

rator, should bind them : and there was no necessity to be reponed against the same, it not being their deed, and being *ipso jure* void : and therefore, before answer, the Lords thought fit to try if the pursuers had meddled with any part of the executry, or had done any deed that could import homologation of the said testament.

Newbyth, *Reporter*.

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1677. January 11. VISCOUNT of OXFENFORD *against* Mr JOHN COCKBURN.

Mr John Cockburn having gone abroad with the Viscount of Oxenford ; and, after his return, having gotten several bonds, from the said Viscount, of considerable sums, and also a pension of 1000 merks : And having charged upon the same, the Viscount suspended upon that reason,—That the said Mr John, during their being abroad, had received great sums of money remitted to him upon the Viscount's account, for which he had not counted ; and that, after count and reckoning, he will be found debtor to the Viscount in more than the sums charged for :

And it being ALLEGED by the said Mr John, that he is only countable for his intromission ; and that his actual intromission ought to be instructed by writ or by his oath : and the declarations of merchants and factors abroad cannot be probation to bind upon him so great intromissions :

The Lords considered the condition of the Viscount for the time, that he could not intromit himself ; and that the said Mr John had such influence upon him, that having been his governor at schools, and, upon the desire of his friends, being put from him by an Act of Council, he, notwithstanding, without and contrary to the advice of his friends, carried him abroad ; and, since his return, had gotten from him the bonds foresaid : And therefore thought fit to try the business to the bottom ; and to ordain the said Mr John to give in his counts of what was received and debursed when the Viscount was abroad ; and the factors and other witnesses to be examined concerning his intromission ; and whether or not any monies, that were remitted for the Viscount's use, were received by the Viscount himself, or by the said Mr John.

Redford, *Reporter*. Mr John Hay, *Clerk*.

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1677. January 12.

*Inter eosdem.*

IN the same case it was found,—That an instrument of requisition was null, because it did not bear that the procuratory was produced. And an instrument being produced, extended under the notary's hand, and being quarrelled upon the ground foresaid, the Lords did not allow the notary to give out another instrument, bearing the procuratory to be produced ; nor did admit probation, by witnesses, that the procuratory was produced ; seeing such solemnities are not presumed, and cannot be proven by witnesses, but by valid and formal instru-

ments : And a notary, having given out an instrument that is defective, cannot thereafter give another to supply the defect ; otherwise the question being betwixt the creditors, who had done lawful diligence, and a donatar, it should be in the power of a notary to prefer and gratify either party as he should be prevailed with, either to give out, or not to give another instrument.

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1677. January 12.

INGLIS against LAWRIE.

SOME of the Lords were of the opinion, that a husband may give validly, during marriage, to his wife, a provision or jointure, where there is no contract of marriage ; but that the wife could not give to the husband, though there were not a contract of marriage ; and that she might revoke any such donation : which appears to be hard and unequal. But this point was not decided.

Act. Colt. Alt. Dalrymple. Mr Thomas Hay, Clerk.

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1677. January 17. ————— against —————.

AN edict of executry being advocated from the commissaries,—a bill was given in, desiring that the advocacion might be summarily discussed ; seeing both nearest of kin, creditors, and the fisk, were concerned that the testament should be confirmed and executed ; which desire the Lords thought could not be granted, in respect of the Act of Regulation : but it was thought a great escape and inadvertency that such advocacions should be passed, seeing the Lords could not confirm testaments : and if any party should be prejudged by any act of the commissaries, it may be reduced upon the head of iniquity. And the Lords thought it was fit that a new edict should be raised ; and, if an advocacion should be sought, the reason should be discussed upon the bill.

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1677. January 25.

KER against KERS.

A DISPOSITION being questioned, as being made *in lecto*, at least delivered then : It appeared by the deposition of one of the witnesses, used for proving the libel, —that the said writ was subscribed divers years before the disponer was on death-bed ;—and, that the same was delivered before death-bed to the said witness ; and, —that the defunct having called for it on death-bed, for drawing two other dispositions of the lands contained therein, one in favours of the pursuer, the disponer's heir, and the other in favours of a son of the disponer, who was father to the person in whose favours the disposition in question was made. And upon debate amongst the Lords, what should be the import of the said testimony ; seeing the depositar did not declare in what terms the same was given to him