

proponed,—the Lords repelled the same, reserving action of improbation, as accords of the law. Which seems to have been proponed for preferring of some other creditor, such an exception not being usual; or because the husband, called for his interest, desired to prolong the process, that, if his wife should die *medio tempore*, he should not be constituted debtor.

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1650. *January 12.* MR ANDREW DICKE *against* HIS BROTHER'S RELICT.

IN the action between Mr Andrew Dicke, executor confirmed to his brother Lewis, [and] his said brother's relict; [she] craved her half of the moveables; and that he would instruct, by the writs in his hand, upon oath, with certification, and make payment conform; she finding caution to make forthcoming the whole, for payment of her proportionable part of any debts emergent, whereunto he could be liable as executor; in respect he could not instruct what was aughting by his brother, but the creditors behoved to do it at their pleasure; which caution was used to be found by legators, and is called, in the civil law, *cautio Muciana*.

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1650. *January 15.* JOHN ————— *against* —————.

IN the removing at John ————— his instance, of certain lands in the Water of Leith,—the exception, That they were tenants to the relict, now, of umquhile David Bell, who was obliged, by contract of marriage, to infest her in these lands, and granted a procuratory of resignation for that effect,—was repelled, being proponed against a compriser, *quia ubi nulla sasina ibi nulla terra*; but might be sustained against the contractor's heir; in which case it is thought that a simple contract of marriage should be good enough for a woman's conjunct-fee, without a seasine. There was here an allegeance proponed also, upon a decret of improbation at B———— of the Cottes' instance against Bell, where it was interlined, and some name blotted, which the Lords thought good to be conferred with the register and warrants of process.

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1650. *January 15.* QUINTENE KENNEDIE *against* JAMES BROWNE.

QUINTENE Kennedie alleging to have been sollicitated to come from Aberdeen over the water to Edinburgh, by James Browne, the time of the sickness, for making William Porter's testament; and having made the same, and moved the testator not only to make him his executor, failyieing his own daughter, but also, in case she survived, to leave him 10,000 merks of legacy: after sundry meetings with the said James, and refusals to deliver the testament, except he would give him the tenth part of his legacy procured by his moyen, at the least more

than ten pieces, which he had offered to him ; he, having delivered the testament, and gotten fifteen dollars in part of payment, as he alleges,—pursues the said James for the ten pieces, upon his promise before the commissaries, and refers to his oath ; who depones with a quality, as is alleged ; and is assoilyied. The said Quintene intents reduction, before the Lords of Session, within the year ; as use is, and ought to be, of commissaries' decreets. Yet the Lords assoilyied the said James, and ordained £40 of expenses against the pursuer, being a member of the house. And the Earl of Cassells, being an extraordinary Lord of the Session for the time, would have had him refunding the fifteen dollars that he got, with fifteen farther.

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1650. *January 15.* SURREARIERS and DOWNAM *against* MARY GARDINES.

MARY Gardines, as executrix to her husband, Thomas Binning, being pursued by Surrariers and Downam, merchants of Amsterdam, for the price of certain wares coft by him, according to his ticket ; did except against the ticket, That it did not design the writer's name, nor was subscribed before witnesses, according to our law. But the Lords repelled the same, in respect of a former practick, wherein the custom of that country was proven to be, betwixt merchant and merchant, without such solemnities. Yea, I could think, that she who was confirmed executrix-creditrix to her husband for implement of her contract of marriage, should not be preferred to strangers, who know not such customs as ours are ; *dum sequuntur fidem popularium nostrorum.*

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1650. *January 15.* JOHN ACHESONE *against* PETER ADAMSONE.

THE exhibition, at John Achesone's instance against Peter Adamsone, was sustained to be proven by witnesses, what they would not exhibit of their own accord, reserving against the deliverer : which is otherwise in any writ deponed in a third man's hand, wherein the depositary's oath is only receivable.

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1650. *January 15.* SPENCE *against* MILLAR.

IN the action, Spence against Millar, pursued by Spence, relict of Archibald Wauchope, as executrix dative surrogated *ad omissa et mala appretiata*, as her umquhile husband was, for the goods left out or undervalued in umquhile John Wauchope's testament by umquhile Margaret Liddell, his executrix and spouse, who was married after to William Millar, and which William Millar is confirmed executor to her : decret was given against him, *pro interesse* ; who has suspended upon that reason, That the said umquhile Margaret her inventory of testament