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

MR ALEXANDER Mortimer, late minister at Kirkcubright, pursuing Isobel Glendoning: she defended, on a decreet of exoneration, finding the inventory of the testament exhausted, to which the pursuer himself was called. He REPLED 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.

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 excercitoriæ institoriæ;* 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.

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

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

is led, are paid, ought not to stop the course of the diligence, unless it be instantly verified, although it be an adjudication in the new form, reserving all the defences to the action for maills and duties. *Vide supra, 2d December* 1675, *Kello* and *Nasmith, No.* 453, § 3.

Referring to oath, if the pursuer be in town, will be reputed an instant verification. *Advocates' MS. No.* 700, *folio* 314.

1678. *January.* JAMES DEANS *against* SIR ADAM BLAIR.

JAMES Deans, bailie in the Canongate, charges Sir Adam Blair of Carberry for £900 contained in his bond. Sir Adam craves compensation for some coals furnished by him to the charger, and refers it to his oath. He not being clear on the quantity, defers it back to Sir Adam. He scruples likewise. Craigie, Justice-Clerk, ordains the coal-grieves and inlayers of the coals to be examined anent the quantities.

Against this, ALLEGED,—They could not take away a liquid written bond. REPLIED,—James Deans his oath had loosed and taken it away this far,—That he had declared he had gotten some coals in part of payment. The Lords sustained the quantities inlaid to be proven by the witnesses foresaid.

But the term being circumduced against them, for not compearing to depone, James Deans, charger, declared he was now clear, after trial, to depone on the number of the loads furnished.

Then Sir A. Blair obtained a declaration from the Lords of the Treasury, that since this bond was contracted on that account, therefore recommended to the Lords to supersede any execution on it till Sir Adam had closed his accounts in Exchequer.

Against this it was OBJECTED,—That it was *rescriptum subrepticium et obrepticium, celata veritate et expresso, mendacio, contra jus et utilitatem publicam;* and therefore the Emperors themselves command it *ab omnibus suis judicibus refutari.* And our Acts of Parliament condemn all privy writings, contrary to the furtherance of justice. Act 47, Parliament 1587, and the laws there cited from the Codex.

This process sisted by James Deans his death.

Advocates' MS. No. 701, *folio* 314.

1678. *January* 1. GEORGE GRAHAME, MALLOCH, *and* WEDDALE.

UPON a report *in præsentia,* in a case of George Grahame, Malloch, and Weddale, John Frazer was simply repelled from bearing witness in any cause, because of this objection,—That he was convicted of bigamy, and so, by Act of Parliament, is infamous, though he had a remission therefore: but here there was no *penuria testium.*

It seems strange, in our law, that adultery shall be death, and bigamy only punished with an inferior arbitrary pain. *Infra,* [*28th May* 1678, Historical Volume,] *Bruchton's case.* *Advocates' MS. No.* 702, *folio* 314.