

March next, and declare they will advise any report that shall come from the conservator *medio tempore*. And, in respect it is acknowledged by the tutor's oath that payment was made of 600 guilders to Hary Walwood, allow the said sum to the defender; but refuse the bill payable to John Sandilands, in regard there is nothing produced to prove that the factor, Suity, accepted or paid the same. And find that the tutor's oath does not prove that he has any writs that can prove payment by the factor to the defunct, except the foresaid 600 guilders; and modify and determine the guilder at twenty-three shilling Scots, the same being a Flanders guilder, and at twenty-two if a Holland's guilder. And find that annualrent is due since the factor was *in mora*. And declare they will determine the time from which the annualrent is due before extract. *Vide 21st March 1683.*
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1683. *March 21.*—Between Bayn and Young, (mentioned 17th Feb. 1683.) The Lords, having advised the conservator's report, found that the factor's own count books could not prove his own payments; but, as to the article of Sandilands' debt, defalked and allowed it, because the bill was produced, Alexander Young finding caution to warrant the pursuer against it, in case it be found protested or unpaid. And refused annualrent, because the factor's cautioner was not *in tuto* to pay till it were confirmed, the pursuer's title being only an assignation from his father un-intimated; and allow all the factor-fee and other expenses contained in the factor's book.

And, on a new bill, they allowed Young to the first of November, to prove any further payments; he finding sufficient caution to pay whatever should be decerned, with the annualrent from the date of this interlocutor.

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1683. *March 21.* JAMES OSWALD *against* DANIEL CATHCART.

BETWEEN James Oswald and Daniel Cathcart, reported by Pitmedden. The Lords reduced Daniel's comprisings.

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1683. *March 22.* THOMAS HUNTER and LADY HAGBURN *against* OUGHTRED MACDOUGALL'S CREDITORS.

CAPTAIN Thomas Hunter and the Lady Hagburn against the Creditors of unquhile Oughtred Macdougall, reported by Harcous. The Lords found that Mr William Wallace's reservation of a power to dispoise without the consent of the fiar, *etiam in articulo mortis*, being in the procuratory of resignation, whereupon instrument of resignation followed; and the faculty being exercised by the said dispoiser, in favours of Captain Thomas Hunter, for a liferent of 100 merks yearly out of the lands dispoised; and in the assignation or disposition by the fiars of the two third parts of the procuratory and resignation foresaid in their favours to Oughtred Macdougall, the said Captain, pursuer, his liferent-right foresaid is also excepted and reserved as a burden on the fee; therefore

they find his annuity and right of liferent is a real burden affecting the fee conveyed by Mr William Wallace, the disponent, and does burden these two thirds of it come in the person of Oughtred Macdougall; and this, notwithstanding the faculty exercised by granting the foresaid liferent, was not conveyed in favours of the pursuer by an infestment, nor was his foresaid liferent-right expressed in Oughtred's sasine. And therefore prefer Captain Hunter to the Creditors of Oughtred Macdougall. And also prefer the relict upon her bond of provision. And find the allegiance, proponed by the creditors against it, is not receivable by way of defence; but reserve action at the Creditors' instance against the relict, as accords.

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1680, 1681, 1682, and 1683. JOHN ELIES and the EARL of SOUTHESK against
The DUKE of HAMILTON.

1680. *June 17.*—IN the action for proving the tenor of a bond, pursued by Mr John Elies, elder of Elieston, against the Duke of Hamilton; the Lords having allowed Mr John to lead his old witnesses, it was objected against Sir Michal Nasmyth of Posso, that he was a bankrupt, lying in prison for debt, and not worth the King's unlaw.

This was repelled by the Lords: but this they sustained to reject him, that he had threatened to do Duke Hamilton an evil turn. Only, objections against witnesses should be instantly verified. See *24th Dec. 1680.*

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1680. *December 24.*—IN Mr John Elies's action against the Duke of Hamilton for proving the tenor of a bond; ALLEGED, The *casus amissionis* of the bond was not fully libelled. ANSWERED,—The summons bore, that the bond was lost and amissing, and *casus amissionis* in proving tenors is *inter ea notoria quæ allegari quidem debent sed non probari*. REPLIED,—Though they be not burdened to prove the *casus amissionis*, (which oftentimes is latent and impossible,) yet it must be specially condescended upon, that the defender may object against it; and that, by a general, (*in quibus latet dolus,*) we preclude him from redarguing and convelling it.

The Register gave the Lords' answer upon this; but, in his own sentiments, he repelled the allegiance. *Vide 22d Jan. 1681.* *Vol. I. Page 124.*

1681. *January 22.*—IN Mr John Elies's cause against Duke Hamilton, (*24th Dec. 1680,*) the Lords found,—if the action for proving the tenor had come in *incidenter*, upon another principal action depending between the Duke and him,—they would have granted a summary enrolling and hearing thereupon, in the Inner-House, as they did lately in Lady Mary Cunningham and Sir John Maitland's case against Cardross: but here they could not; because the process, whereon the proving of the tenor depended, was only betwixt Southesk and Elieston, and therefore Elieston behoved to enrol *in communi forma*. *Vide 26th Nov. 1680, Lockhart;* and *16th June 1681,* thir parties.

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1681. *June 16.*—IN Mr John Elies his action for proving the tenor of a lost bond against Duke Hamilton, (*22d Jan. last;*) Alexander Gelly, writer,