to defaize their own parts one to another *pro rata portione,* though there was no clause, paction, or obligement tying them thereto. I think this would not hold in the civil law, and was a stretch thereof, and dissonant to its principles. In June, 1677, the same case occurred to be disputed again. *Vide February,* 1680.

Advocates' MS. No. 574, § 3, *folio* 285.

ANENT TESTAMENTS AND INVENTORIES.

IF a creditor give up a person as his debtor, in his testament, in such a particular sum, if a greater sum be found to be in the debtor's bond, it seems to be *legatum liberationis pro reliquo;* and which legacy will sustain in so far as amounts to the dead's part of the moveables, and no farther. See Balfour's Practicks, *titulo* 19, *Of Payment, numero* 7. See *alibi,* this remarked at large in other papers; *Vide supra, numero* 421, *November,* 1673, *Sir James Douglas* against *Hayston. Vide Gudelinum de jure novissimo, libro* 2, *cap.* 9, *pag.* 62.

1677. *June.*—A man with his own hand, at his marriage writes an inventory of all the goods, and inventory of his house, and subscribes it; and among other articles he sets down a mazer cup of Mævius. The writer dying, and Mævius also being dead, the executors of Mævius pursue the executors of the writer of the inventory, for delivery of that cup. *Quæritur,* 1*mo,* if this will be a sufficient constitution of the debt, viz. his declaration in that inventory, since the expression is ambiguous, and may be expounded, The cup I bought or got from Mævius; yet in strict propriety of speech, it imports the cup belonging to Mævius. It may be lent to me, or consigned and depositate in my hands *custodiæ causa:* only the placing it in the inventory of his own goods, the diuturnity of time, and the silence, do much fortify the possession, and weaken the claimer's right. Yea, even an inventory given up by a party at his death, in his testament, does not so prove but it may be questioned by creditors, as short given up, or undervalued; like our datives *ad omissa,* or *male appretiata. Vide, Novellam* 48, *de Jurejurando a moriente præstito super mensuram suæ substantiæ,* and Gothofred's notes there.

In the abovementioned pursuit by Mævius's executors, the inventory being questioned as holograph, and the subscription denied, the judge repelled this, without putting them to adminiculate the verity of the subscription, because it consisted in his own private knowledge that that was his hand write, which he knew very well.

This seems to have been evil determined, for he should not decide *secundum privatam scientiam,* but, *secundum allegata et probata:—eleganter Vinnius, ad* § *Institut. de Officio judicis. Vide immediate supra, numero* 573.

Advocates' MS. No. 574, § 4, *folio* 285.

1677. *June.* WILLIAM SYME *against* HAMILTON of Bardowie.

WILLIAM SYME, as assignee constituted to a bond owing by Hamilton of Bardowie, pursues Bardowie's son upon the passive titles. He alleged absolvitor from the passive title, as vitious intromittor with his moveable goods and gear; because

he offers him to prove there is an executor confirmed before the intention of this cause. 2*do,* Absolvitor from the passive title, as intromittor with the maills and duties of his father's lands; because offers to prove his father was denuded of the fee of these lands in his favour.

Thir defences were found relevant to purge thir odious titles. But as to the alternative, *successor titulo lucrativo post contractum debitum,* it would not do against it. *Vide infra,* No. 575, [*June,* 1677, *Kincaid* against *Gordon.*]

Advocates' MS. No. 574, § 5, *folio* 285.

BOSWELL *against* BOSWELL.

IN a pursuit *in anno* 1662, Boswell in Kinghorn, *contra* Boswell, (whereof I have seen the decreet,) it was ALLEGED for the defender, No process against him as successor *titulo lucrativo post contractum debitum,* because he offered him to prove, though he was apparent and nearest heir, yet the disposition was not merely gratuitous and destitute of all onerous cause; but he had these lands disponed to him for sums of money he either had paid, or was obliged to pay, near the half of the worth of the lands, if not more: and so it is to be called an onerous cause more than a lucrative, since the onerous cause predomines, *et unumquodque denominatur a majore et famosiore parte:* it is more onerous than lucrative. ANSWERED, to make it relevant they ought to say not only onerous but adequate, else it is still lucrative.—And so the Lords find to this effect, to make up what is wanting of the price. And so they ordained Sir A. Seaton, of Pitmedden, in his plea with the daughters of Blair, to allege an adequate full price, as ordinarly then given in the country. *Vide supra,* No. 538, *in margine,* [28*th January,* 1677.] See this marked beside me *alibi,* in some small alphabetical practiques since the King's restoration, *voce successor lucrative.*

Now the Lords liberate from this passive title, if he have paid 9 parts of 12, of the price. See 29*th November,* 1678, *Hagins* against *Maxwell.*

Advocates' MS. No. 574, § 6, *folio* 286.

1677. *June.* ANENT VITIOUS INTROMISSION.

I. IF a stranger shall meddle and intromit with the moveable heirship, it will bind no passive title on him, as the intromission with the moveable goods would do; because heirship is of the nature of heritage, in which no passive titles quadrate against any but those who are *alioqui successuri.* But the stranger's intromission will bind him to simple restitution, and infer vitious intromission, but no passive title. *Advocates' MS. No.* 574, § 7, *folio* 286.

II. One is convened as vitious intromitter with the goods and gear of such a man, and it is libelled, that that man vitiously intromitted with the goods and gear of another person, whom they instruct to have been their debtor by bond or decreet.