

in £20,000 Scots, as heir of tailyie of Colbrandspath. See the case and decision *alibi*.  
*Advocates' MS. No. 688, folio 313.*

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1677. *December.*

ANENT EXECUTORS.

It was inquired if an oath, given by an executor upon the inventory of the testament, where he has either omitted things knowingly and fraudulently, or given them up on oath to a notorious less value, will infer perjury, seeing this would involve many in Scotland.  
*Advocates' MS. No. 689, folio 313.*

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1677. *December 15.* MR JAMES LAUDER *against* ONE of the TENANTS of BERFOOT.

MR James Lauder, as factor constituted by the Lords of Session to uplift the rents of Berfoot for the behoof of the lady's creditors, having charged one of the tenants upon a decret in absence; he suspended, ALLEGING,—By a tack, he was only liable in such a duty.

ANSWERED,—That tack was only set to him by collusion, by David Boyd, seeking to intrude himself in possession; and it being with diminution of the former rent, and he only one creditor, he could not prejudge the rest.

Glendoick repelled the reason, in respect of the answer, and found the letters orderly proceeded against the said tenants, called Storie and Bairnsfather, for the old duty.  
*Advocates' MS. No. 690, folio 313.*

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1677. *December 15.* MR THOMAS GORDON *against* JOHN STRAITON.

JOHN Straiton is pursued for a horse stolen out of the park, at the instance of Mr Thomas Gordon, the writer, as the owner.

ALLEGED,—He must be assoilyied, unless some *culpa* be qualified against him.  
 ANSWERED,—He was *in culpa*, because there was a slop made in the park-dike, out at which horses might be taken away easily.

REPLIED,—*Non relevat* to make him liable; because, *Imo*, He intimated to them, after that slop was made, that their horses should thereafter be on the inputter's peril. See the title *D. Nautæ, Caupones, Stabularii*, and the lawyers there. *2do*, That slop was not made by him, but by public authority, for carrying stones to the abbey, which he might not resist. *3tio*, He did all *quod in se erat*, for he set a guard at that slop.

DUPLIED,—Intimation *non relevat*, since *res non erat integra*; and it was *intempestiva*. *2do*, The supervenient authority is nothing to the inputters. *3tio*, Offers to prove they came and took instruments there were none watching at the slop.

TRIPLIED,—All he was obliged to do, was to set men there; he could not

attend always himself. *Qdo*, 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, cauponæ, 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 decret 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