

ALLEGED,—*Imo*, *Absolvitor* from the penalty, because there is no day expressed in the bond at which he was liable to sist him; and therefore he was not obliged to sist him till they required it, which they never yet did.

*Vide infra*, No. 409, [3d July, 1673, *Seaton* against *Forbes* ;] and 639, [1st January, 1678, *Clelland* against *Lockhart*.]

REPLIED,—They offered to prove by the defender's oath he engaged to present him betwixt and such a day, and that it was so agreed upon, though it be omitted in the bond. This was FOUND RELEVANT.

That *2do*, ALLEGED,—He could not be bound to sist him at that day, because he offers him to prove he was then lying bedfast of a very heavy sickness, which behoved to purge his failie. Sir George Lockhart remembered the same was found relevant to himself, in an action some few days before, *viz.* on the 30th of June, 1670, (it is No. 47, *supra*.) seeing the same was *casus fortuitus*: yet he contended that the defender had yet incurred the penalty, in so far as he was obliged (not indeed to sist him when he was lying sick and unable,) but *primo quoque tempore*, so soon as he was able to come abroad and travel; which they did not, and therefore must be liable. REPLIED,—That they needed not offer him till they were required. Which was REPELLED; since here *dies interpellat pro homine*, and therefore they found it was the defender's duty to have offered him as soon as he was in a condition to come abroad.

Then they ALLEGED,—They offered them to prove he has ever since lain sick and unable to come abroad. Which was FOUND RELEVANT.

*Act.* Lockhart.      *Alt.* Cheap.

*Advocates' MS. No. 58, folio 79.*

1670. July 2. SIR ALEXANDER CUNYGHAME of Camskeith *against* The TOWN of HADINTOUN.

THIS was a charge for delivery to him of a cup, or of L.15 Sterling as the price thereof, which the said town was decerned by the commissaries to make payment of to him as he who had won the same at their horse race. The reason of suspension was, that this being about a horse race it was noway a consistorial matter, and so the commissaries were not judges competent to the same; but *esto* they had been judges, they committed manifest iniquity, in so far as they repelled an unanswerable defence in law, *viz.* that Camskeith could never be heard to seek the cup, because they offered them to prove that, being weighed at the louping on and at the leaping off, he was lighter when he leapt off than when he began, and so can never plead the cup; and this, though the same was proven by the judges sworn and appointed for weighing them.

ANSWERED,---This is *jus tertii* to the town, and noways competent to them but only to the second rider, who compears not; *item*, denies there were any such persons sworn to weigh them; as also to prove the custom in that place is that they do not weigh them at their leaping off, which special custom must derogate to

the general custom of weighing them elsewhere, *quia specialia derogant generalibus*.

This custom was found relevant.

*Act.* Charger, Cunyghame.

*Alt.* Sinclair.

*Advocates' MS. No. 59, folio 79.*

1670. *July 5.* CALDERWOOD *against* HANDIESYDE and SHAW.

THIS is a reduction of a disposition, *1mo*, Because granted on death-bed. *2do*, On the act of Parliament 1661, preferring the creditors of the defunct to the creditors of the apparent heir. *3tio*, On the act of Parliament 1621, anent dispositions not made for onerous causes.

To this last, it was ANSWERED,—That the disposition itself bore that it was made for onerous causes.

REPLIED,—That he behoved to prove the onerous causes for which it was granted otherways than by the disposition itself.

DUPLIED,—If the disposition had been *inter conjunctas personas*, then he confesses he ought to have instructed the onerous causes, albeit the disposition had borne the same: but being among strangers, he needed not; especially considering the defender is willing to give his oath upon the onerous equivalent causes thereof.

The Lords REPELLED the reason and reply, in respect of the answer and duply.

Then ALLEGED,—That the disposition bore only in general, that it was granted for causes onerous, without condescending on the special causes thereof; which was not relevant.

REPLIED,—It were a hard thing to reduce all dispositions bearing only, in general, causes onerous.

The Lords REPELLED the allegiance, in respect of the reply.

*Act.* Chalmers.

*Alt.* Lermont and Sinclair.

*Advocates' MS. No. 60, folio 79.*

1670. *July 5.* The PROVOST and BAILIES of RENFREW *against* PORTERFIELD of that Ilk.

THIS is a reduction by this town, of a decret arbitral, proceeding upon a submission entered into by the Provost then, (in name of the town,) *in anno 1632*, with this defender, anent some lands belonging to the said town, in property or as common good. The reason was, that the said town, and far less the provost by himself, had no power to enter into a submission anent their property given them by his Majesty's predecessors, with this express condition, that it should not be leasum to them to annalyie the same: but their submitting is a sort of aliena-