attend always himself. *2do*, They might be near by, or at the back of the dike.

John Straiton seems to say much for his own liberation. See Dury, *28th November* 1626, *a Stabler* against *Mowat*, and Bartolus and Mascardus, there cited. See *16th July* 1679, *Binny* and *De Veaux*.

The Lords, upon a report, inclined to find John Straiton not liable, in respect of his *placeat*, unless they would qualify *dolus* or *culpa* on his part. And that thir denunciations are legal, see *L. ultimam in principio, D. nautæ, caupones, stabularii.* See Nicolaus Mozzius *de Contractibus, tit. Societas, p.* 554; Masuerii *Practica Forensis, titulo De Probationibus, p.* 137, *in calce.* See Mr Alexander Birnie's case. *Advocates' MS. No.* 691, *folio* 313.

1677. *December* 15. DOCTOR BONNER *against* SIR PATRICK THREIPLAND.

DOCTOR Bonner pursues Sir Patrick Threipland, late provost of St Johnston, *pro salario*, as having attended him, when he or some of his family were sick. ALLEGED,—He denied the order or employment. ANSWERED,—He produced a letter, written by Sir Patrick to him, desiring him to come, &c. REPLIED,—That will serve for that sickness, but will not be a universal constitution of him to be his physician in subsequent sicknesses; to which he came officiously uncalled, and only to make a visit, and dined.

The Lords sustained the first employment sufficient, unless countermanded; and modified ten dollars for every visit, it being four miles distance.

Advocates' MS. No. 692, *folio* 313.

1677. *December.* ANENT ADJUDICATION.

WHERE one obtains a decreet against his debtor's heirs, as lawfully charged to enter heir in general, and they do not compear nor renounce to be heir; before one can adjudge on the new Act of Parliament, 1672, it will be safest to raise a special charge to enter heir, and execute it, before they raise the summons of adjudication, though that Act of Parliament mentions it not. Likeas, though the said Act mentions not the calling of the superiors, in thir summonses of adjudications, yet it will not be amiss to call them, as is done in the adjudications upon the apparent heir's renunciation. *Advocates' MS. No.* 693, *folio* 313.

1677. *December* 18. KINROSSE *against* CLEILLAND, Merchant.

IN the action, Kinrosse against James Cleilland, merchant, one comes to Cleilland to take off clothes and other ware: he tells he must have a cautioner: he brings one, who declares, if what was taken off was within 200 merks, he was content to engage to see the merchant paid; if otherwise, then he would not

engage: there is more taken off than 200 merks; the cautioner is pursued. He ALLEGES *absolvitor;* because he had trusted him far above 200 merks; and his being cautioner for him was only conditional; and, the condition not observed, he was altogether free. ANSWERED,—*Utile per inutile non vitiatur;* he was not craving him to be liable *quoad excessum,* but only *ad concurrentem quantitatem.* REPLIED,—*Stipulatio* was *individua;* and, not being then accepted, it was *in totum inutilis*: § 5, *Institut. de inutilibus Stipulationibus.* DUPLIED,—Vinnius there confesses that was but a subtle nicety, and contrary to *Lex* 83, § 3, *D. de Obligationibus.*

The Lords found *(referente* D. Pitmedden,) the cautioner was obliged for 200 merks, and presumed the merchant's acceptation of it at that time by his present declaration of his mind now, (because of the exuberance of faith *in re mercatoria).* Yet see *Lex 52 D. Locati,* cited by Vinnius, *ubi supra,* who distinguishes *inter contractus onerosos et lucrativos:* but I see not the reason of it.

Advocates' MS. No. 694, *folio* 313.

1677. *December* 20. JAMES BAYNE *against* HALL.

JAMES Bayne, the wright, having undertaken the rebuilding of one of those burnt tenements near the Netherboll, upon this condition, That he should possess it aye and while he were reimbursed; he summarily pursues the relict, called Hall, to give him the keys, though she stood infeft in the ground of the tenement, *viz.* before it was burnt.

The Lords found she was not bound to remove summarily; but behoved to be warned, though the superficies was extinct. See this case more fully deduced in another law manuscript. *Advocates' MS. No.* 695, *folio* 313.

1677. *December* 20. ROBERT BRUCE *against* ANNA DOUGLAS, Relict of Sibbald of Kair.

IN the action pursued by Robert Bruce against Anna Douglas, relict of Sibbald of Kair, where he pursues, as executor-dative *ad omissa,* her as executor-principal, as intromitting with the goods omitted by her and confirmed by him: she cannot object against the grounds of the debt, but must do it by way of reduction of the decreet-dative, unless the executor be confirmed *qua* creditor; and then they have interest to object, why their super-intromission cannot be questioned, unless, you will say, they are more than paid. Yet they are vitious intromitters, even as to that superplus, for they want a title; since they should have eiked it to the principal testament, and not have suffered another to have taken a dative *ad omissa.*

In this cause there was occasion to propone, on the Act of Parliament in 1670, that the bond was prescribed *quoad modum probandi,* being holograph; *item,* on the axiom *quod debitor non præsumitur donare.* See the informations.

Advocates' MS. No. 696, *folio* 313.