

1680. *November 9.* ROBERT YOUNG *against* — YOUNG and JAMES EWART, her Husband.

ROBERT Young, merchant in Edinburgh, pursues before the sheriffs of Edinburgh, — Young, relict of George Hutchison, vintner in Edinburgh, and James Ewart, now her husband, for payment of 400 merks, owing by her former husband's bond.

ALLEGED,—She was executrix confirmed *qua* creditrix, and the inventory was exhausted partly by her own debt, and partly by payments made to other creditors before his citation.

The sheriff, before answer, ordained her to produce the confirmed testament, and the instructions of her payments. Advocation is raised upon sundry reasons, whereof this was one, that the sheriff had committed iniquity, and exceeded his power, in making an act before answer; which *officium nobile* is only competent to the Lords, and not to be usurped by inferior judges, to shun the determination of the relevancy till they have all the probation lying before them.

ANSWERED,—It was their ordinary practice, and there was no material injustice to ordain her to produce the testament; and the shunning to decide the relevancy was rather in her favours than against her.

Many thought the Lords would be jealous of allowing any but themselves to manage these Acts before answer, which themselves had but lately invented; however, my Lord Haddo was to give us the Lords' answer on it; as also on this point, Whether the sheriff did right in modifying the funeral charges, and expenses of the confirmation of the testament, upon their own particular knowledge what those things commonly stand or amount to in a person of his quality and condition, without first taking probation what was expended thereon: for, suppose they were truly debursed, yet, if exorbitant, a judge may tax and modify them.

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1680. *November 10.* LUMSDEN of INVERGELLY, Petitioner.

ON a petition of Lumsden of Invergelly, representing that he is minor, and that he is willing to abdicate and renounce all his estate in favours of his creditors, and that it be roused and set for their behoof, according to the priority of their diligences,—therefore craving to be liberated from personal execution by caption:

The Lords granted the desire of this bill, he renouncing his whole estate to his creditors; and this no wise prejudging the several real diligences against the same. See Durie, *25th June 1624, Somervil.* *Vol. I. Page 114.*