

1677. *December 20.* MR ALEXANDER MORTIMER *against* ISOBEL GLENDONING.

MR ALEXANDER Mortimer, late minister at Kirkcubright, pursuing Isobel Glendonning: she defended, on a decret of exoneration, finding the inventory of the testament exhausted, to which the pursuer himself was called. He REPLIED on super-intromission. DUPLIED,—*Non competit hoc loco*: let him take a dative, and then he shall get an answer.

Yet it seems, where fraudulent super-intromission is offered to be proven against an executor, and by their own oath, it may, in such a case, be receivable without a dative; but in other cases they ought to take a dative.

*Advocates' MS. No. 697, folio 313.*

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1677. *December 20.* The VISCOUNT of OXENFUIRD *against* MR JOHN COCKBURNE.

IN the pursuit, at the Viscount of Oxenfuird's instance, against Mr John Cockburne, he convenes him as he who was either as tutor, pro-tutor, factor, negotiator, governor, or who had the trust of his monies, in his minority, and while he was travelling abroad; that he may make count, reckoning, and payment to him for what monies were remitted to him by his friends, laying aside once what might handsomely maintain him. And he founded on the trust contained in the *actiones excercitoria institoria*; and in the edict, *nautæ, caupones, &c.*; and that young men be not not tempted to spend prodigally, which is the *ratio senatus-consulti Macedoniani*.

ALLEGED,—There was no title or jot in law on which he could be overtaken, he having only the trust of my Lord's person and breeding.

The Lords found Mr John Cockburne liable to count for all the bills remitted to his Lordship while abroad, and actually intromitted with by him; as also with what rents he lifted at home: reserving to themselves to consider, at the conclusion of the cause, how much his being governor should operate.

Some of the Lords were of opinion to have made him liable *simpliciter*; but the plurality qualified it, so as to render him only countable for his actual intromissions. However, the decision was in a new and extraordinary case; and it was not imaginable that, in their travels through France, Italy, Germany, and other places, Mr John, as my Lord's governor, either had kept an exact count-book, how he disbursed my Lord's money, or took any receipts of what he paid at Innes's, [Inns,] or other places.

*Advocates' MS. No. 698, folio 314.*

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1678. *January 1.* HARPERFIELD *against* BALLANTYNE of CORHOUSE.

IN an action at the instance of Harperfield against Ballantyne of Corhouse, the Lords found a decret of adjudication may be pronounced summarily, without enrolling. And the offering to prove the debts, for which the adjudication