

debtor by that paper to the disponent; and that it was not a sufficient probation of the debt, especially seeing by a letter of the defunct's it appeared counts were not fully clear between them; but it had been his safest course, when he saw the nomination gave him up as a debtor in 500 merks, to have protested against it. The Lords also found, that though Thomson offered to aliment the pupil *gratis*, yet being removed as suspect for not concurring in upgiving the inventories, he could not have the custody till he reduced the act removing him; but that regularly the pupil ought to be delivered up to the other tutor, though he made not the same *gratis* offer, unless he were the nearest in blood to succeed to the pupil; in which case, law denied him the keeping of his person, *ad evitandum votum captandæ mortis*.  
*Vol. I. page 540.*

1693. *February 16.*—The Lords, on the 28th Dec. last, had found, that Thomson had lost the tutory of Harvy, his pupil, and would not hear him against that act, without a reduction. He now insists on his reasons, *viz.* that all the reason of debaring me, was because I would not concur with the other co-tutor in giving up the inventories; and I had reason to refuse, because he inserted me as debtor for 500 merks, which I denied to be just debt.

ANSWERED,—You might have protested against that article.

2do, The notary and witnesses, in the instrument requiring him to accept, were not examined.

The Lords thought, in such cases, the instrument was probative of itself, without adducing the testamentary witnesses, unless the other party would offer to improve it as false.

3tio, It was only his advocate, who renounced and gave over the office of tutory, who had no mandate or commission from him to that effect; and though in *actibus officii* he needs no other mandate but his gown, yet in quitting of rights, he should be specially authorised; as, in the renouncing to be heir, it must be subscribed under the client's hand. Yet Advocates frequently pass from such and such parts of the libel.

The Lords, in this case, allowed Brown the administration of the minor's affairs, but gave the custody of the pupil to Thomson, who was married to the child's aunt, and having no children of his own, offered to entertain him *gratis*, and to be otherwise kind to him; especially seeing Brown was either to succeed, or had the power of distributing the means by the father's appointment, in case the child died.  
*Vol. I. page 561.*

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1693. *January 13, and February 16.* WILLIAM DENHOLM of Westshiels,  
*against* The EARL of BALCARRAS.

1693. *January 13.*—THE Lords found he behoved to deliver up the bonds as they were at the time of the decret ordaining him to denude of them, and seeing they were then unregistrate, and that *lite pendente nihil est innovandum*, he ought not to have put them into the register, and that the offering of extracts was not an implement in obedience to the decret; and, therefore, ordained him

to take the principal out of the register, and deliver them to Westshiells, if they were not booked, and so could not be gotten back; for the Lords thought it humour on both sides, and *malitiis non est indulgendum*. *Vid.* act 18th Parl. 1689, *in fine*. *Vol. I. page 545.*

1693. *February 16.*—At examining the witnesses about taking out the extracts of these bonds which the Earl of Balcarras was decerned to deliver up to Denholm of Westsheills, mentioned 13th January last; Mr. Charles Gray, advocate, refusing to answer this interrogatory, whether he was present at any consultations where the Earl was advised to take out no extracts;

The Lords found he was not bound to answer this, being to cause him detect his client's secrets, and against his fidelity; though on the other hand it was more against the duty of a Christian advocate to give fraudulent advice to their clients, how they may frustrate or defraud their creditors. *Vol. I. page 562.*

1693. *February 16.* LIEUTENANT MACKAY *against* ALEXANDER MONRO's Relict.

THE Lords allowed Lieutenant Mackay to get up a trunk-valise, which General Mackay left with Alexander Monro, from his relict, upon his finding caution to make it forthcoming, and to secure her, conform to an inventory thereof to be made. *Vol. I. page 562.*

1693. *February 17.* LAURENCE OLIPHANT *against* MARY HEPBURN, and OLIPHANTS, her Children.

THIS was a reduction of an additional portion of two or three thousand merks, that Laurence Oliphant had given to the eldest son of the first marriage, on this reason, that he had got to the full what is provided by his mother's contract, viz. 5000 merks, and that the second contract provided all the conquest to the second children, and therefore he could not take it from them.

The Lords found these clauses of conquest did not impede rational deeds, nor cut off the paternal power of disposal when it was moderate; and they found this provision rational and moderate, and therefore sustained it.

*Vol. I. page 562.*

1684, 1685, 1686, and 1693. JAMES SUTHERLAND and GEORGE WEDDERBURN, *against* Bailie JOHN JOHNSTON of Polton.

1684. *November 14.*—IN the case of James Sutherland and George Wedderburn, his son-in-law and assignee, against Bailie John Johnston of Polton, it was