

1693. *February 10.* MR. JAMES ANDERSON *against* MR. JOHN ELIES, his father-in-law.

THE Lords stopped the delivery of the writs till the former depositions, about the altering and taking out of a sheet and writing it over again with larger faculties to revoke, were produced, and the witnesses re-examined thereanent; in regard the former probation was *res inter alios acta*, being between Sir James Hamilton and Elleiston.
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1693. *February 10.* GEORGE WEIR, brewer in Edinburgh, *against* CAMPBELL of Carrick.

THE Lords found the bond given the son by Carrick was alimentary, and so could not be assigned by him for terms yet to come; but sustained his assignation for bygones, in regard the assignation bore, that Weir had alimented him; and found the discharge by the son to his father before the assignation was good and valid *quoad* these terms that were then passed at the time of the subscribing the discharge, but not for what he had paid by advance before it was due.
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1693. *February 10.* THOMAS GOODWILLY *against* SKEEN of Hallyards.

MR. THOMAS GOODWILLY, schoolmaster of Strathmiglo, *against* Skeen of Hallyards, for a mortification out of the lands of Pitcairn of Pitlowr, which Hallyards had bought.

The Lords found, though it was clad with forty years possession, yet it was not real, nor of the nature of a servitude to affect the ground of Pitlowr *against* a singular successor.
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1693. *February 14.* MARGARET BOGLE *against* WILLIAM NAPIER.

MARGARET BOGLE *against* William Napier, cautioner for James Armour, her children's tutor. The Lords found the cautioner liable for Armour, the tutor, to make up the relict's third, seeing she had renounced the executory to him, and his intromission was *per universitatem*, the relict's share not being yet distinguished nor separate from the other two parts; for they thought, if it had been laid aside and separate, then it would have been no part of the tutor's administration to have meddled with it. This was only carried by the President's vote; and they who were of the contrary opinion, argued, that a cautioner for a tutor only engaged

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 Woodhousely *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-