

to him, notwithstanding of an idle reservation cast in the end of the decreet of redemption, without warrant of the contract foresaid, not bearing any such obligation.

*Page 112.*

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1649. *December 26.* JOHN MAXWELL of GRIBTOUNE *against* JAMES MAXWELL.

IN the suspension, John Maxwell of Gribtoun, whose father was executor to the Lord Herreis, his own father, against James Maxwell, his uncle, who had obtained decreet against him for his portion natural, there was a reason, That, of the sum of £16,000 confirmed, he could only have a proportional part, according to seven or eight children, of the half of the testament; seeing, before the act 1617, the executor gained the dead's part; except they could show the schedules mentioned in the foresaid testament, whereby the father left legacies to his bairns. And here was controverted, That the daughters married out of the house could not come in to have a proportional part, as being forisfamiliated; except their contract of marriage did bear that they should be bairns of the house, notwithstanding the tocher given; likeas, mention was made *de collatione dotis*. Whereanent the Lords would have practiques to be produced. The other reason, That the Lord Herreis was rebel, and his escheat disposed to Andrew Ker of Fentoune, whereon he obtained general declarator, was repelled; because, after that general declarator, the foresaid executor confirmed his father's testament above mentioned, so that Andrew Ker his gift and declarator seemed to be to the bairns' behoof; neither could the blank assignation, purchased from Andrew Ker, eighteen years after, by the Lord Herreis, purge the negligence of the executor, who should have done diligence in executing the testament for his brethren's use, against the said Lord Herreis, as intrmitter.

*Page 113.*

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1649. *December 26.* WILLIAM ACHESONE *against* JOHN ACHESONE.

IN the action of neighbourhood, William Achesone, nephew, heritor of the tenement of land in Niddry's Wynd, against Mr John Achesone, his uncle, who had gotten a dwelling-house with two cellars, opening to the south and west, disposed by his father to him first, and excepted expressly, as it was before designed, out of the posterior disposition of the whole tenement made to Gilbert, to whom the said William is heir; the said Mr John was thought to have done wrong, in opening up a passage to the east, towards the close, of the tenement, which might be built up in a new tenement by the heritor, although there were doors in the said east side of the cellar, but bigged up; because the common author having the whole, might have had passages as he liked. So, for the probation, the said William was preferred.

*Page 114.*