

king's service that the suspender rode in his superior's company and retinue; and he ought not to be permitted to contemn his superior.

This debate being reported, the Lords found he was obliged to have attended his superior, and that in doing of it he likewise attended the king; and there was no interfering or incompatibility of duty or commands, but both tended *ad eundem finem et effectum*; therefore they repelled the reasons of suspension: but they retrenched and modified the fine to 50 pounds Scots. *Vol. I. Page 100.*

1680. *June 4.* HOPE of CRAIGHALL *against* ERSKINE of OTTERSTONE.

HOPE of Craighall pursues Erskine of Otterstone, his vassal, for non-entry. ALLEGED,—Absolvitor, because he is infest on a precept of *clare constat*. REPLIED,—The precept is null, for his act of curatory appoints three to be a quorum; and it is only subscribed by one of them, *viz.* Mr Archibald Hope. DUPLIED,—That is *nullitas facti*, and so only receivable in a reduction. *2do*, Offers to prove, by production of seven or eight several evidents, that Mr Archibald acted as sole curator; which is sufficient warrant to assoilyie him from an odious non-entry.—This seemed relevant, but it was elided by this TRIPLY,—They offered to prove that the precept was never delivered to him, but *viis et modis* unwarrantably got up from one in whose hands it was conditionally consigned, and that without performance of the condition. This triply was sustained. *Vol. I. Page 100.*

1680. *June 10.*

ONE pursues an executor for a debt, and refers it to his oath, that the defunct to whom he is confirmed, acknowledged it as a true debt upon his death-bed. ANSWERED,—*Non relevat* unless the executor had then, or since, promised to pay it. REPLIED,—It being within 100 pounds Scots, it ought at least to have the force of a verbal and nuncupative legacy. DUPLIED,—Verbal legacies are not sustained in our law where there is a written testament; because then it is presumed that *testator totam suam voluntatem in scriptis redegit*, and that he intended not *partim testatus et partim intestatus decedere*. But these nuncupative legacies were only effectual where they were left by one who made no written will and testament.

The Lords, before answer, ordained the executrix to depone; and so waved to decide the relevancy. *Vol. I. Page 101.*

1677 and 1680. PATRICK REID *against* SIR JAMES STEWART.

1677. *June 7.*—THIS day the Lords advised Mr Patrick Reid's process against Sir James Stewart; wherein they found,—by the unsubscribed scrolls of account given in by Andrew Balfour, where the balance was only £47

Scots to Sir James, though the accounts were yet open, unfitted, and all counts bear tacitly *salvo justo calculo*; (but here it was not *error in calculo*, but in placing and charging himself with articles;) and Balfour's letters to Cutler acknowledging the balance of accounts between Sir James Stewart and him were near equal;—that Sir James was not Balfour's debtor in the L.200 sterling acclaimed, but that the two, conjoined, amounted to a discharge; only ordained Sir James to depone anent the instructions of the debit side of the account, &c.

See it fully in the informations beside me. *Advocates' MS. No. 591, folio 291.*

1680. *June 15.*—Mr Patrick Reid's action against Sir James Stewart was decided, and Sir James assoilyied. See *7th July 1677. Vol. I. Page 102.*

1680. *June 15.* JOHN CLERK *against* MUIRHEAD and OTHERS.

Two decreets obtained by John Clerk against Muirhead and others, are turned into a libel, because Mr William Monypenny, advocate, disclaimed his compearance, though he was marked, taking a day to produce them: only the persons reponed were decerned to pay the expenses of the decreets.

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1679 and 1680. The LADY SHEINS *against* the LADY WAMPHREY.

1679. *January 2.*—IN the action betwixt the Lady Sheins and the Lady Wamphrey, the Lords would not bring in Sheins' diligence as done *pari passu* and within year and day with Wamphrey's, albeit it was alleged that Wamphrey retarded Sheins by suspending; seeing they had time enough to have discussed the cause within the year, but were *in mora*, and suffered it to lie over. *Vide infra, 26th Jan. 1681, Lady Bangour.*

*Vol. I. Page 30.*

1680. *June 15.*—IN a case betwixt the Lady Wamphrey and Sheins, (*vide 2d Jan. 1679,*) the Lords admitted a compensation to extinguish a comprising, they proving by the compriser's oath that it was for the debtor's behoof.

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1680. *June 18.* COLIN MACKENZIE *against* The TOWN of EDINBURGH.

MR Colin Mackenzie against the Town of Edinburgh for the ann due to Mr Robert Lawrie, who died, one of their ministers. ALLEGED,—The ministers of Edinburgh have never been in possession of an ann past memory of man; and so have prescribed an exemption and immunity. ANSWERED,—They oppone the Act of Parliament 1672, which is general, and excepts none from payment of anns. This was taken to the Lords' answer. But it was thought an ann would be found due.

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