

1694. *Nov. 29 and Dec. 28.* SIR WILLIAM BINNY and SIR ROBERT BAIRD
against ANDREW ALEXANDER, late Factor at Rochell.

November 29.—THIS was a bill of suspension of a decret of count and reckoning *in foro*. The Lords repelled this reason, That Philiphaugh, auditor, did not report the whole count and reckoning to the Lords; in regard they had already determined that was not necessary, but only such points as had difficulty: and that he needed not report that article, how far the books of a factor, kept exactly in France, proving for him as well as against him, would be as probative here; in regard the Lords, on Castlehill's report before, had repelled that.

As to the reason, That the auditor had advised oaths taken in the count and reckoning, the Lords found he might. But, in regard it was ALLEGED they bore qualities which should have been advised by the whole Lords; therefore they desired the reporter to consider, and report what these qualities were, seeing they might be so plain as not to retard the count and reckoning by bringing them in to the whole Lords.

As to the reason, That he got not terms to prove, the Lords thought, if he sought diligences and was refused them, he might have reason to complain; or, if he had instructions, instantly to produce.

As to the bill of exchange, whereof only a protest was produced, the Lords ordained Sir William Binny to give his oath of calumny if it was yet resting: and, *quoad* the restriction and modification of his expenses in pursuits at the marble-table of the Admiralty in Paris, &c. the Lords desired to see if it was done on a report to the whole Lords, or only by the auditor. In the first case they would not meddle with it. But, though it had been only the Ordinary's deed, yet it is very dangerous to loose decreets *in foro*, after so much debate and dependence by the space of ten years. *Vol. I. Page 646.*

December 28.—Between Andrew Alexander and Sir William Binny, mentioned 29th November last. The Lords found the quality was not such but the same might be advised by an auditor in a count and reckoning, where it was taken by himself to clear an article; for, though inferior judges are not competent to extrinsic qualities in oaths, yet one may do it where there is no great intricacy nor difficulty. But, as to the article of his expenses, the Lords, before answer to the opening the decret, allowed Andrew to depone on the verity of the account; reserving to themselves to modify. And, as to the interlocutor of Castlehill's, which Andrew alleges was in his favours, and is abstracted, the Lords would not suffer the tenors of interlocutors to be made up; but allowed the advocates, extractors, and clerks, to be examined anent their having of the same, or its being abstracted by them, or others to their knowledge.

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1694. *December 28.* JAMES JOHNSTON against LEWIS and SARA JOHNSTONS.

THE pursuit was for the remainder of his portion dispoed to him by his

father in his contract of marriage. ALLEGED,—Posterior to that obligation the father took a bond for 1700 merks to himself in liferent, and you in fee, and which must be ascribed in part of payment of the debt he was then owing you; seeing *debitor non præsumitur donare*. ANSWERED,—That brocard takes not always place, and is elided by stronger presumptions. And here the sum of the contract of marriage was suspended during the father's life; and so this substitution cannot be in implement thereof, because that were to make him pay before the term. This the Lords repelled, because both of them had one term, *viz.* the father's decease.

The *second* qualification was, That, as his father's estate increased, so he augmented his children's portion, and gave the other two more than this son; and, if this be not construed a gift, then he would not get any thing but just what was provided in his contract; and the rest would be more unequally provided than he; and, this being *conjectura de voluntate defuncti*, he lived many years after this; and, if he had designed it for payment, he would have by some writ declared so. The Lords, in this circumstantiate case, found it ought to be esteemed a distinct liberality and donation, and not to be imputed in payment of the preceding debt; but ordained the circumstances to be engrossed in the interlocutor, that it might not enervate the maxim founded on the presumption in other cases.

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1694. December 28. STEWART against The TOWN of PAISLEY.

RANKEILER reported the poor woman Stewart against the Town of Paisley. The Lords read the Act of Parliament; and found it was but a private act, and fell under the act *salvo jure*; and, though it gave them the privilege of the royal burrows to cite heritors of decayed tenements, within a year, to rebuild them; and, if they failed, then to appreciate, and either reëdify them, or sell them to such as would: and therefore reponed her to her right; but the purchaser, who, on the faith of that act, had built, would get back his price, and allowance for all his meliorations. Some of the Lords thought she should have been first burdened to prove the two allegeances she founded on:—*Imo.* That the year and day when she was cited could not run against her, because she was then in Londonderry, and, being besieged, it was an insuperable impediment; *2do.* That the Magistrates were *in dolo*, having sold it much cheaper than might have been got for it; and having concealed and kept up 250 merks of the price they received, like Ananias and Sapphira. But the plurality would not put her to that trouble and expense.

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1694. December 28. MR JAMES and ALEXANDER LUNDIES against ALEXANDER TROTTER.

THE Lords opened the decret of count and reckoning, upon this nullity, That the decret bore that the term was circumduced against Lundy for not proving the whole sum of the wadset was paid to Trotter's creditors conform to