his pay, and being granted in favour of the pursuer, who was then a gentleman of the guard, and that for the entertaining of his mother, who was aunt to the Earl, the precept, being a military act, is privileged in law; and falls not within the Act of Parliament requiring solemnities in writs and obligations; the laws of all nations freeing soldiers therefrom: and if betwixt merchants, bills of exchange and precepts for payment are binding without these solemnities; and count-books being subscribed, *multo magis* ought the precepts of commanders to their own soldiers to be sustained. It was REPLIED to the *second*, That the precept was now in the pursuer's possession, and could not be taken away but by his oath, albeit it were not; yet, being a delivered evident, by Newburgh, to one who had a trust from the pursuer, as well as Newburgh, and it being recovered by an incident diligence, and thereupon a decreet *in foro* founded against this same Earl, he cannot now be heard to question the same.

The Lords did seriously consider the first point, if the precept was obligatory, neither being holograph, nor having writer and witnesses, neither being subscribed when the Earl was *in procinctu*, or on a march to a present occasion to fight; in which case the law of nations gives them liberty to make testaments, or subscribe other writs, and sustains them without the ordinary solemnities required in law; but otherwise they have not that privilege: And, therefore, they found it necessary that the pursuer should instruct the verity thereof, by proving that sometimes payment was made; or that the precept was made use of for instructing accounts given up by the quarter-master; or some other pregnant presumption; without which they thought it hard to sustain the same as a valid and a lawful deed. And, as to the *second*, they found, That, it being in the pursuer's possession, to whom it was granted, and made use of in judgment against the same defender, that it could not be taken away but *scripto vel juramento*.

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1677. *February* 6. THOMAS, JOHN, and SUSANNA MARSHALLS, *against* WILLIAM MILNE.

IN an action pursued at the said Marshalls' instance, for payment-making to the said Thomas and Susanna Marshalls of the two part of the whole lands which belonged to their father, Thomas Marshall, upon this ground,—That their father, by an assignation, did dispone his whole lands in favour of Beatrix Bell, their mother, and the said two children, to be equally divided amongst them; which sums were to be uplifted and employed accordingly by the said Beatrix, with consent of the said William Milne, and John Marshall, their uncle; notwithstanding whereof, the said William Milne did take a translation from the mother to the whole debts and bonds, as solely belonging to her; and, by virtue thereof, did intromit with several sums, and might have intromitted with the whole, the debtors being at the time responsible; but, notwithstanding, he having kept up the bonds, and never having pursued but for so much as would satisfy his own debt due by the mother, nor never having offered to make a retrocession, it was concluded that he ought to be liable *ex capite fraudis et doli*, as being nominated a trustee for the children, and without whose consent nothing could be done in law.

It was ALLEGED for the defender, That he being neither nominated a tutor nor factor for the bairns, he was not bound to act for them; nor could be liable in law for omissions, which is the only ground of law whereupon tutors, curators, or factors were liable for not doing diligence; whereas he, being a creditor to the mother, was *in bona fide* to take a translation for a just and onerous cause; and was only obliged to pursue for recovery of so much as would pay his own debt; and, never having been required to make a retrocession, was not liable for the superplus.

The Lords, having seriously considered this case, as being singular, the defender neither being tutor nor factor; and, on the other part, that, by his own translation to the assignation, he was nominated a consenter for the use of the bairns, as well as the mother; so that, without his consent, nothing could be done, which did imply a clear trust; and that he having intromitted with the whole bonds, did thereby satisfy his own debt; and did never offer to the children, nor their uncle, who was joined with him, to make a retrocession, or to concur against the debtors;—therefore they did decern the defender liable: albeit he was neither tutor nor factor; but that the trust being known to himself, and he being master of the whole bonds, was liable for their damage, in suffering the debtors to become irresponsible; the case of minors being most favourable, who cannot deal for themselves, and their defunct father having relied upon the defender, his care and diligence.

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1677. *February* 8. The LORD STRANRAER *against* SIR ROBERT GORDON of EUBO.

THE Lord Stranraer having pursued Sir Robert Gordon of Eubo, as one of the three commissioners for managing his estate, for making full count thereof, according to the rental,—it was ALLEGED, That the commission was never delivered to him, nor was he required to meet with the other two; and all that he ever did being but as a friend, to assist the chamberlains, and sometimes to uplift money for my Lord's use, which he had so employed, he could not be farther liable but for his actual intromission.

It was REPLIED, That, by the defender's own missive letters, he declared that he was acquainted with the commission, and that he was willing to serve my Lord; and, having formerly intromitted before the commission, and managed the whole estate, he ought to be liable, not only for his intromission, but for diligence against the tenants; especially the commission being registrated.

The Lords, having considered the commission, that it did not bear any salary or allowance for pains; and it not being proven that he did accept thereof, being required, with other two who were joint with him; they did assoilyie from doing diligence, and found him only liable for actual intromission.

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1677. *February* 9. JOHN CALLENDER *against* DAVID COLYIER.

IN a suspension, raised at John Callender's instance, who was charged at the