

1680. *November 10.* LADY KINCARDEN, Petitioner.

LADY Kincarden craved that her son's estate might also be roused for the use of the creditors, as to the casual rent of coal and salt : which was done, but far below the former tack-duty ; which was thought not to proceed as if the coal were become worse or wasted, but by collusion, that the superplus of the tack-duty might secretly come in to the Lady and her son.

But I think the creditors might, to avoid this cheat, take it in their own hands, and offer caution to account for more. *Vol. I. Page 115.*

1680. *November 10.* JAMES LANDS *against* JOHN LUTFOOT.

IN the charge at the instance of James Lands against John Lutfoot ; the suspender adminiculating the marginal note in the testament used by him, (which was vitiated,) by a letter of Corser's, the Lords found the letter not probative unless it be proven holograph and of the date it bears ; and, before answer, ordain the witnesses inserted in the testament, yet in life, to be examined anent the revocation of James Lands's assignation, contained in the marginal note, if it was there when the testament was subscribed ; and if the note was then of the same tenor that now it is of.

Then James having given in a bill for getting Mr David Watson examined, who dictated the said testament, (though he be not a witness in it,) and knows the said note is false, and affixed since ; the Lords declared they would first hear what the witnesses said, and, at the advising, if they saw cause, they would then take Mr David's oath.

It was further ALLEGED against James Lands's assignation, that it was null, being an undelivered evident the time of the cedent's death. This was repelled, in respect it bore a clause dispensing with the not delivery. *2do*, OBJECTED,—Offered to prove, by witnesses who saw it, that the said assignation was blank, and James's name was only filled up since his cedent's decease.

The Lords found this not probable by witnesses, but only *scripto vel juramento*, since James's name now stood filled up in it ; and so his assignation could no otherwise be taken away.

*3dly*, ALLEGED,—That his assignation, being gratuitous, behoved to be affected with the funeral charges of the cedent. This was repelled, in respect of thir two answers :—*1mo*, That Lutfoot had not debursed them. *2do*, That there were as many moveables as would have done it. *Vol. I. Page 115.*

1680. *November 12.* WILLIAM BROWN *against* THOMAS WILSON.

THE Lords refused to take the oath of Mr David Dewar, advocate for Brown, upon this allegiance made by Wilson, That he offered to prove, by his said advocate's oath of calumny, that Brown had referred his libel to Thomas Wilson's oath, and he had deponed negatively thereupon, and so was assoilyied ; seeing

the oath *non constabat ex actis* and the clerk's minutes, (which is the only probation in such cases,) he having omitted to write the oath, which was taken at the side-bar. And they found an oath which was not extant *in scriptis seu re-tentis* could not be made up by an advocate's oath. *Vol. I. Page 115.*

See 23d Dec. 1680, page 384.

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1680. *November 13.* HUGH BLAIR *against* ROBERTSON and CHAPMAN, her Husband.

IN Hugh Blair's pursuit against one Robertson, that was his taverner, and — Chapman, now her husband, for his interest, the Lords having advised the probation which was led on an act before answer, anent the vitiation in the count-book kept betwixt them, they decerned, conform to Hugh's count-book, which bore in the controverted article, that she had only paid him two pieces of wine such a day, whereas her book bore, that she had counted to him for four pieces, which could not prove in her own favours; especially seeing, the writer of both books being examined, he owned Hugh's book.

Yet she offering to prove, by Hugh's wife's oath, that her book was juster and righter in that particular than her master's; though it was alleged she was *vestita viro*,—yet the Lords ordained her to come in and depone without any new act, being in a concluded cause, because she was *præposita negotiis*, and in use to count weekly with her servants and taverner. And they received it *hoc loco*, though it was contended it should have been proponed in the first act, because it was instantly verified by the pursuer's wife's oath, who lived in town, and it was only an act before answer. Yet, by an Act of Sederunt, 23d July 1674, these acts are declared to be equivalent to acts of litiscontestation.

Then she having denied it, it was ALLEGED there could be no decreet, because the price of these two pieces of wine was not yet proven. This was repelled, in respect of the notoriety of the quantity a piece consists of, and that each pint was sold at twenty-pence, allowing so much to her for dreg and leakage.

Thereafter, on the 20th of November they referred to Hugh's oath, that he had charged her with a piece of wine which was returned to Gilchrist the merchant. He deponed, that piece was returned, but that he substituted and put another in the place of it. At advising, it was ALLEGED, that this quality of giving her another piece was extraneous, and behoved to be otherwise proven. The Lords refused to divide the oath, but found the quality competent and intrinsic, there being no other probation but his oath. *Vol. I. Page 115.*

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1680. *November 16.* KATHERINE CARNEGY and THOMAS ALLAN, her Husband, *against* The EARL of SOUTHESK.

IN Sir David Carnegy of Pittarrow his double poinding against his sister Katherine and Thomas Allan her husband, on the one part, and the Earl of Southesk on the other; the Lords, *nem. con.* preferred the sister's right by bond to Southesk's precept which he had got from old Pittarrow upon Sir David