

1676. *February.* LORD ROSSE of Auchlossan, and the DUKE of MONMOUTH or BUCCLEUCH, *against* the EARL of TWEDDALE.

BESIDES thir decisions marked, there was in this Winter Session two famous actions.

One, a declarator at my Lord Rosse's instance, as donatar to Captain Rosse's *ultimus hæres*, in which Rosse of Auchlossan compeared, and offered to prove his contingency of blood to the said umquhile captain; and probation being led, a very pretty debate arose from the civil law, if *fama* of the country and designations *per dulcissimam appellationem* of a cousin, either in discourse or in writs, were probative of consanguinity; wherein the advocate compared Rosse's fortune to Nilus' head; we see the streams, but know not the fountain.

The other was by the Duke of Monmouth or Buccleuch against the Earl of Tweddale, as executor to the last Countess of Buccleuch, for relieving the heir of debts, and reducing a transaction between them, because done in the duchess her minority, to her lesion; and consisting of many other points. *Vide infra*, No. 545, (thir same parties, February 14, 1677.)

*Advocates' MS. folio 244, margin.*

To shut up this Winter Session 1675, and January and February 1676 with a remark should have been set down in the beginning of it, because it happened then, viz. Captain Martin's escape furth of the tolbooth of Edinburgh, where he was imprisoned by command of the Lords of Session, till the event of a plea depending against him, upwards of L.5000 Sterling value of goods he had, in a manner by piracy, taken out of a ship he pretended to be a lawful prize. One night he made his escape in women's apparel, and Patrick Vans, the keeper of the tolbooth, upon a petition given in to the Lords of Session, got himself assoilyied of all negligence upon his part, that so the subsidiary action might not recur against him, after the debt for which he was imprisoned were constituted against him; which would have been very difficult, he being escaped, and they having had many things which required clearing by his oath; which absolvitor proceeded also on this second ground of law, that his escape was merely *casus fortuitus, qui nulla humana prudentia prævideri poterat*, and so could not be attributed to omission in point of duty; and yet it was cried out upon, as most unjust, both as to matter and form, and that it would not hinder but he might be convened by the creditors for Martin's debt, they not being heard, and so *res inter alias acta* could not prejudice them. *Vide supra*, November, 1672, No. 374.

*Advocates' MS. No. 473, folio 244.*