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 decreet 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 decreet, bearing,---she had obtained the next

court-day to depone; without regard to which they had extracted the decreet against her. Though there was a *jus quæsitum* to the charger by his first extract, yet it was considered that both ought to be regulated by the warrants signed by the judge; therefore the Lord Ordinary granted diligence for production of the same, that it might appear which of the two extracts were most conform to the principal warrants, as also to cite the clerk to answer for giving out contradictory extracts; but, the woman having neglected to take out a second diligence, the term was circumduced against her. On a bill to the Lords, they reponed her still, reserving to themselves the consideration of the expenses at the conclusion of the cause; for they thought it very unfavourable on the pursuer's part to prosecute a woman for indiscreet language, where she was provoked by his riding through her corn; and however it might be an injury, yet it could not be properly a slander, there having been few or no witnesses present; and if she did not utter the slanderous words libelled, then it would be a scorning of God and man, and a lie to confess them before the congregation; and therefore reponed her again to her oath, &c.; and thought it could not be properly called a slander, where it could only be proven by the party's oath. *Vol. I. Page* 719.

1696. *June* 10. FRANCIS BRUCE *against* MARY SMITH and THOMAS AIRD.

LAUDERDALE reported Francis Bruce against Mary Smith and Thomas Aird, now her husband. He, as executor decerned, pursues her for delivery of a 1000 merks' bond, that he may confirm it as brother to her first husband, to whom she had disponed that bond in her contract of marriage.

ALLEGED,—She could not exhibit; because, by a clause in the contract, in case there were no children of the marriage, and she survived, the 2000 merks therein provided was to divide equally betwixt his heirs and her; and so she had *jus retentionis* in her own hand for implement of that obligement.

ANSWERED,—He, being executor, was only liable to fulfil, and, having found caution, it ought to be delivered to him; and, if she had any claim, the creditor's action lay solely against him, whom she must pursue. *2do.* The most she could plead were to retain the half, seeing the whole subject divided between his heirs and her, and so every bond.

REPLIED,—She opponed the clause of the contract, and *frustra petis quod mox est restituendum;* and why should unnecessary processes and charges be multiplied, seeing *tutius est incumbere rei quam personæ,* and her own 1000 merks was declared to return to her in case of no bairns, and her surviving; and his *nudum officium* as executor could not entitle him to uplift it from her.

The Lords found she had right to retain the whole. But it being moved, That, in case the creditors distressed the executor, and they should be preferred to the relict, and the rest of the estate were not able to satisfy them, that she might find caution to relieve the executor in that event;—the Lords found she was not obliged, seeing she got it not as a creditor to her husband, but as a substitute fiar, failing of bairns of the marriage.

In the same process, he pursuing for the moveables, her defence was *quoad*