

to exhibit all the debts she has already satisfied, with the discharges thereof, and to assign to the debts that are resting to the defunct ; which they ordain the heirs to accept of, for their relief *pro tanto*, in so far as the Lord Reporter shall find the same to be sufficient debts: and remit to the reporter to hear the parties, how far the said debts do exceed the said bonds so to be assigned ; and to decern the relict presently to relieve the heirs of the said superplus debts, either out of the moveables or out of the liferented lands. *Vol. I. Page 175.*

---

1682. *February 21.* STEWART, Tutor of Innernytie, *against* Sir JOHN AYTON of that ilk.

IN the action pursued by Mr Stewart, tutor of Innernytie, and Sir John Ayton of that ilk, anent an assignation made by Innernytie to Sir John of a bond of four thousand merks, which the tutor of Innernytie alleged was never delivered, at least to have been revoked and altered, and taken back again, and that it was lying beside the defunct the time of his decease ; whereon the Lords had examined witnesses for both parties ; and their depositions coming this day to be advised, the Lords, after a long deliberation, before answer, recommended to Lord Forret and others to try and endeavour a settlement betwixt them. *Vol. I. Page 175.*

---

1682. *February 22.* The late LORD ROLLO'S CREDITORS *against* The present LORD ROLLO.

SOME creditors pursuing Lord Rollo on the passive titles, for payment of his father's debt, and witnesses being adduced, they led some other creditors of his ; and it being objected against them, that they were to be suspected as interested :

The Lords allowed them, seeing they were not personal creditors merely, but wadsetters secured *aliunde* ; (though he, if once heir, then became liable to them in the requisition ;) but with this express declaration and provision, that their testimonies should not prove, when they came to insist against him for their own proper debts, and so it was not *in re propria*.

Yet it was *amicum testimonium illius qui consimilem forebat causam*, who might tyne and win in the cause ; and at this rate the creditors who now pursue may be adduced as witnesses to serve those creditors who now depone, in fixing a passive title on my Lord : and the decision was thought dangerous.

*Vol. I. Page 175.*

---

1682. *February 22.* JAMES OGILVIE *against* GILBERT GOURLIE.

THE case, James Ogilvie, apothecary in Edinburgh, against Gilbert Gourlie being reported by Newton, the Lords, before answer, ordain Gilbert Gourlie to

produce the notary to the instrument of possession used by him on his assignation, that he might be examined on the verity of the said instrument : as also ordain James Ogilvie to adduce the witnesses in the testament, and any other habile witnesses, to be examined what the carriage of the defunct was the time of her subscribing the testament, and what she declared at that time in relation to her granting a disposition to Gilbert Gourlie, or at any time after granting the said disposition ; and assign the 10th day of March next to both parties' procurators to the effect aforesaid ; and in the mean time grant warrant to the bailies of Edinburgh to inventory and sequestrate the goods.

Thereafter, on a bill presented by the said Gilbert, the Lords, on the 7th March 1682, granted this deliverance :—Having considered the petition, allow the supplicant, the 20th instant, to produce the notary, (in respect it was said he dwelt at Dumfries ; though Gilbert pled that he should not be burdened to produce him at all, unless they offered to improve, and consigned ;) and grant warrant to the Magistrates of Edinburgh to cause roup the goods within the house by a neutral person to be appointed by them, at the sight of both parties ; and for that effect that the diets of the roup be intimated to the parties, a competent time before ; and appoint the magistrates to retain the money that shall be gotten for the goods at the rousing, to be made furthcoming to the party who shall be found to have the best right.

*Vol. I. Page 175.*

---

1682. *February 23.* DAVID FORBES and CATHARINE CLERK, his Spouse, *against* Sir JOHN CLERK of PENNYCUICK.

MR David Forbes, advocate, and Catharine Clerk, his spouse, pursuing Sir John Clerk of Pennycuick, her brother, for their mother's executry ; Catharine having confirmed herself executrix *ad omnia et male apprehiata*, Sir John ALLEGED, That, after the mother's death, the father had provided the said Catharine, now pursuer, to a very opulent tocher of ten thousand pounds ; and, seeing *debitor non præsumitur donare*, it must be presumed to have been applied by the father debtor to be in satisfaction of the mother's executry in the first place.

ANSWERED,—This brocard doth not hold between parents and children.

The Lords, on Forret's report, repelled the defence against exhibition, and ordained Sir John Clerk to produce and exhibit his father's count books, by which it might appear what his estate was at the time of his wife's death, that her executry might thereby be known and valued.

*Vol. I. Page 176.*

---

1682. *March 1.* JOHN TROTTER *against* ALEXANDER YOUNG.

JOHN Trotter pursuing Alexander Young, merchant in Edinburgh, as cautioner for a factor in Campvere ; he founded on an exoneration he had got of his cautionry from the royal burrows, by their act.

The Lords found he was not liable for any goods sent to that factor after