

ledged the execution was false, in so far as it bore he had cited him to compare *nomine proprio*, for his own interest. He now tergiverses, and pretends that declaration was elicited and emendicated from him by Alexander Jafry, Phineven's agent.

The Lords considering his prevaricating variation, and that one of the witnesses had already denied his being present at the giving of that execution; they put him in close prison till the other witness should be likewise examined.

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1698. *February 26.* ROBERT DOUGLAS, in the Name of The EARL of MORTON, against SIR WILLIAM BRUCE of KINROSS; and MITCHELL of BRAEHEAD against BOSWAL of AUCHINLECK.

THIS day two appeals or protestations for remeid of law to the Parliament were given in. The *first* was by Robert Douglas, in the name of the Earl of Morton, his brother, against Sir William Bruce of Kinross, about his decret of declarator of his irredeemable right to the lands of Aberdour and Smithfield; though the Lords had declared the same purgeable by payment of his debt any time betwixt and Whitsunday 1699.

The *second* was by one Mitchell of Braehead, against Boswal of Auchinleck, about the lands of Bogwood, wherein Mitchell pretended the benefit of a possessory judgment, which the Lords had repelled, together with the adminicles adduced by him for proving the tenor of a disposition which Mitchel alleged was lost during the late siege of Londonderry in Ireland.

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1698. *June 7.* M'GILCHRIST against STUART of AMBERSMORE.

THE Lord Northberwick, as President nominated, and Probationer, reported the following causes in presence of the Lords, in order to his trial; and afterwards was approved by the Bench, and admitted on his taking the oaths.

The first cause was at M'Gilchrist's instance, against Stuart of Ambersmore, doctor of medicine, for payment of a sum whereto he was constituted assignee. The DEFENCE was,—Your title is null, being an assignation to a bond granted to a wife, designing her such; and the sum, *jure mariti*, falling to the husband, her assignation could give no right. ANSWERED, *Imo.*—By a missive-letter you promised me payment. REPLIED,—That was on a supposition you had a valid right; and must be taken, *in terminis juris*, to imply a tacit condition.

*2do.* ALLEGED,—If need be, the pursuer is willing to confirm before extract, *tanquam in bonis*. ANSWERED,—That cannot supply the nullity of the assignation; but the confirmation, in form, should have preceded the intending of this action.

The Lords did not find the letter sufficient to sustain the defect of the assignation; but found the offer of confirming before extract, enough to validate the title and sustain process: as, where an extract of a bond in the English

time, is given out, the same is sustained, the principal being produced *cum processu*, and in many the like cases. *Vol. II. Page 1.*

1698. *June 7.* The MARQUIS of DOUGLAS *against* M'DOUAL of FREUGH.

LORD Northberwick also reported the Marquis of Douglas, as donatar to the Viscount of Dundee, Graham of Claverhouse's forfeiture, against M'Doual of Freugh, one of the creditors, to accept of a locality of land effeiring to his sum; conform to the 24th Act of Parliament, 1696. Against which pursuit thir three dilators were proponed: *1mo.* The sentence of doom and forfeiture, which is his active title, is not produced; *2do.* No process, because all parties having interest are not called, *viz.* the other creditors, who may quarrel his allocation, and say it was *res inter alios acta* as to them; and they are appointed by the foresaid Act of Parliament to be called; and this process being succedaneous, in place of roups of bankrupt estates, (seeing forfeited estates cannot be so exposed,) they must have the same formalities. *3tio.* Neither the rental nor the holding of the lands are libelled, without which no locality can be settled.

It was REPLIED for the Marquis, to the *first*, That the doom is standing in the public records of Parliament, and is notour, and has been acknowledged by the defender himself; and the Marquis's charter and seasine on the King's gift, given out in process, is a sufficient title: To the *second*, Donatars cannot know all the creditors; and, when the fund is sufficient to pay them all, there can neither be hazard nor prejudice; likeas, he has convened the rest of the creditors to the same effect, to give them off land, in a separate process, which is also in the roll to be called: To the *third*, The Marquis has an exhibition depending for the evidents of the lands, without which he could not well know the rental or holding.

The Lords repelled the *first* dilator: and, as to the *second*, Thought all the creditors should be brought into the field; but, seeing the other process was ready, the Lords conjoined them, and so repelled the *second*, in respect of the answer: and, as to the *third*, Found the rental ought to have been libelled; but, being on a new Act of Parliament, they would not cast the process on such an error and informality, but allowed the pursuer to rectify and amend his libel, by giving out a condescence of the rental; and allowed either party a mutual probation thereupon. *Vol. II. Page 2.*

1698. *June 8.* THOMAS VEITCH *against* MARY NEWLANDS.

I REPORTED the competition betwixt Mr Thomas Veitch, advocate, and Mary Newlands; and the Lords found Newlands had a sufficient interest to propone the nullity against Mr Thomas's adjudication, notwithstanding they did not instruct themselves to be creditors to Dickson, who was Mr Thomas's author, seeing they stood infest in the tenement; and found the right was in trust for the apparent heir's behoof, notwithstanding the back-bond bore no obligation to retrocess, but only a discharge of personal and real execution; and sustained