

1696. *February 29.* LAURENCE RENTOUL *against* NATHANIEL FIFE and JOHN WHITE.

LAURENCE Rentoul having been fined in 300 merks by Mr Nathaniel Fife, sheriff-depute of Perth, and John White, his procurator-fiscal, in the late times, for conventicles and other church irregularities; he pursues them on the new Act of Parliament, for repetition. ALLEGED for the fiscal, That though he granted the receipt of the money, conform to the discharge produced, yet the decret bore expressly, to pay it in to the fiscal, for the use and behoof of the sheriff-depute: whereupon the Lords assoilyied him. ALLEGED for Mr Nathaniel, That he denies he ever received it, or, if he did, he counted for it to the Exchequer.

The Lords thought his own decret did bind the receipt on him; and it not being the fine of an heritor, but a tenant, he was not countable to the Exchequer for it, but it belonged wholly to himself, by the Act of Parliament 1672; and therefore they decerned against him, reserving his relief against his fiscal, or any who shared in it, as he should instruct the same, as accords of the law.

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1696. *February 29.* WILLIAM SMITH *against* His CREDITORS.

THE *cessio bonorum* of William Smith, with a dispensation for his wearing the habit, was passed; and sundry others were refused. *Vol. I. Page 717.*

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Many other cases might have been inserted here; but they were either such as were plain, or parallel with those already marked; or which did not come up to some precise abstract point in law, but, being involved in circumstances of fact, could not be so easily adduced, and applied to enforce and illustrate other cases, or be rules for the Lords' decisions hereafter; the same cases rarely occurring, invested with the like circumstances, so as to determine the Lords to follow them as practicks for the future. What makes the *auctoritas rerum judicatarum* more uncertain, and renders the following or receding from prior decisions arbitrary, is the difficulty which judges find of balancing aright, if the diversity of circumstances of the case in hand, from a former decided case, be sufficient in themselves to influence, occasion, or introduce, a diversity or alteration in the determination and decision of the present debate. Or if they be not of that weight, moment, and relevancy, as to cast the balance, and difference the case from the former, or alter the

decision ; and from this latitude taken by judges, arises the real or seeming contrariety and clashing between several practicks, one with another ; the reconciling of which antinomies were a work more tedious than profitable.

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1696. *June 4.* ANDREW WAUCHOP OF NIDDRY, &C. CREDITORS OF ALEXANDER ROBERTSON, *against* ALEXANDER ROBERTSON their Debtor.

ANDREW Wauchop of Niddry, and other Creditors of Mr Alexander Robertson, pursuing a roup of his lands ; and the Lords appointed for seeing the same being absent on the day prefixed, the one not in town, and the other confined by the gout, the diet, by warrant of the said Lord, was continued to a farther day. This being objected as a nullity, the Lords found his personal presence sufficiently supplied by the warrant given by him to the clerk, to adjourn the court to a new day, and therefore allowed the roup to proceed at that time. But, in the roup pursued by David Allan against John Belches of that ilk, the Lords found, Where the parties had neglected to give the Lords, overseers of the roup, timeous advertisement of the diet, so that they were both absent, though the clerk had continued the court to a short day, that this adjournment had no warrant ; and therefore they behoved, either upon the old or a new diligence, to cite the Creditors over again, and use the other solemnities of the market-cross and parish-church doors : for albeit this protracted the affair, and put them to a greater expense, yet being the foundation of the bidder's security, they behoved to be orderly done, and an adjournment without the judge's express warrant could not supply it ; though in ordinary processes the diets are not peremptory, but with continuation of days ; and summonses are called by the clerk alone, in order to seeing or continuing, without the judge's presence.

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1696. *June 9.* JAMES DALLAS *against* MARION SIMPSON.

Mr James Dallas, younger of St Martins, obtained a decret before the Commissary of Stirling against Marion Simpson, for slander, fining her and her husband in 200 merks, and ordaining her to appear before the congregation and crave pardon ; which being suspended, the Lord Ordinary assoilyied the husband from the fine, (else it were in the power of an intemperate woman's tongue to ruin her husband ;) but found it ought to affect her personally, if she survived the husband, and her share of the moveables, in case of the dissolution of the marriage by her death ; and decerned her to perform the *palinodia* : But she thereafter alleging that she was only holden as confessed for not deponing, she produced a second extract of the decret, bearing,---she had obtained the next