

tion could prove against a third party ;—which the Lords thought it could not. But it stuck with severals, that this assignation, though *in rigore juris* null, being signed by a wife *vestita viro*, without his consent, was supplied in that defect by the posterior contract, and was confirmed by the husband's dying without ever quarrelling it ; and that there was none competing who derived a right either from the wife or husband, or their heirs ; and it was *jus tertii* to others. Yet the Lords, by a plurality, found this production did not satisfy the terms of the act, and points admitted thereto by the interlocutor ; and therefore assoilied. See Dury, 14th March 1634, *Gib* ; where a voluntary contract between a man and his wife is sustained where there was no separation by a sentence.

*Vol. I. Page 643.*

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1694. November 16. ROBERT WILSON and His CURATORS *against* His WIFE.

ROBERT Wilson and his curators having raised a reduction of a disposition granted to his wife, upon the reason of deathbed : when the probation came to be advised, the Lords found it clearly proven, that, at his going to kirk and market, he fainted by the way, and was supported. But it was not cleared, when his sickness began, and if he had contracted it before subscribing that disposition ; which was absolutely necessary : for, if a right be granted by one in health, though he die within an hour after, without going either to kirk or market, it would be valid. Therefore, the Lords assoilied from the reduction. Whereupon a bill was given in by the pursuer, representing, that, through mistake, the witnesses had not deponed upon the time when he took the disease, and had not answered that interrogatory ; whereas, if the Lords would allow them yet to be reëxamined, they would clear that point above exception.

The Lords thought that of dangerous consequence, to begin a new probation, when you had the power and management of it in your own hand ; therefore, they refused any farther diligence, the cause being now advised, and found not proven. For an act of litiſtestation is a judicial contract and novation, on which both parties put the whole cause ; and, if these points be not proven, then, of consent, he engages to lose the cause. Yet sometimes the Lords, for their own clearing, will admit probation in this state of the process, if it can be shortly expedite, and draw not out the cause to any length. *Vol. I. Page 643.*

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1694. November 14 and 20. FRENCH of FRENCHLAND *against* The EARL of ANNANDALE and SIR CHARLES MAITLAND of PITRICHY.

November 14.—PHESDO reported the bill of suspension given in by French of Frenchland against the Earl of Annandale, and Sir Charles Maitland of Pitrichy, as assignee, by the minister of Moffat, to the vicarage-teinds thereof. The reasons were, *1mo*. That the advocates, who took a day for producing them to depone, had no warrant, and were not employed, but appeared officiously.

This the Lords repelled, else it would cast all the decreets *in foro*.

*2do*. That the term was circumduced against them, under trust, when my

Lord's chamberlain and doers bade them stay at home, for they should be in no hazard. Though my Lord answered, they had no commission from him, of giving any such assurance; yet the Lords thought, there was much to be indulged to the rusticity of tenants.

*3tio.* The quantities and prices whereon they were holden as confessed, were most exorbitant.

The Lords judged it reasonable to repon them; such duties being oft libelled at random, far above the true values; unless my Lord would consent to discuss the reasons summarily on the bill. But, in either case, modified 100 merks of expenses, to be paid the charger ere they were reponed. *Vol. I. Page 642.*

*November 20.*—In the cause between the Earl of Annandale and French of Frenchland, mentioned 14th current, the Lords finding that the suspender took advantage of his succeeding by a singular title, to shun the payment of those years his father possessed; therefore, to bring him to reason, they refused to loose the decret against him, but referred it to the reporter to settle the parties, so as he might restrict to the true quantities and price of the vicarage, and not as they were exorbitantly libelled at large.

This was to cure one piece of strict law with another as rigorous, and to draw him to reason only. *Vol. I. Page 643.*

1694. *November 21.* JOHN GUILDMAN *against* JOSHUA SMETON, Skipper in Dundee.

THE Lords reponed the skipper against the decret; because, though it bore compearance, yet it mentioned no mandate the procurator had; in which case he could not refer to the pursuer's oath that he had received the bag of spice, seeing it was incumbent on the pursuer to have proven his intromission with it. And what moved the Lords, was, that he had been silent for several months after the entry, and had not intimated to the skipper that he wanted it, and never reclaimed till the skipper was seeking his freight: but found, he might yet prove, that, after the entry of the goods, he required the skipper, by way of instrument, to hold count to him for that bag of pepper; or else, by the skipper's oath, that it was never delivered. For, though the bill of loading did bind it on the master, yet it bore, "quality not known;" and, having delivered the goods in gross, and in cask, it might have been wrapt up therein; and, after he missed it, he should immediately have required it.

Some thought, if the parties had objected it, the bailies of Dundee were not competent judges to such a maritime cause, but only the Court of Admiralty; and others doubted if they could prorogate the jurisdiction by consent.

*Vol. I. Page 644.*

1694. *November 21.* MR ROBERT BENNET, Advocate, Petitioner.

WHITELAW reported a bill of suspension, given in by Mr Robert Bennet, advocate, of a bond, bearing a substitution, failing the charger by death, to an-