

5th of February they advised the other ; and found she was sufficiently remunerated *aliunde* for this her consent ; and that it was not proven that the said remuneration was either the design or cause of that bond given by Luss to Sir Archibald Stuart of Blackhall, for the Lady's behoof ; and therefore reduced it *in totum*.
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1685. *February 11.* DANIEL NICOLSON *against* GILBERT FIFE.

DANIEL Nicolson, writer in Edinburgh, against Gilbert Fife, merchant, and late bailie there, is reported by Marcus. The case was: Major Robert Johnston and Gilbert Fife having made a vendition and excambion of their shares in two frigates ; and the privateer, of which Fife promised to give Johnston a 16th part, having gone to sea, and brought in a rich prize, Johnston pursued him before the Commissaries of Edinburgh, for his share of the said prize, and refers the agreement to his oath. Fife depones, That he had offered him a 16th part of that ship before it went out, but he refused it. The Commissaries found this quality of the refusing extrinsic, and therefore decerned. Fife suspending this, he ALLEGED,—It was never a completed bargain ; and that Johnston would never have owned nor claimed the said frigate, had she not brought up that prize ; and, having been at no expense on the out-reik, *dolus pro prius nemini debet prodesse*.

The Lords found, in respect the promise was made by Gilbert Fife in favours of Johnston, that, except Daniel Nicolson, who is now Johnston's assignee, will instruct, *scripto vel juramento*, that Johnston did require Fife to make him a right to that part of the ship before it went out, he had no right to any share of the prize brought in ; and therefore suspended the letters *simpliciter*. For they thought it hard that Gilbert Fife should be bound, when there was no document nor vestige whereupon Major Johnston's acceptation of the bargain could be fixed upon him ; so that, if a prize had not come up, he might have refused to accept from George Fife the 16th part of that frigate ; unless it could be proven to have been *unicus contextus* of a complex bargain.

Then the Lords, by a deliverance, on a bill of the 21st of February, ordained Fife to depone if Johnston out-reiked the frigate, or if he ever desired to do it, whereby he intimated that he looked upon it as his.

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1685. *February 12.* The EARL of TWEEDDALE *against* The EARL of LAUDERDALE and SIR WILLIAM SHARP.

THE Earl of Tweeddale gives in a petition against the Earl of Lauderdale and Sir William Sharp, craving Sir William may be ordained to produce his tack of the late Duke of Lauderdale's estate, by sight whereof, it would appear that

the years of the said tack were expired ; and *medio tempore* craved a sequestration of the maills and duties of the lands.

The Lords called for Sir William, and having looked to the tack, and finding it was set aye and while the Duke's debts wherein Sir William stood cautioner, were paid ; they gave it back, without allowing Tweeddale a sight of it ; and found, Sir William not being now a member of the Session, he could not be summarily convened *hoc ordine* ; and refused to sequestrate the rents.

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1685. The BISHOP of EDINBURGH *against* WILLIAM HAY, Commissary-Clerk.

January 9.—THE Bishop of Edinburgh pursues William Hay, commissary-clerk, for deprivation, on sundry gross malversations. This process being reported by Pitmedden, it was cast on this dilator, that there were but five free days in the second citation ; though the Bishop alleged 24 hours, by our custom, was sufficient for the second citation within the town of Edinburgh, where the defender dwelt.

Some of the points he complained of in the clerk were, that, contrary to the instructions given to the Commissaries and their clerks, he had not yearly brought in the registers of the Court to be marked by the Bishop. *2do*, That he had recorded sundry testaments as suffering a bipartite or tripartite division, and by which books he had counted to the Bishop for his quote : whereas the principal confirmed testaments given out by him bore no division at all, whereby the Bishop was cheated and defrauded of a part of his casualty of quote. *3tio*, He had extracted and given out an eik to a testament, as dated in 1666, with a cautioner not then six years old ; whereas it was done within these two years. He pretended the Commissaries authorised him to do it. But they denied it ; *et in criminibus claris mandatum superioris non excusat.*

There is no clerk, if strictly tried, but may be found to have incurred escapes deserving deprivation ; and the Marishall de Monluck's observe as to all ministers of justice, that, without a yearly remission, they may merit capital punishment, is recorded by Pet. Ærodius, *Rer. Judicatar. lib. 9, tit. 7.*

The Bishop's design was, if he could not force him to give a new composition, then to see if he could remove him, and to put his brother, Mr Robert Paterson, in the place. *Vide* more of this, 18th February 1685.

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February 18.—THE Bishop of Edinburgh *against* William Hay, commissary-clerk, mentioned 9th January 1685. The Lords having heard his malversations, with the answers made thereto ; and particularly, that all committed before the transaction between the Bishop and him, whereby he gave him 4000 merks, must be presumed remitted ; (though it may be alleged, the Bishop knew them not at that time, and so was *non cogitatum* ;) they ordained, before answer, the Bishop to prove his condescendence, and the clerk to prove his alleviations.

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