

but he was willing to give it up to be cancelled; and offered to prove, by the comuners, that this was all that was treated on.

The Lords found the contract signified nothing if it did not oblige him to dis-
pone the adjudication also; and refused to examine witnesses anent the meaning
thereof; thinking it clear enough of itself, and to be interpreted against him
qui potuit legem apertius dicere. *Vol. I. Page 650.*

1694. December 14. The CREDITORS of SCOT of ARDROSE *against* GEORGE
GRAHAM and the LADY LARGO.

THE Creditors of Scot of Ardrose, against George Graham and the Lady
Largo, who opposed the sale of these lands; because, by a condescendence and
agreement, there were lands given off for three parts of their principal sum to
all that should subscribe and enter into the said agreement; and the Lady
Largo had lands effeiring to the fourth part of thir sums; and Spence's ap-
prisings, acquired in by Sir Daniel Carmichael, which was the preferable right,
was communicated to them.

The Lords found, they having divided the lands amongst them in this man-
ner, they were proprietors of their several localities, and could not be forced to
consent to a roup of these lands except they pleased; and that Sir Daniel's oath
did not restrict his apprising, as was alleged, but only showed the inductive
cause why he acquired it to secure his other debts. *Vol. I. Page 651.*

1694. December 14. SIR JAMES COCKBURN *against* SIR ROBERT MILN of
BARNTON.

RANKIELER reported three points in the count and reckoning between Sir
James Cockburn and Sir Robert Miln of Barnton. The *first* was, Whether Sir
Robert was bound to produce instructions for the £1200 which Sir James yet
wanted of the £24,000 of the salt sent abroad the time of the preëmption in
1673. The Lords thought the presumption lay against Sir James; seeing he
confessed he had got the instructions of the £23,000, and, by virtue thereof,
had uplifted; that it was probable he had also gotten the rest; and therefore or-
dained Sir Robert Miln to depone if he has any of these instructions, or if he
delivered them.

The *second* was, Who was to be at the expense of the collectors' salaries the
time Sir Robert had it? The Lords found, seeing the profit thereof was made
over to Sir James, the *onus* followed the *commodum*, and he behoved to undergo
the burden thereof.

The *third* was, anent the account of charge and discharge given in by Sir
Robert, whereby he charged himself with £17,000, and in the same writ dis-
charges himself; but does not produce the instructions, alleging they were
burnt with his house at Leith in 1682; though regularly you cannot both *ap-
probare et reprobare*, and you must not divide the writ, but take it complexly

as I have given it;—as was found between *Balnmoon* 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.

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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 assoiyled 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.

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[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 decret, 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.

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[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