oath, by writ, or witnesses; and bearing the points to be sufficiently proven by the writs produced, which are expressed in the production, or by the oath of the party, or by the testimony of famous witnesses, if these be omitted; which pass in course, and are not particularly advised by the Lords:—but that infers nothing as to the particulars advised by the Lords; for albeit, when parties are absent, the clerks give sentence, of course, in matters clear, or in others do report the libel to the Lords, who give their interlocutor, without full inspection of the libel, or probation by writ, and will, in the second instance, hear parties who were absent in the first, upon the relevancy, or probation by writ or oath, yet never upon that point, whether the testimonies, even in absence, did prove, seeing these cannot be published. And therefore the Lords do narrowly advert thereto in all cases: as this very day, in a contravention inferred by the violence of a son in the family, the Lords would not admit a contrary probation, that he was a schoolmaster *extra familiam:* nor would they reëxamine the witnesses adduced, what they meant by being in the family, whether he was only in the house for the time, or if he resided with his father; seeing they bore, that he was in his father's family and household.

The Lords found the reason of reduction, That the testimonies adduced proved not, was not competent; and therefore would not revise nor reconsider the testimonies, but adhered to the decreet, and found the letters orderly proceeded.—[*See page* 237.] *Vol. II, Page* 650.

1678. *December* 6. MR WILLIAM WEIR *against* EDWARD RUTHVEN.

MR William Weir, as assignee, by Patrick Ker, to a bond granted by the deceased Earl of Bramfoord, of 5000 merks, pursues a declarator against Edward Ruthven, that the Earl having been forefault during the troubles, his forefaulture was rescinded, and his estate established in the person of Edward Ruthven, his grandchild, by his eldest daughter the Lady Forrester; that therefore the estate of the Earl should be affected with this debt, by apprising or adjudication.

The defender ALLEGED Absolvitor; because, by a special Act of Parliament, his grandfather's estate was established in him, without mention of his debt, so that, in effect, he was made donatar to his grandfather's forefaulture; and it is sure, the king or his donatar is liable for no debt, unless it had been perfected by infeftment or confirmation from the king.

The pursuer answered, That there was no gift of forefaulture, which could only be given by the king. But it is clear, by the Act, that the Earl was restored, not by way of grace, but by justice, as having been unjustly forefault for those acts which he did by the king's command, as a loyal subject. And though the Parliament, by a special Act, qualifying the restitution, to preserve the Earl's memory and estate, which would have fallen to his two daughters, and settled the same in the person of Edward, his grandchild, and ordained him to take the name of Ruthven; yet the settling of an estate in this manner, extending both to the Earl's real and personal estate, can never be understood with exclusion of his debt, unless it had been so expressed, it being contrary to material justice: But the settling of an estate being *nomen universitatis*, not by way of gift, but by way of justice, must be understood *cum suo onere*.

Which the Lords sustained, and found that his estate might be affected with his debt. *Vol. II, Page* 652.

1678. *December* 6. JOHN LAW *against* MARY SMITH and FERREIS.

JOHN Law having charged, upon a decreet of the bailies, against Mary Smith his taverner, and Ferreis, her cautioner; the cautioner suspends, on this reason, That, by the taverner's count-book, written with the charger's hand, there are several sums not allowed to her in this decreet: and that, at her removing, she left a quantity of wine, which was gauged by two gaugers, and yet it was referred to the charger's oath, the quantity and value of the wine; which was probable by gaugers.

The charger ANSWERED, That he opponed this decreet *in foro*, wherein there is compearance both for the taverner and cautioner, who was not only cited at first, but thereafter cited personally, to hear sentence.

It was REPLIED, That the decreet mentions no warrant for the procurator, nor any writ produced for him that might infer warrant.

The Lords admitted the allegeance for the cautioner, unless it were instructed, by his oath, that he gave the procurator warrant to compear for him.

Vol. II, Page 654.

1678. *December* 11. GRANT of CORIMONY *against* MACKENZIE of SUDDIE.

[*See page* 236.]

IN a suspension and reduction, at the instance of Mackenzie of Suddie, and Grahame of Drynie, against Grant of Corimony, of a decreet of spuilyie pronounced by the Lords, upon probation by witnesses, which is before mentioned, debated and decided upon the 30th day of November last: It was further alleged, for Mackenzie of Suddie, that the foresaid decreet, as to him, was in absence: for, though the process was returned by Mr Roderick Mackenzie, junior, indefinitely for the defenders, yet it is offered to be proven by his oath, and he hath already given his declaration, that he was never employed nor informed by Suddie; and therefore, being to him as a decreet in absence, the Lord sought again to consider the testimonies: by which it would appear, that there was not any thing proven against him.

It was ANSWERED, 1*mo*. That when an advocate doth return a process for the defenders, if his oath or declaration may loose that, it would insecure all the decreets *in foro*: for though that hath been sometimes sustained before subscribed returns, when it depends merely upon the clerk to mark for whom advocates compeared, yet it neither hath, nor can be admitted, since advocates have been accustomed to subscribe the returns of processes, and so may, by the return, declare for whom they compear: but when it is indefinite for the defenders, it must be for all or none of them. *2do*. Though the decreet had been without all compearance,—the spuilyie being proven by witnesses,—there can never be