

1671. *June 29.*

Anent PRESUMPTION OF DEATH.

AN allegeance of death of one that is known to have been out of the country, being admitted to probation; *queritur*, I producing his wife's contract of marriage with another man, if that will be reputed a sufficient probation that he is dead? I think it will, providing always the wife has used the solemnities appointed in such a case by law, *viz.* waited seven or ten years without hearing from him; then caused cite him at the market cross of Edinburgh, Pier and Shore of Leith on sixty days, which being elapsed, then got a declarator of his death; after which he will be reputed dead, though *in rei veritate* he may be yet in life. But if it be malicious desertion, then not this method, but the order prescribed in the 53d act of Parliament 1753, is to be observed.

Advocates' MS. No. 186, folio 100.

1671. *June 30.*

Anent ADVOCATIONS.

MY Lord Gosford refused to advocate a cause from an inferior judge, upon the reason of iniquity committed by him; because, before the intimation of the advocacy, litiscontestation was made, and they had no reduction thereof; so that he found in such a case, the act of litiscontestation must be reduced. *De hoc cogitandum.*

Advocates' MS. No. 187, folio 100.

1671. *June 30.*

Anent ACTIONS OF DECLARATOR.

A DONATAR to an escheat having cumulated both his general and special declarators in one summons, the Lord Gosford refused to decern in the general, and make an act in the special *simul et semel*, (though Hope tells that as the practice of his time;) but decerned in the general, and ordained them to enrol of new for the special.

Advocates' MS. No. 188, folio 100.

1671. *June 30.*

Anent DENUING OF LIFERENT BY CONSENT TO ALIENATE.

FOUND that a woman's consent to an alienation of lands provided to her in liferent, prejudices her not thereof, because a renunciation is the only *habilis modus* for denuding her of her right; far less then will a consent given by the hus-

band to a disposition of his wife's liferent lands belonging to him *jure mariti*, be interpreted a passing from the liferent, or a discharge thereof.

Advocates' MS. No. 189, folio 101.

1671. *June 30.* Anent COMPETENT AND OMITTED.

COMPETENT and omitted fails, *1mo*, where the defences are difficult, and the cause was before an inferior judge; *2do*, where it was in a suspension, unless it was of multiplepointing, because a man may suspend oftener. This is now altered by the Lords' decisions, see *alibi*, providing they be new reasons not proponed in the former; neither will one be admitted to allege that they were competent in the first suspension, but there omitted. *Vide supra No. 49, [1st July 1670;] infra 484, [Wright against Sheill, June 1676.]*

Advocates' MS. No. 190, folio 101.

1671. *June 30.* CUTHBERTSON *against* WILLIAM CUNYGHAME.

IN Cuthbertson's case against William Cunyghame, (the informations whereof I have beside me,) the Lords found this allegiance relevant to liberate from intrusion and spulyie, *viz.* that the defender entered to the house alleged intruded into, and wherein the goods spulyied were lying, by warrant from pursuer's wife, (he having only right thereto *jure mariti*,) she delivering to him the keys thereof, and setting to him the house at the just avail, so that she was *utilis negotiorum gestrix*, and did her husband's affairs profitably; and that this might be proven, *prout de jure* or by the wife's oath, which may be taken in prejudice of her husband, when it is *ad distractum*, and to liberate another *a spolio*, but not *ad contractum* or to burden her husband with a debt: neither did they regard whether it was done by order and warrant from her husband or no.

Advocates' MS. No. 192, folio 101.

1671. *June 30.* Anent LIBERATION OF A CAUTIONER IN A SUSPENSION.

WHERE a decret suspended is turned in a libel, if the defender be unwilling to debate presently, then he will get up the instructions and verifications of that decret to see, as if it were in an ordinary action; and the cautioner in the suspension will be freed.

Advocates' MS. No. 193, folio 101.