

the nullity against his adjudication, that it wanted a special charge to enter heir ; and so preferred Newlands *in hoc statu processus*. *Vol. II. Page 2.*

1698. *June 10.* HELEN WISHART *against* ROBERT BOWIE and JOHN PLENDERLEITH.

WHITELAW reported the complaint given in by Helen Wishart, relict of James Smeton, merchant in Edinburgh, against Robert Bowie, and Mr John Plenderleith, writer to the signet, bearing, That Bowie had taken a decret against her, *stante matrimonio*, for goods given to her *tanquam præposita negotiis* ; which, in law, only bound her husband ; yet, on this illegal decret of the Sheriff's, they had taken her with caption ;—therefore craved they might refund her damages by their wrongous imprisonment.

It was ALLEGED,---That the Sheriff's decret was a good enough warrant, both to the party and the writer, to raise horning and caption thereon ; for it is not their province to consider the justice or legality of decreets ; and, by the 10th Act of Parliament, 1606, horning is ordained summarily to pass on Sheriffs' decreets ; and testificates were produced by both parties, under the hands of writers to the signet, some affirming the horning and caption warrantable, and others declaring them illegal.

The Lords thought there was a probable ground to excuse them from fining and censure ; yet, the woman being palpably wronged, her expenses behoved to be landed somewhere ; and the Sheriff-clerk was most to blame, who gave out so unwarrantable a decret ; and therefore remitted it to the Lord Reporter to adjust and proportion her damage amongst them all. *Vol. II. Page 2.*

1698. *June 14.* The EARL of SUTHERLAND *against* The VISCOUNT of ARBUTHNOT and The LAIRD of KNOX.

HALCRAIG reported the Earl of Sutherland against the Viscount of Arbuthnot, and the Laird of Knox, his tutor-of-law. It was a pursuit for repayment of some accounts of expenses debursed on the three following articles : *1mo.* In the Earl's debating against and opposing the said Knox's being served tutor, in respect of his unfitness and insufficiency ; *2do.* For debursements given out in a council-process for getting an aliment to the younger children off the Viscount, as heir ; and the *third* was, For expenses given out in pursuing Knox, the tutor, to implement and fulfil an agreement passed betwixt him and the Earl to count yearly, &c.

ANSWERED,---None of thir articles were *in rem pupilli versum*, and so can never make him liable ; for the expense wared out in stopping Knox to be tutor was unnecessary, for you afterwards consented, on a transaction, that he should be tutor. As to the *second*, The Viscount behoved to defend against his brother and sisters' aliments ; because 5000 merks by year was craved, and the Lords only modified 2500 merks ; so he behoved to have a sentence to warrant the

quota. To the *third*, The minor was not concerned to pay the expense of a process between his tutor and grandfather anent the contravention of the articles of agreement ; and, if they insisted against the tutor as liable *nomine proprio*, he opposed the libel, where he was only convened as tutor, and so could not answer *hoc ordine*.

REPLIED to the *first*, Though I ceded his being tutor, yet it was upon conditions advantageous to the pupil : To the *second*, Though I demanded 5000 merks, yet I then declared I would sequester the half of it to be a stock to augment the younger children's portions : To the *third*, The tutor is convened *super propria culpa*, for contravening the articles of agreement ; and so, it being for a fact of his own, he must be liable ; especially seeing, by a writ under his hand, he had renounced all dilators in this cause.

The Lords found the pupil not liable for the expenses contained in the three articles, nor yet the tutor for the first two ; but as to the third, being founded on the contravention of his own agreement, they ordained him to answer summarily *hoc loco*, without putting the Earl to a new process ; and allowed him to be heard on his defences before the Ordinary, reporter of the cause.

Vol. II. Page 2.

1698. June 15. JOHN MONTGOMERY and ROBERT CUNNINGHAM *against*
THOMAS RIG.

PHILIPHAUGH reported Mr John Montgomery, writer, and Robert Cunningham, under-clerk, against Mr Thomas Rig, advocate, for exhibition of some papers, contained in his father's receipt of the same.

ALLEGED, *1mo.*---Mr Thomas Rig, my father, was pursued in his own lifetime for these papers ; and, the libel being referred to his oath, he deponed *negativè*. *2do.* This receipt, being dated in 1670, it falls under the Act of Parliament 1669, anent the prescription of holograph writs, if not pursued within twenty years after the date ; and this is twenty-eight years ago. *3tio.* The writs in the receipt have been restored, though it has been neglected and forgot to be sought up ; because, a year after the receipt, there is a certification, in the process wherein they were produced, extracted, in which all these writs now craved are mentioned as in the clerk's hand, and inserted in the decret as produced ; which demonstrates they have been restored, though the receipt be unretired ; especially seeing the receipt bears also the process, and yet it is now in the clerk's hands, and acknowledged to have been returned : so all has been restored together.

ANSWERED, to the *first*, The exception, *quod juratum est*, does not meet here ; for he only depones, in the terms of an exhibition, that he had them not since the citation, nor put them away fraudfully before ; and his receipt being found out since, the oath and it noways interfere ; nor can it absolve him, being now pursued *super diverso medio* : To the *second*, The vicennial prescription of holograph writs relates only to bonds, missives, or subscribed count-books, and cannot be extended to receipts of writs no more than it was found to comprehend bills of exchange in a late case of *Lesly of Boquhayne* : To the *third*, Mr