for warrandice; because *nondum constat* whether he will evict or not, or how much, whether it will be in whole or in part; and till the *quantum* be known, there can be no warrandice decerned, because that must be proportionate to the eviction.

To the next, anent the obtaining his son's consent; that is *factum speciale et quidem alienum*, and in the condition he is now stated with his son, altogether unprestable by him; so that in law *non tam præcise tenetur* for performance; but all that can be sought of him is *damnum et interesse*, sustained by them through his not obtaining his son's ratification, which how soon as they liquidate it, he is content to pay.

This was found relevant. And because my Lord Craigie inclined to sustain this action, at least *pro declaratoria juris*, in case Mr. Dick prevailed against Murdoch in his reduction, it was urged, that such a sentence being general would be altogether useless and insignificant; and that warrandice upon eviction being *actus legitimus*, it neither admitted *diem* nor *conditionem*. And caution being craved of Sir Andrew, it was judged by some very unreasonable till the distress were manifest.

*Advocates' MS. No.* 207, *folio* 103.

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1671. *July* 8. The COMMISSARIES of Edinburgh *against* The SHERIFF and his DEPUTES.

THE commissaries of Edinburgh, and the sheriff and his deputes falling in contest about that seat in the north side of the hall, each of them laying claim thereto as their own; and the matter being brought before the Lords by a bill given in by the commissaries; the Lords found, that before the building of the Parliament house, they had different seats, and that they so continued till both the offices came to be in person of one, viz. of Claud Hamilton, in the beginning of the English, who having done with the one Court, sat still and keeped the other; and that sinsyne the sheriff deputes have used that seat through tolerance from the commissaries; and therefore find they may either take their own way for getting a new seat; or if they please they may sit down and hold their court at twelve o'clock when the commissaries are up. If there had been an active sheriff, (he being both far more honourable and far more ancient than the commissariot,) it may be thought he would not have lost the interlocutor.

*Advocates' MS. No.* 208, *folio* 103.

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1671. *July* 8. Anent GIFTS of ESCHEAT.

A LORD of regality having gifted the escheat of one who lived within the regality, and the donatar seeking general declarator; it was ALLEGED,—The gift is null; because the person was denounced and registrate at the horn before the erection of the regality; and so that escheat belongs to the king, and not to the

Lord of the regality; unless he can show where the erection gives him a special right, not only to escheats that should fall thereafter, but to all bygone escheats not yet gifted by the King's Majesty. ANSWERED,—This escheat must fall under his erection, though general; unless they could say gifted before.

Then ALLEGED,—The denunciation was null, because not used at the head burgh of the regality. ANSWERED,—He could not do that, because at that time there was no regality.

Craigie inclined to find he had no right to bygone escheats, except it were expressed in his erection.

*Advocates' MS. No.* 211, *folio* 103.

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1671. *July* 8. Anent PASSIVE TITLES.

ONE being pursued *super titulis passivis* to pay a debt owing by his father, he alleged absolvitor from the titles as heir, successor *tit. lucrativo*, lawfully charged to enter heir, or gestion *pro hærede*, and such like; because he offers him to prove he had an elder brother in life who would only be heir, *et adhuc vivere præsumitur, nisi mors allegetur*. ANSWERED,—They offered to prove he was killed at Chattam.

This was found relevant; and the Lord Craigie declared he needed not adduce witnesses thereon, but that *testimonia* might suffice in this case.

Then craved absolvitor from that vitious intrommitter, because offered to prove there was an executor confirmed; as also absolvitor from that of executor, because they condescended upon another who was executor.

This was found relevant also.

*Advocates' MS. No.* 212, *folio* 103.

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1671. *July* 5, 8, and 11. MAXWELL of Nether Pollock, *against* KIRKCONNELL MAXWELL.

*July* 5.—KIRKCONNELL MAXWELL being pursued by Maxwell of Nether Pollock upon the passive titles, for payment of a debt owing by his father, and specially on the title of gestion as heir, in so far as he intromitted with the mails and duties of his father's lands; ALLEGED,—That intromission can never infer the passive title of behaviour, because he can ascribe it to a very specious title, viz. to a comprising led against his father, whereof he had acquired the right, and in virtue whereof he intromitted. *Vide infra, June* 1677, *No.* 575, [*Kincaid* against *Gordon, June* 1677.] REPLIED,—This comprising being come in the person of the apparent heir, whether it was led by a conjunct person or no, it must be presumed to have been *in fraudem*, and so will never save from a passive title. DUPLIED,—All that can be subsumed on that act of Parl. 1661, is, that it shall