to take the principal out of the register, and deliver them to Westshiells, if they were not booked, and so could not be gotten back; for the Lords thought it humour on both sides, and *malitiis non est indulgendum*. *Vid.* act 18th Parl. 1689, *in fine*. *Vol. I. page* 545.

1693. *February* 16.—At examining the witnesses about taking out the extracts of these bonds which the Earl of Balcarras was decerned to deliver up to Denholm of Westsheills, mentioned 13th January last; Mr. Charles Gray, advocate, refusing to answer this interrogatory, whether he was present at any consultations where the Earl was advised to take out no extracts;

The Lords found he was not bound to answer this, being to cause him detect his client's secrets, and against his fidelity; though on the other hand it was more against the duty of a Christian advocate to give fraudulent advice to their clients, how they may frustrate or defraud their creditors. *Vol. I. page* 562.

1693. *February* 16. Lieutenant Mackay *against* Alexander Monro's Relict.

The Lords allowed Lieutenant Mackay to get up a trunk-valise, which General Mackay left with Alexander Monro, from his relict, upon his finding caution to make it forthcoming, and to secure her, conform to an inventary thereof to be made. *Vol. I. page* 562.

1693. *February* 17. Laurence Oliphant *against* Mary Hepburn, and Oliphants, her Children.

This was a reduction of an additional portion of two or three thousand merks, that Laurence Oliphant had given to the eldest son of the first marriage, on this reason, that he had got to the full what is provided by his mother's contract, viz. 5000 merks, and that the second contract provided all the conquest to the second children, and therefore he could not take it from them.

The Lords found these clauses of conquest did not impede rational deeds, nor cut off the paternal power of disposal when it was moderate; and they found this provision rational and moderate, and therefore sustained it.

Vol. I. page 562.

1684, 1685, 1686, and 1693. James Sutherland and George Wedderburn, *against* Bailie John Johnston of Polton.

1684. *November* 14.—In the case of James Sutherland and George Wedderburn, his son-in-law and assignee, against Bailie John Johnston of Polton, it was

debated, how far the Lords of Session may still advocate causes from the Admiral Court, notwithstanding the late act of Parliament 1681, establishing and extending the Admiralty jurisdiction very far, and prohibiting advocations from them in all maritime or seafaring cases.

For, 1*mo*—It was ALLEGED, a process founded on a co-partnery, or society for trade, was not properly a maritime cause. 2*do*, When the advocation was actually past, Sir David Thoirs, Admiral-depute, ought not to have contemned the same by rejecting it, and proceeding to decern, but should have applied to the Session or Secret Council.

ANSWERED—That a trade depending on bills of exchange, or bills of loading, or cargoes of wine, &c. from abroad, was truly maritime. And, as to the 2d, The late act of Parliament made the Admiral Court sovereign *in prima instantia*.

Sir David Thoirs durst not venture this point to interlocutor; and so his decreet in absence was turned into a libel, and Bailie Johnston thereby freed of finding caution *judicio sisti et judicatum solvi* for L.36,000 Sterling libelled, as is required by the form of the Admiral Court; though they offered to restrict their libel to L.6000 Sterling, for which he might find caution. But my Lord Saline, who past the bill of advocation, caused Bailie Johnston give in a complaint to the Lords against Sir David, for contemning not only the Lords' authority, but also the King's Signet letters of advocation.

The Lords ordained Sir David to answer the bill. He verbally declared he would not, because he could not be cited *hoc ordine*, he not being convened as a member of the house, who may be summarily called, but as a supreme Judge; therefore they must raise an action against him before the Privy Council for malversation, where he is content to answer. The Lords, notwithstanding thereof, recommended to him to answer the complaint; at last it was accommodated; but this interfering of privileges and jurisdictions begot some animosities and heats.

In this case it was debated, how far in law count books in a co-partnery proved *pro scribente vel contra tertium;* for that they prove *contra scribentem* there is no doubt. If you make use of a charge given in by me, you must also own the discharge I give in with the same breath on the other credit-side; or else you must constitute and prove your charge against me *aliunde;* for it is *in articulo connexo, quem non licet dividere et pro parte approbare et pro reliquo reprobare*. And to this the Lords inclined. For this cause being reported by Saline on the 19th of November, the Lords ordained both parties to count and reckon; but before the Court proceeded, they ordained James Sutherland to exhibit upon oath in the clerk's hands all the books and writs relative to the co-partnery, which he received from Bailie Johnston the suspender. *Vol. I. page* 310.

