables disponed to Mr James, which was a part of the onerous cause of the granting the bond of provision charged on; but were a part of the father's reserved liferent, and of the moveables he had acquired since June 1669, which, by a contract passed betwixt the father and Mr James, he permitted his father to dispose upon at his pleasure; and so might give them to his second son, Mr John, as well as to a stranger. This was sustained as relevant.

Then ALLEGED for Mr James, the suspender,—That even thir moveables behoved to be affectable for the father's debt, notwithstanding of his gratuitous disposition thereof to his son, after the contracting these debts. ANSWERED, He could not be heard; because, by an agreement betwixt his father and him, he had undertaken all the debts. REPLIED, It was only conform to an inventory; and he had been necessitated to pay debts not contained therein. DUPLIED, By a writ under his hand, he had undertaken to relieve his father of all debts. This duply, on the 13th of February, 1678, was found relevant; and, before answer to the rest, we were ordained to produce the haill writs founded on. See the informations and bills in this cause beside me. *Advocates' MS. No.* 686, *folio* 312.

[See the subsequent part of the Report of this Case, Dictionary, p. 14848.]