

*rem pupilli salvam fore*; and her third noways belonging to them, though the tutor was liable for it in respect of his intromission therewith, yet it being not *qua* tutor, but as assignee to the executory, it was extrinsic to his office, and so could not bind his cautioner.

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1693. *February 14.* IRVINE of Inchery, and OLIPHANT, his tutor, *against* SPENCE and WEYMES.

THE Lords found, seeing the tutor died during the count and reckoning, that they would not suffer his heir to be cited *incidenter*, but that they behoved to raise a formal process of transferring against him. It were good the Lords fixed this variation, for at other times they allow parties to be heard *incidenter*.

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1693. *February 14.* JAMES DEANS of Woodhouseely *against* SIR JAMES PRIMROSE of Elphiston.

THE Lords at first repelled that defence of Sir James's, that being minor, *non tenebatur placitare*; seeing it was only a redeemable right by the back-bond, and a trust; and *2do*, his goodsire, Sir Archibald Primrose, was never infest thereon: but Sir Archibald's heirs of line not being cited, the Lords stopped process till that was done; and found it not sufficient, that the heirs of Sir William were cited, who was heir of tailie and provision in this tenement.

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1693. *February 14.* The CHILDREN OF MR. JAMES FITHIE *against* The EARL OF NORTHESK.

THE Lords found no process in the exhibition, if insisted in *primo loco*; for they thought a debtor not bound *edere instrumenta contra se*, by producing a bond which he alleges was paid, given up, and retired: But found the presumption of liberation *ubi chyrographus est apud debitorem* may be taken off by a more pregnant and positive one, that it came not by payment into the debtor's hand, but by some other indirect and sinister way; *viz.* that here it was confirmed by their mother in their father's testament, (which the Lords found a sufficient title to the children as nearest of kin, without taking a dative *ad non executam*; but did not find that upgiving, in the confirmed testament, a sufficient probation of the existence of this bond,) and was lying beside her the time of her death; and her cabinet being broken up, the said bond of 8000 merks was taken out of it, and at last came into the hands of one of Mr. John Johnston, a broken man, who trans-

acted with this Northesk's father, and gave him back his bond, and got L.1000 Scots at sundry times, as appeared by receipts and letters betwixt the said Johnston and the Earl's chamberlain, who was the manager and carrier on of the fraud. Which condescence the Lords found relevant to elide the presumption of its being in the debtor's hand ; and if this was proven, then they would allow them to insist for exhibition of the bond, but not sooner. *Vol. I. page 559.*

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1693. *February 15.* JAMES PRINCE *against* HARY BLAIR, son to Hew Blair, vintner.

THE Lords thought the husband's creditors were not in strict law obliged to bury his relict, yet when it was shortly after the husband's death, and she had not again married, *ex humanitate*, they should bury her out of the husband's means, unless they could condescend on as much of her own as would bury her. But here the Lords repelled it, in regard it was already proponed and repelled in an extracted decret of suspension ; and so the Lords would not receive it now against a decret *in foro*. See the first decision in *President Newton's Observes*, 1681, [Heriot *against* Blyth and Muir, *Nov.* 1681.]

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1693. *February 15.* SIR ROBERT MURRAY of Abercairny *against* MR. DAVID GRAHME, tutor of Gorthy.

THE Lords reponed Mr. David against a decret *in foro*, in regard they had precipitantly taken out it for the charge in the count and reckoning, which was constituted by the factor's oath, without receiving in, and considering the discharge and defalcations which the factor had to give in ; so it was only the half of the counts.

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1693. *February 15.* MR. ARCHIBALD NISBET of Carfin *against* COMMISSARY DALRYMPLE and GRANGE DICK.

THE Lords found there could not be a partial transference of some points and interlocutors, but that it behoved to be of the whole. But would not cast the process, but allowed them *instantanter* to add these omitted signatures of process.

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