

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.

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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.

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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

the date of that liberation ; though they were shipped three days before it, and the said discharge or exoneration of the cautionry was not intimated to the merchants.

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1682. *March 1. ROCHEID'S DAUGHTER against ROCHEID, her Father.*

ONE Rocheid in the Merse being pursued by his daughter, to grant her a yearly aliment ; to which he was unwilling, because he doubted of her legitimacy ; (for he was divorced from her mother, for her notour adultery :)

The Lords found him liable to aliment her ; but, in regard he offered to take her home to his own house, assoilyied him from any modified aliment ; and ordained her to go home, and stay with him ; and would not astrict him to entertain her elsewhere, unless he had beat her usually.

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1682. *March 1. ANDREW DICKSON against JOHN RAE.*

ANDREW Dickson against John Rae, upon the indentures. The Lords, upon Drumcairn's report, ordained John (since he had deserted his employment, for the test, so that he could not teach him,) to give back the half of the apprentice fee, *viz.* £50 Scots, the half of the time being yet to run ; and would not summarily *hoc loco* take in several malversations, alleged by John to have been done to him by his said apprentice ; but reserved them to be pursued *via actionis* as accords. Then Andrew gave in a bill craving expenses ; which the Lords denied to grant.

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1682. *March 8. GEORGE BANNERMAN against MALCOLM of BALBEDIE.*

MR George getting a new gift from the king, of being chamberlain of the king's rents in the Stewartry of Fife ; Balbedie competes on an old gift he had, clad with possession. ALLEGED,—He had lost it ; because he had not taken the test. ANSWERED,—This office was not comprehended nor expressed in the Act 1681, anent the test. REPLIED,—The general clause includes it. DUPLIED,—He was *in bona fide* not to guess or divine that ; and he is now willing to take the test ; and *res adhuc est integra, et est locus penitentiae*.

The Lords found, that, since he had not taken it before the 1st of January 1682, fixed by the Act, he had lost his office : and would not allow him to take it now.

This extension is dangerous ; and, *a paritate*, may reach commissioners of excise, baron-bailies, (both which were once spoken of in the Parliament to be included, but were *de industria* omitted, that they might be free of the test ;) and many others, who do not look on themselves as in public offices.—Balbedy's son