

The clerks of Edinburgh were, soon after this, turned out ; and Sir James Rocheid reponed, as mentioned *infra*, 22d January 1686.

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1685. December 17. BORTHWICK'S WIFE *against* Her HUSBAND.

DOCTOR Borthwick's wife having obtained an aliment from him *ob ejus sævitiam*, he presents a bill of suspension, that the modification was more than his small fortune could allow ; which seems a very rational defence.

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1685. December 18. JOHN FLEMING *against* WILLIAM BECK.

JOHN Fleming, baxter, pursues William Beck, merchant, in a reduction *ex capite inhibitionis*. ALLEGED,—The ground of the debt whereon the inhibition was served, is paid ; in so far as he arrested the mails and duties of the debtor's lands, and took a decret for making forthcoming, and so must count for the whole, even as a compriser entering once into possession is bound to count for the whole, and to do diligence, or else show an impediment that hindered him ; as was found 14th January 1681, *Shaw against Muire*.

The Lords, on Tarbet's report, repelled the defence on the decret of making forthcoming obtained by the pursuer, unless the defender will allege that he actually intromitted ; but ordained the pursuer to grant assignation to that decret, in respect of his offer to do the same.

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1685. December 19. The DUCHESS of LAUDERDALE *against* SIR WILLIAM SHARP of STONYHILL.

THE Duchess of Lauderdale gives in a bill against Sir William Sharp of Stonyhill, in regard of his sickness, craving he might be examined anent the having sundry papers belonging to the deceased Duke of Lauderdale, her husband, and consequently to her as deriving right from him, relating to the lands he had disposed to her, or to that apprising of Anderson of Hills, with which this Earl of Lauderdale clothed himself against the Duchess, that she might try if it was paid or not ; and my Lord Kemnay was appointed to go and examine him.

Before advising his oath, Sir William Sharp died ; but the Lords, on the Duchess's application, on the 29th January 1686, granted a sequestration of all

Sir William's cabinets and papers, that the writs relating to her right from her husband might be inspected. *Vol. I. Page 386.*

1685. *December 22.*

JOHN Cuthbert having been examined on a commission obtained by Elizabeth Frazer and Hugh Monro of Taninich, her husband, for exhibition of writs : and it being represented, by a bill, that at the examining they would not give the pursuer access ; *2do*, That their oaths want these formal and solemn words, " As they shall answer to God :"

Lord Carse, to whom the consideration of the bill was referred, annulled the report, on the want of these words, and granted a new one.

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1685. *December 23.* ARCHIBALD LAW *against* JOHN BALLANTYNE.

THE case of Archibald Law, writer, and John Ballantyne, door-keeper to the advocates, was reported by Carse. This was a competition betwixt Law as assignee, and Ballantyne an arrester and inhibitor. They eluded the arrestment, because infetment had followed on the debt arrested ; and, for the inhibition, though it was prior to Law's assignation, yet he offered to prove there was a prior assignation from William Brown of Stevenson, which was given back, and this was taken from John Adam his trustee ; and so it must be drawn back *ad suam causam*, and reputed in implement of the first assignation. ANSWERED,—That cannot be, for the first was absolutely passed from and extinct ; and no law can make a resurrection of it. *Quod semel extinctum est reviviscere nequit, et quod nullum est nullum debet sortiri effectum.*—If it had been casually lost, there had been some ground to recur, but not where it was deliberately cancelled. REPLIED,—It was only then laid aside as unnecessary.

The Lords found, that its tenor might be made up *ad hunc effectum*, for proving that there was a prior back-bond and assignation before the arrestment and inhibition, providing there was no fraud in concealing it, for disappointing William Brown's other creditors ; and remitted to my Lord Carse, reporter, to inquire anent the reason of cancelling these writs, and to do therein as he shall find cause.

This being reported again on the 28th January 1686, the Lords found the former assignation has been cancelled *animo fraudandi* of William Brown's creditors ; and therefore reversed their former interlocutor allowing the tenor of it to be proven ; and simply preferred Ballantyne's right to Law's.

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