him, and therefore begged leave to fetch them, and paroled he should presently return. The macer trusting him simply, Rutherford makes his escape; the rumour whereof running up and down the town, Towie Barclay, who was lately but released from his confinement at Glasgow, comes in to the Lords in the Inner House, and proffered to find him out and fetch him again within an hour; which accordingly he did with a great deal of zeal, expressing that he could not abide cheatry by any thing in the world. Such persons know one another's lurking places so well.

Advocates' MS. No. 224, folio 105.

1671. *July.* Anent the sale of the BASS.

IN Andrew Ramsay's business about the sale of the Bass to his Majesty, the King's Advocate was induced to attest the disposition made by the Provost to his Majesty of that Isle, to be a sufficient security, and that the Provost had a valid and good right thereto under his hand; though he alleged it was a thing no King's Advocate ever before him had been in use to do, yet he would say nothing verbally save what he would also give under his hand.

Advocates' MS. No. 226, folio 105.

1671. *July* 27. LADY FINGASK *against* Her CHILDREN and their TUTORS.

IN the Lady Fingask her action against her children and their tutors, she craving the annualrent of the 3000 merks left her by way of additional jointure in her husband's testament:

It was ALLEGED,—The heir behoved to be assoilyied therefrom, because being a deed *in lecto*, and so could not prejudge him.

To this we ANSWERED,—That albeit it was done on deathbed, yet the heir must be liable therefore, because it depends upon an act *inter vivos*, viz. her contract of marriage, by which, acknowledging the provision he had put her in to be mean, he reserves to himself a power at any time in his lifetime, *etiam in ipso articulo mortis*, to burden and affect his heir with what farther provision and additional jointure he shall judge fit; so that what he has done in his testament is only in prosecution and the exercise of this power.

To this it was REPLIED,—That that provision and reservation could never salve it, because it was contrary to a fundamental law, with which none can dispense.

We were to have the Lords' answer on this.

They altogether declined to tell their sentiment thereon: but found if we would still insist to burden the heir with the 3000 merks contraverted, because of the reservation made *inter vivos*, they would hear us in their own presence press that point from reasons *in jure*; but if the lady would insist for it as a legacy to affect the free gear, then they would ordain her to be answered *secundum vires*

inventarii, and to come in with the other legacies *pro rata*. *Vide supra*, *No.* 7, [*Mosman* against *Bells*, *February* 1670,] *and No.* 160, [*March* 1671.]

Sir George Lockhart was of opinion that a man's own private deed was not enough to warrant such dispositions on deathbed. Yet thought if a man had his lands given him by his Majesty's charter, or if he caused insert in his charter any such power, that the same would sustain *quoad* the lands contained in that charter; (which power the Earl of Teviot had.) *De quo multus dubito.* The tutors offered her assignations to bonds for her liferent use; see this repelled *13th February*, 1629, *Cochrane and Dauling.*

Advocates' MS. No. 227, *folio* 105.

1671. *July.*

Vide infra, *No.* 307, some actions and decisions that were in this month of July.

Advocates' MS. folio 105.

1671. *July.* Anent Fidejussion.

About this time a bond granted by a principal and his cautioner was quarrelled as null *quoad* the cautioner, because he had signed it six days before the principal; and it was alleged that fidejussion being an accession and sequel of the principal obligation, (without which it cannot subsist,) it must follow the same and not precede it.

The Lords found whatever subtility was in the Roman law thereanent, yet that the same could never be respected in our cautioners; who differed exceedingly from theirs, and were in effect *correi debendi*, co-principals, bound conjunctly and severally for the debt, and so it was no matter whether they preceded or followed. But the debate ran on a gross ignorance of the civil law; for by it a cautioner may either precede or follow the principal obligation; *L.* 4. *and* 6. *D. de Fidejussoribus; par.* 3. *Instit. eodem; L.* 50. *D. de Peculio; L.* 35. *D. de Judiciis.* And as for the objection that it is a sequel, the same has no weight, because the lawyers make use of a fiction here, by which the accessorian obligation, though prior in time, yet *juris intellectu* is held posterior to the principal obligation; just like a substitution, which will be maintained by reason of this fiction though it precedes the institution of the heir; *l.* 2. *p.* 5. *et* 6. *D. de vulgari et pupillari;* and like to a servitude which may be imposed and constituted on a house not yet built; *L.* 23. *p. ult. D. de servit. urbanorum.* See *annotata* upon the act of Parliament in 1670, about annexing Orkney and Zetland to the crown.

Advocates' MS. No. 228, *folio* 105.