

got sundry very intricate unclear oaths advised, *affirmative*, proven, or *negative*, not proven, with close doors, without calling the parties or their procurators, the next Saturday after they had deponed.

*Nota.*—The Lords not only sat in the afternoons oft to advise concluded causes, but also sequestrated the Tuesday forenoons to bring them forward, and to despatch such causes.

*Advocates' MS. No. 547, folio 275.*

---

1677. *February 23.* SARAH ROOME *against* —————

IN Sarah Roome's case, the Lords preferred a creditor to a provision made in a contract-matrimonial in favours of a child of a second marriage, albeit there was an inhibition served upon the said obligation, and the creditor's debt was contracted after the said inhibition; because they found the obligation was only a naked destination, and the inhibition could only reach, prevent, and cut off posterior deeds in favours of another third wife, or of other children, and not of extraneous creditors; else such obligations would enervate all commerce, and would hinder a father from contracting onerous debts. However, this decision evacuates provisions matrimonial sadly. *Vide supra, June, 1676, Catharine Mitchell and Littlejohns; and December, 1676, No. 524, inter eosdem.*

*Advocates' MS. No. 549, folio 277.*

---

1677. *February.* LORD NEWBYTH *against* JAMES STEWART

JAMES STEWART having a wadset on the lands of Foord, my Lord Newbyth, who had purchased them lands by a declarator, contended they were paid by intermission; and if anything was owing in the count and reckoning, offered to give it in; since he had a very lucrative wadset, and much beyond the annualrent of his money. ALLEGED,—He was not bound to count for the superplus, because his right was a proper wadset, nowise liable to count and reckoning, by the 62d act of the Parliament 1661.

*Advocates' MS. No. 550, § 2, folio 277.*

---

1677. *February.* The MARCHIONESS of DOUGLAS, Petitioner, and ISOBEL HADDOWAY, Petitioner.

THE Lady Marquis of Douglas obtained at Secret Council modified to her 2000 merks, for aliment till the first of June, since she did not cohabit with her lord, in respect of some differences betwixt them.

About the same time, one Isobel Haddoway gave in a bill to the Lords of Session against Maccubi, merchant in Edinburgh, her husband, complaining that he

kept not his own house, and yet gave her no competency to live upon, &c. The Lords ordained him to be cited by a macer, and referred it to Castlehill to hear them, who agreed them together. *Advocates' MS. No. 550, § 4, folio 277.*

1677. *February 24.*

— against JOHN LAW.

JOHN LAW, goldsmith in Edinburgh, having arrested a country gentleman within Edinburgh, to find caution as law will, for the price of victual assigned to him; the Lords, upon a bill of complaint made to them, annulled the caution, because of the late act of Parliament in 1672, anent arrestments within burgh.

*Advocates' MS. No. 552, folio 278.*

1677. *February.*

REMARKS ON SUNDRY POINTS OF LAW.

I. HOME of Linthill suspended his minister of Eimouth, Mr Gilbert Innes's general letters, and offered him the worst victual, yea which grew on other lands he had, not lying within that parish. Certainly the Lords will not allow this, but ordain him to give neither the best nor worst. Some venture to give the lame to God, and what will not pay the master's farm shall pay the stipend.

II. I have heard that axiom of law, *Dispositio hominis facit cessare provisionem legis*, as in *testamentaria tutela et successio* preferred to the *legitima*, &c. called in question; for if it were not the will of the law that validated the man's disposition, it would not subsist; it would have no preference: so it is still *legis dispositio adjuvans et concomitans*, that gives it strength: and so *dispositio hominis non facit cessare dispositionem legis*, for the law could prohibit that act which it permits, and overrule it. Yea, in the case of usury, or renouncing the benefit of the acts against it, *pactio hominis non tollit legem*; nor in a husband ordaining his wife to continue tutrix to his bairns, *etiam si ad secundas convolaverit nuptias*, it will not be supported by law: then law predomines over paction, *et pactis privatorum nequit derogari juri publico. L. 39, D. de Pactis. Vide supra, numero 160, [July, 1671.]* Yet this is only a sophism, for though the law interposes, yet it is only remotely, *permittendo*; the immediate and near influencing cause is the will of the party, and so in many cases, *dispositio hominis facit cessare provisionem legis*. See for this rule, Cujace *ad tit. 30, libri 5, C. de Legitima Tutela; et legem 130 D. de Verborum Significatione, ibique Alciatus et Wissembach.*

III. The Sheriff's fiars are mainly set for this design, to regulate the prices of undelivered bolls by the tenant to their master, to make them liable in that price; yet some masters do, by act of Court, bind their tenants in payment of higher prices than the fiars, in case of failie of delivery, as 20s. more, *nomine pœnæ*. The Exchequer fialls are set for the King's vassals, who pay in their feu-duties to them as the King's Commissioners, and if it be within L.10, to the Sheriff, by the regulations