1676. *July* 14. SIR JOHN KEITH *against* ISOBEL CULLEN.

SIR John Keith, being infeft in the barony of Caskieben, pursued improbation and reduction against Isobel Cullen and the heir of her husband. She produced her contract of marriage and an extract of her seasine; and, before extract of the certification *contra non producta*, she produced a summons for proving the tenor of her charter and principal seasine; and gave in a bill, craving the certification to be stopped till she might conclude her tenor. Yet the certification was extracted without any answer to the bill, or repelling of the tenor. Sir John now insists on his reason of reduction, that the defender produces only her contract of marriage, and an extract of a seasine from the register of seasines; which being only for publication, without keeping the principal seasine, it hath no effect in improbations; so that certification being granted against the principal seasine, there is no real right. *2do.* Though the seasine were produced, it is base, holden of the husband; so that the certification against his heir makes the wife's right fall in consequence.

The defender ANSWERED, That she offered to prove that her husband had a wadset-right, and that by collusion with Sir John Keith, he transacted the same, and suppressed his infeftment: so that, albeit her right fell in consequence, yet she ought to be reponed, because of the collusion, to produce or instruct her husband's right:—all which she offers to prove by Sir John's own oath. And seeing there was no answer to her bill, in relation to the tenor, before the certification, the process ought yet to be stopped till time be granted.

The pursuer REPLIED, That there was not the least diligence done upon the tenor, there being a year since the certification was extracted. *2do.* Certifications cannot be annulled upon probation of tenors, unless the tenor be raised in due time, before the terms in the production be run; for then the tenor is as an incident, that may stop the principal cause of reduction: but if otherwise, certifications could be quarrelled upon probations of tenors, that great security of the lieges would be exceedingly weakened, and an inlet made for multiplying and continuing of pleas: but, as certifications in improbations cannot be reduced *sub prætextu instrumentorum de novo repertorum*, much less can it be reduced upon making up of the tenor by witnesses; which is far less than the principal writ found out after the certification.

The Lords found, That the certification being recent, and bearing the production of the tenor, and bill thereupon, without any answer of the Lords repelling or sustaining the same, they found the tenor was not thereby eleided; but would not stop proceeding in this state of the process, upon that account, but reduced with reservation of the tenor. And, as to the allegeance of the collusion, as to the husband's right, they allowed the same by reduction, and also reserved the wife's terce, in case she failed in the tenor.

Vol. II, Page 450.

1676. *July* 26. UMPHRAY *against* CORNELIUS NEILSON.

CORNELIUS Neilson having freighted Umphray's ship from Aberdene to

Leith, with timber, by a charter-party; Umphray thereupon charges for the freight. Neilson suspends upon this reason, That after a part of the timber was embarked, the admiral arrested the timber; and the said Cornelius wrote to the skipper, that he would satisfy him for the time of his attendance, and desired him to disload what he had embarked; which he did accordingly: And, therefore, seeing he had found the ship at Aberdene, where he had freighted the same, and that he had been impeded to fulfil the charter-party, without his fault, and that the charger had accepted of his offer, and disloaded accordingly, he could not be liable for the freight. And, albeit the skipper came to the Road of Leith, on his way to Borrowstounness, the suspender was not liable, unless it could be instructed that he had lost a freight between the date of the charter-party and the time of disloading the timber, or sustained any other damage.

Which the Lords found relevant to liberate him from the freight, and to make him liable for all other damages.

Vol. II, Page 459.

1676. *November* 14. THOMAS LAWRIE *against* ANGUS.

THOMAS Lawrie, having shipped some silk-ware at Rouan, he obtained his bill of loading to be delivered at Leith when the ship landed there. He, finding the goods to be embezzled, pursued the skipper for damage, and obtained decreet for 400 merks, for spoiling of the goods, and for 100 pounds for detention thereof. Angus, the skipper, gives in a bill of suspension: and the cause being appointed to be heard upon the bill, he insisted on this reason, That he was unjustly decerned, having proponed this relevant defence, that the spoiling of the ware was neither by his fault nor negligence; because he offered him to prove, that his ship and pump were sound, and in good condition, at his loosing; and that he had stowed the pursuer's ware in a safe and convenient place of the ship; but that he himself had changed them from that place of the ship, and had put them low in the hull of the ship, near the pump, that they might be less accessible to *capers*, lest they had come to search the ship: so that he had done all that was his part as a diligent and provident master, who would only have put such ware as would not have spoiled with water near the pump. And as for the detention, he had good reason to detain the ware till the freight was paid.

It was ANSWERED, That the master of the ship, by his office and contract of conduction, is obliged to preserve the merchant's ware safe; and nothing can exoner him but such force or *casus fortuitus* as he could not foresee or prevent: so that no leakage in his pump can liberate him, unless it had been incident by stress of weather, which could not have been repaired at sea; which is not alleged. Neither is it relevant, though it were true, that the merchant stowed his goods near the pump, seeing the pump should have been sufficient against leakage; neither did the skipper show the master any hazard in that place more than the other.

The Lords found the reason of detention of the ware, till the freight was paid, relevant; and found the other reason also relevant, that, when the ship loosed, the pump was sufficient against any leakage, which leakage fell in by the