

ceased Earl of Seaforth, as being cautioner for him, and distressed, pursues for delivery of his moveables.

The Countess of Seaforth, having confirmed herself executrix-creditrix, also compears, and ALLEGES, She ought to be preferred ; because Suddie, not having paid the sums in which he was engaged cautioner, as he could not have poinded the Earl's goods unless he had paid, so neither can he claim the same goods as executor-creditor : otherwise the debt might be satisfied by the Earl's goods, and yet the Earl not liberated of the debt, but put to an action against his cautioner to purchase him a discharge ; whereas the Countess hath confirmed upon most privileged debts, such as the Earl's funeral expenses, to which she was assigned.

It was ANSWERED, That Suddie, having the first confirmation, which is a decret of the commissaries standing unreduced, there is no place for the Countess her posterior confirmation for the same goods ; but Suddie would have the sole administration, though he had been a mere executor-dative. *2do.* He offers, before he extract, to produce a discharge, from the Earl's creditors, to his successors, of the equivalent sum.

The Lords preferred Suddie to the administration, he producing a discharge before he extract ; but allowed the lady to be heard upon the funeral charges, which is a preferable debt to all others, not as executor, but as a creditor.

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1681. *February 9.* SIR JAMES COCKBURN *against* The LADY CRUMSTAIN.

THE Lady Crumstain having pursued a declarator against Sir James Cockburn, which being disputed in the Outer House, and the Ordinary having ordained some writs alleged upon to be produced before answer ;—which being now produced, the Ordinary having called the cause again,—

It was ALLEGED for Sir James, That writs being produced upon an act, the Ordinary could not determine thereon, but only the Lords *in præsentia*.

It was ANSWERED, That here was no act of litiscontestation, nor an act before answer equivalent thereto, but only a warrant to produce writs which were in the parties' hands, that an allegiance might be founded thereupon, according to the tenor of the writs.

The Lords found, That this being no act of litiscontestation, or equivalent thereto, the Ordinary ought to hear the parties upon the writs produced.

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1681. *February 9.* GEORGE COCKBURN *against* WEEMS.

GEORGE Cockburn having obtained a gift, of the King, of the cocket-office, empowering him to give cockets to all ships loosing in Fife ; there arose a competition betwixt this gift and a prior gift given by the Exchequer, of the same of-

office, to umquhile James Weems and his son James Weems conjunctly, and to the longest liver.

It was ALLEGED for Cockburn, That the cocket-office, being a known fixed office, was only communicable by the King's gift under his own hand; and the commissioners of Exchequer have no power to gift the same.

It was ANSWERED, That though the commissioners of Exchequer had no special power to gift offices, yet they have a general power to manage the King's revenue, and consequently to do all things necessary for that effect: which extends to the cocket-office; seeing by the cocket the loading is known, and thereby the custom of the export.

It was REPLIED, That though the Exchequer may give commissions, in so far as is necessary for administration of their own commission, yet that can extend to no fixed office; which the King himself can only gift: for, though the Lords of Session have the power of administration of justice, which necessarily requires clerks and macers, yet they cannot gift the place of a macer, neither can the council name their macers. So that the giving of cockets not being an ambulatory commission, but a settled office at the King's gift, the Exchequer cannot gift it, unless they had special warrant, much less can they gift this office with a conjunction or substitution. *2do.* Weems is inhabile, as being at the horn.

It was DUPLIED, That being at the horn doth not incapacitate to exercise such an office; and Weems hath assigned it to the Lord Burntisland; and may exercise the same by a depute.

The Lords found, That Weems's gift not bearing a deputation, he could not make a depute. And having called for the commission of Exchequer, they found that this gift was not warranted thereby; and therefore preferred Cockburn upon the King's gift, unless Weems will prove, that, by long custom, the Exchequer hath been in use to give such gifts of the cocket-office as this formerly to others.

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1681. *February 9.* CUNNINGHAM *against* His CREDITORS.

THE Lords having appointed the keeper of the minute-book to uplift and pay the macer's dues,—several creditors of Adam Cunningham, one of the macers, arrested the same in his hands, and pursued to make forthcoming.

It was ALLEGED for the macer, That these dues being his fees for his service, they were alimentary, and necessary to him to exercise his office; and they being paid in smalls, the keeper of the minute-book could not positively depone what was in his hand, at every arrestment.

It was ANSWERED, That the macer's place being lucrative more nor necessary for his aliment and service, his creditors could not be excluded upon that pretence; and there is no reason that a macer, bruiking office by the King's gift, subservient to the distribution of law and justice, should not be law-biding.

The Lords found the macer's dues arrestable; and appointed the keeper of the minute-book to count therefor yearly, the first day of January, the first