

produce the notary to the instrument of possession used by him on his assignation, that he might be examined on the verity of the said instrument : as also ordain James Ogilvie to adduce the witnesses in the testament, and any other habile witnesses, to be examined what the carriage of the defunct was the time of her subscribing the testament, and what she declared at that time in relation to her granting a disposition to Gilbert Gourlie, or at any time after granting the said disposition ; and assign the 10th day of March next to both parties' procurators to the effect aforesaid ; and in the mean time grant warrant to the bailies of Edinburgh to inventory and sequester the goods.

Thereafter, on a bill presented by the said Gilbert, the Lords, on the 7th March 1682, granted this deliverance :—Having considered the petition, allow the supplicant, the 20th instant, to produce the notary, (in respect it was said he dwelt at Dumfries ; though Gilbert pled that he should not be burdened to produce him at all, unless they offered to improve, and consigned ;) and grant warrant to the Magistrates of Edinburgh to cause roup the goods within the house by a neutral person to be appointed by them, at the sight of both parties ; and for that effect that the diets of the roup be intimated to the parties, a competent time before ; and appoint the magistrates to retain the money that shall be gotten for the goods at the rousing, to be made furthcoming to the party who shall be found to have the best right.

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1682. *February 23.* DAVID FORBES and CATHARINE CLERK, his Spouse, *against* Sir JOHN CLERK of PENNYCUICK.

MR David Forbes, advocate, and Catharine Clerk, his spouse, pursuing Sir John Clerk of Pennycuick, her brother, for their mother's executry ; Catharine having confirmed herself executrix *ad omnia et male apprehiata*, Sir John ALLEGED, That, after the mother's death, the father had provided the said Catharine, now pursuer, to a very opulent tocher of ten thousand pounds ; and, seeing *debitor non præsumitur donare*, it must be presumed to have been applied by the father debtor to be in satisfaction of the mother's executry in the first place.

ANSWERED,—This brocard doth not hold between parents and children.

The Lords, on Forret's report, repelled the defence against exhibition, and ordained Sir John Clerk to produce and exhibit his father's count books, by which it might appear what his estate was at the time of his wife's death, that her executry might thereby be known and valued.

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1682. *March 1.* JOHN TROTTER *against* ALEXANDER YOUNG.

JOHN Trotter pursuing Alexander Young, merchant in Edinburgh, as cautioner for a factor in Campvere ; he founded on an exoneration he had got of his cautionry from the royal burrows, by their act.

The Lords found he was not liable for any goods sent to that factor after