

REPLIED,—Though forms are both useful and necessary to be observed, yet they must never be so adhered to as to destroy matter ; and here justice craves discovery of one of the boldest tricks that has been set on foot in this age, to make a man in a moment bankrupt, who died in the reputation of being very rich ; so that extraordinary diseases must have as extraordinary cures ; and this is no more than what the Lords, by their *officium nobile*, may do. Yea, to come lower, it is what the Commissaries do every day, and every Justice of the Peace, to secure the goods and effects of defunct debtors from abstraction and embezzlement, and to discover all sinistrous practices to hide or conceal their goods,—the creditors being *in damno vitando*, and only craving the examination of his accomplices, not to infer any guilt, but only *ad rimandam veritatem*: and how oft do the Lords, *præter communis juris regulas*, examine parties before processes come in, to lie *in retentis*, that probation may not perish. And this can wrong nobody but those who design to cheat their creditors.

The Lords, in respect of the singularity of this case, granted a summary warrant for trying when his money, bonds, bills, bank-notes, silver-plate, and other valuable goods were absconded, not against all at random, but conform to the condescence given in ; to this effect allenarly, that they may be made forthcoming to the creditors, nearest of kin, and all others having right thereto.

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1708. December 3. WILLIAM COCHRAN of KILMARONOCK and OTHERS *against* ARCHIBALD HOUSTON.

MR William Cochran of Kilmaronock, and sundry others, being bound for considerable sums, as cautioners for Hamilton of Orbiston ; when he sold his lands of Erskine to Blantire, it was agreed, that those debts wherein Kilmaronock and others stood engaged, should be paid out of the price, for relieving them of their cautionary, *primo loco* ; and accordingly sundry of their bonds being satisfied and retired, they were put into the hands of the deceased Archibald Houston, writer to the signet : and now a bill is given in, craving they may be given up, or else put into the clerk's hands for security of the cautioners, lest they wander and come back on them hereafter.

ANSWERED,—That Archibald Houston had debursed money for Orbiston, and likewise had an account due to him for writings and pains ; and, until these were paid, he had a tacit hypothec on the papers.

Some doubted of this privilege claimed by writers, especially as to lent money ; yet the Lords thought, if the writs were taken out of their hands, they had no security for their accounts, it being on that pledge they advanced their money ; therefore they remitted to the Ordinary on the Bills to consider his account, and the instructions thereof, and modify the same, that then the papers may be put into the clerk's hands, for the cautioners' security ; to be delivered up if no objection be made by the creditors, or any other having interest in

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these bonds ; at least inventoried, and declared paid out of the principal debtor's effects.

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1708. *December 7.* JAMES COLQUHOUN *against* JOHN WHITE.

JANET Colquhoun in Paisly, an old widow, having lain bedfast several months before her death ; John White, chirurgion apothecary there, being her door-neighbour, his wife and daughter attended her during her sickness, night and day, time about : of which care she being sensible, she gave some of her body-clothes and plenishing, by way of gratitude and remuneration, to John's wife and daughter, having no child of her own. James Colquhoun, being her nearest of kin, confirms himself executor, and pursues the said John White, with his wife and daughter, before the Commissary of Glasgow, for delivery of the defunct's goods intromitted with by them, or 500 merks as their value ; and refers the intromission to their oath, who depon in this manner :—The father, that he saw some chairs in his house which he knew were not bought by him, and asking his wife and daughter, he was told they were given by Janet Colquhoun, for their pains in waiting on her ; and the mother and daughter acknowledged a great many other particulars, but added that they were gifted by the defunct. The Commissary found, That, without a written testament, she might only legate to the value of £100 Scots ; for so far has a nuncupative testament been sustained in our law ; but, in so far as exceeded that sum, the Commissary discerned them to restore *ipsa corpora*, or else 500 merks, as the price thereof.

They suspended on thir reasons,—That, for the husband himself, he had no intromission, and that his wife could not depon to fix any debt upon him : and, for his daughter, she had deponed that the inconsiderable goods she had were truly gifted to her ; and that the Commissary had committed iniquity in finding that quality extrinsic, and putting her to prove it : besides, he caused no appretiation to be put upon the goods, and so put a random value on them.

The Lords found, The rings, and other goods, delivered by the defunct out of her own hand, while she was alive, were unquestionably hers, as also what tokens she had left to others ; which they had accordingly delivered conform to the defunct's will. And that it was not enough to assoilyie the father, that he only saw the goods in his house, seeing the daughter was *in familia* with him, and he was answerable for what she received. And though his wife could not swear a debt against him, she was bound to depon as to goods brought into his house ; yet, in regard he found the quality of gifting extrinsic, and had not proven the value of the moveables, therefore they turned his decret into a libel, and reponed them to their defences : for the husband did not object against his wife's deponing, but suffered her to go on ; and so cannot now recur, being then competent and omitted. See *9th February 1672, Wood against Robertson ; and 5th February 1669, Deans against Bothwell.*

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