as I have given it;—as was found between *Balnamoon* and the *Earl of Southesk*, in William Carnegie's accounts. Yet, where parties are bound to give in a charge against themselves, as factors, tutors, &c. it were very unjust to suffer them to exhaust their intromission with uninstructed articles of discharge. And here, there being also a back-bond granted by Sir Robert, obliging him to hold count, the Lords found he ought to instruct the said £17,000.

Vol. I. Page 651.

1694. *December* 18. Ross of Tillysnaught and Middleton *against* William Turner, Notary.

Ross of Tillysnaught and Middleton, against William Turner, notary, anent a testament. The Lords, having considered the reasons of reduction, with the probation led, they assoilyied from the reduction, and sustained the testament as a valid and probative writ. It was urged, that the witnesses were inserted at the head in a preface or title to the testament; which was both suspicious, unusual, and contrary to the 173d Act, 1593, and 5th Act, 1681, requiring the witnesses to be at the end of the writ. This was thought to be of a dangerous preparative: Yet here the Lords repelled it, because it appeared it was read to the defunct; though some of them did not remember they heard the word *heir* and *executor* in the title read; and farther, the body of the testament began, "the said Robert Middleton." There were sundry other objections against this testament, which the Lords repelled. *Vol. I. Page* 651.

[It would appear, from the following intimation of a protest, by Turner, for remeid of law, that the Lords, by a subsequent interlocutor, found the testament null.]

1707. *July* 31.—William Turner, notary, protested for remeid of law against Alexander Ross of Tillysnaught, his decreet, reducing Robert Middleton's testament; and that the interlocutor was not signed for several days after the sentence was pronounced, contrary to the Act of Parliament 1693.

Vol. II. Page 389.

[See the subsequent action raised by Ross against Turner, *infra*, 1710, November 14.]

1694. *December* 19. George Muirhead of Stevenson *against* William Stewart, Merchant in Glasgow.

The Lords found the contract between them, for transporting the meal to Ireland, did not import an obligation on Stewart to go along with it personally; and that he, having delegated his own brother, and sold Muirhead's part as he did his own, the Lords would not tie him to count for any other prices but

those he got; albeit Muirhead offered to prove that the meal sent at the same time from Scotland gave a much higher price.

As to the *second* head of malversation insisted on, That he returned the ship empty, and did not buy a loading in Ireland, ANSWERED, 1*mo*. The seas were then very dangerous, and full of pirates; 2*do*. Goods, which could then be got in Ireland, were at a low value, and little or no profit to be had upon them in Scotland. Some were for admitting this to his probation, as relevant to assoilyie him; but the plurality thought, seeing he acted for him as for himself, that he ought only to give his oath, *ex officio*, whether or no he forbore to buy a cargo in regard the seas were pestered, or that he thought there was little profit to be made by such a return. *Vol. I. Page* 651.

1694. *December* 19. CATHARINE WILKIE and MR RORY MACKENZIE *against* BAILIE GILBERT FYFE.

RANKEILER reported Catharine Wilkie and Mr Rory Mackenzie against Gilbert Fyfe. The Lords opened the decreets *in foro*, found them null, and reponed Bailie Fyfe against them:—1*mo*. Because there was allowed to the said Catharine a third of the moveables to be deduced out of the inventory of the testament, albeit there was none due; the inventory being exhausted by debts, and that her advocate passed from it; as also, that sundry articles, without any probation, were allowed. *Vol. I. Page* 652.

1694. *December* 19. JAMES BAIRD *against* GEORGE INNES of DINKINTY.

JAMES Baird, servitor to Sir James Ogilvie, advocate, against George Innes of Dinkinty, for the spuilyie of two horses. The defence was,—I was minor, and they were carrying clay out of my ground without warrant or allowance; and my mother ordered me to seize them.

The Lords thought this sufficient to liberate from a spuilyie; but decerned him in restitution of the horses, or their prices, without violent profits; reserving his relief against his mother, as accords. *Vol. I. Page* 652.

1694. *December* 19. CECILIA PAIP, Lady Keilor, *against* RICHARD NEWTON of that ilk.

THE Commissaries had exonered him in so far as concerned his aunt's portion in Holland, as, by the testament produced, it was left to him.

The Lords found he could have no preference on that head, (she being in a degree equally sib to the defunct;) seeing the same was uplifted and spent by