

1794. *February 8.* BAILIE WILLIAM MENZIES *against* CLERK of TROLLAS.

ALLEGED,—The co-tutors behoved also to be called, who might have defences unknown to him. The Lords found, in so far as he was convened as tutor, and proved there were more conjoined in the office with him, they ought all to be cited *cum processu*; but, if he insisted against him *qua pro-tutor*, that was a passive title that gave no benefit nor privilege, and therefore he must answer *instante*.

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1694. *February 9.* ELIZABETH GUTHRY *against* CARNEGIE of PHINEVEN.

PRESMENNAN reported Elizabeth Guthry, late servant to Mrs Mary Mauld, against Carnegie of Phineven, craving up a great many goods, contained in a condescence, as hers; which Phineven, the executor, alleged belonged to her lady, and consequently now to him. The Lords thought the lady's wearing clothes ought to be given her, on the presumption that they commonly gift these to their servants; though some would have it restricted to old worn clothes; for, as to newer suits, why should creditors be prejudged? And, as to the rings, jewels, and watch, found it relevant that her mistress gifted them to her before her death. Some required also that she should say *delivered*; but this being a nuncupative legacy, it could extend no further than £100 Scots, not being proven *scripto*, but only by witnesses. She offered to give her oath that the particulars in the condescence belonged to her, she having been in possession as well as her mistress; and urged, that one may stop a poinding by offering to depone that the goods are theirs. But, *imo*. The servant cannot be reputed to be in conjunct possession of what is in the house, except what she has in her own trunks; and, in poindings, none are admitted to depone but they who show a disposition. And they ordained it to be proven what goods were lying open, and what were in the lady's cabinet or locked chests.

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1694. *February 9.* JEAN HENDERSON and ROBERT CLELAND *against* SIR WILLIAM HENDERSON of FORDEL.

NEWBYTH reported Jean Henderson, and Robert Cleland writer in Edinburgh, her husband, against Sir William Henderson of Fordel, her brother, on a decret for 13,000 merks, as her tocher, founded on the passive titles. The Lords sustained this reason, That the decret was extracted surreptitiously while they were under trysting and communing.

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