1685. *January* 29.—James Sutherland, and George Wedderburn's case *contra* Bailie John Johnston, mentioned 14th November, 1684, was reported by Forret. And the Lords found they would take no other probation of Bailie Johnston's having the count-books, and putting them away, but his oath, seeing the co-partnery was never in writ, and was suffered to lie over twenty-two years since its dissolution: and found the abbreviates of the counts given in by John Johnston behoved to be taken complexly, as well in what made for him as against him; and could not singly be made use of only to constitute a charge against him, without noticing the discharge and credit side of the account also. *Non licet idem et approbare et reprobare.* *Vol. I. page* 335

1685. *November* 25.—The case of Bailie Sutherland and George Wedderburn, his son-in-law, against Bailie Johnston, mentioned 29th January, 1685, was reported by Forret. The Lords, before answer to this point, whether the abbreviates shall be probative as well for his discharge as a charge against him, in relation to debit and credit, ordained Provost Curry, Bailie Johnston himself, James Sutherland, and Gilbert Fife, to be examined *ex officio,* whether the book of debit and credit was marked by any of the partners in presence of all or any of them, and if they knew what came of the instructions either of debit or credit; and if the double of each person's account was not given to them at the time of marking the said accounts, or thereafter; and Provost Curry and Gilbert Fife to be examined if they got any money from Bailie Johnston upon the account of Patrick Fife or James Curry's interest in the copartnery, or upon what account they got any money from Bailie Johnston at any time since; as also, if they were in use to uplift debts owing to the copartnery, or goods belonging to it, or to receive money from Bailie Johnston without giving him receipts therefore; as also Bailie Johnston to be examined, what was the reason why he omitted articles condescended on which were not inserted in the abbreviate; and that James Sutherland be examined if he has any particular account relating to his interest in the copartnery. Sutherland's lawyers acknowledged *quod nemo tenetur edere instrumenta contra se;* but that there were exceptions, where some were bound to furnish a charge against themselves; as tutors, curators, factors, book-keepers, cash-keepers, and other managers; who could not be charged unless they gave it in; and when they did, it were ridiculous to think their discharge given in by them should also, without any more instruction, prove for them. *Vol. I. page* 377.

1686. *January* 15.—Wedderburn and Sutherland's action against Bailie Johnston, mentioned 25th November, 1685, was again advised; and the Lords found, that the pursuers, Wedderburn and Sutherland, cannot make use of the abbreviates for proving the charge, unless to prove also the articles of discharge, except such articles as of their own nature require to be instructed by writ; without prejudice to the charger to prove his charge otherwise than by the abbreviates, or to add to the articles of the charge; and find that the pursuer's accepting a copy of the defender's obligement relative to a list of bonds therein mentioned, does not prejudge the pursuer of the other debts of rests mentioned in the abbreviate as due to the co-partners; and find the defender liable to assign to the pursuer his share thereof, and to make the bonds forthcoming; as likewise, find the allegeance proponed by the defender, that the shipping contained in Bruce of Newton's former accounts is not transferred to the abbreviates, because they were *medio tempore* shipwrecked and lost at sea, relevant to be proven *prout de jure:* And find the defender liable to count for the sum of L.340 Sterling mentioned in Newton's account, and to assign to the pursuer his share of it, and to make the bonds forthcoming: and ordain the count and reckoning to proceed accordingly.

Vol. I. page 393.

1693. *February* 17.—The case of James Sutherland against John Johnston of Polton, being reported, the Lords declared they would hear it in their own presence, if George Wedderburn, the assignee, could make any transaction with Polton, and discharge him; seeing he had given a back-bond of the date, declaring it

was but a trust in his person for James Sutherland his father-in-law's behoof, which was *pars contractus*, and affected personal rights; and so the transaction could subsist no farther but for the money that was paid *pro tanto*, he breaking immediately after giving this discharge. Many of the Lords were for assoilyieing Polton from this reduction. *Vol. I. page* 562.

1693. *February* 17. EDWARD BIRD of Ford *against* JAMES JUSTICE of Easter-Crighton.

CAPTAIN Edward Bird of Ford against James Justice of Easter-Crighton, being a debate about a seat in the kirk. The Lords remitted it back to the presbytery of Dalkeith, to review their own sentence, and to do therein what they should find just. But the Lords did look upon this as a civil interest, wherein the church was not sole judge, but if they wronged any, their sentence might be rectified. *Vol. I. page* 562.

1693. *February* 21. GORDON of Daack *against* GORDON of Techmury.

THE Lords repelled the defence, that he was only convenable *pro virili parte*, and the other children, of the second marriage, ought also to be convened; and found each of them liable *in solidum in quantum* they were *lucrati*, and had received, and their portions extended to; but ordained the pursuer to assign him, for recovering his easier relief against the rest. *Vol. I. page* 562.

1693. *February* 21. BAILIE of Jerviswood *against* BRAND of Baberton.

BAILIE of Jerviswood, as adjudger from Secretary Johnston, against Brand of Baberton. The Lords found, seeing Sir Archibald Johnston of Wariston, the Secretary's father, was now restored against his forfeiture *per modum justitiæ*, and that they offered to pay all Brand's just debts he had on the lands of Newhall, that therefore Brand ought to remove and cede the possession. If it had been only a restitution *per modum gratiæ*, he could not have obtained re-possession against a creditor. *Vol. I. page* 563.

1693. *February* 21. BAIKIE of Tankerness *against* BAIKIE of Greentofts.

THE Lords adhered to their former interlocutor: and found Tankerness fiar, by the conception of the tailyie; and seeing there was no irritancy, he could not be