1714. *November* 4.

CAMPBELL of Horsecleugh *against* The LADY Little Cesnock.

No 9.
A husband having granted a disposition to his wife of his whole moveables, and a bond of 3000 merks payable by his heir, with a quality, that if the debts due to him exceeded the debts due by him, the bond should be proportionally abated; the relict's intromitting with the defunct's writs without inventory, found to infer a presumption, that the debts due to the defunct exceeded the debts due by him to the value of the sum in his bond, or that the same were accepted by the relict in full satisfaction.

CAMPBELL of Little Cesnock disponed to his Lady the whole debts due to him, and all his moveable estate, with the burden of his debts; and, further, granted her a bond of 3000 merks to affect his heritage; but with this quality, that in case the principal sums of the debts due to him did exceed the principal sums of the debts due by him, that the said bond of 3000 merks should be abated proportionally in whole or in part. Some time after Little Cesnock's decease a warrant was procured from the Sheriff-depute to inventory his writs, which was not done; but his closet and cabinets were sealed by the person sent to inventory, and some friends, the Lady being absent.

Campbell of Horsecleugh, Little Cesnock's heir, pursued a reduction of the 3000 merk bond, on this reason, that the same was qualified, and did provide, that if the debts due to him did exceed the debts due by him, the same should be extinguished or restricted; and subsumed, that the bond was extinct, because the Lady had taken upon her to intromit with the writs *per aversionem* without inventory or authority of a Judge, and therefore it must be presumed, that the defunct's free principal sums did at least amount to the sum in the bond.

It was *alleged*; The Lady's disposition did bear a power to intromit with the subject disponed, so that *non versabatur in illicito, esto* she had broke open the seals and meddled with the writs. 2*do*, She had exhibited all the writs upon oath, or condescended what was become of such as were not exhibited, for which she would hold count, and this deposition being in the same process at the pursuer's instance, *juratum est*. 3*tio*, The Sheriff's warrant was to inventory, and not to seal; yet the goods were sealed, and not inventoried, which was unwarrantable; and several doors of the house were so sealed up, that the Lady could not have access to her own liferent house at her return, and therefore might lawfully break up the same.

It was *answered*; 1*mo*, The clause with power to intromit, was a clause of style which was understood *legitimo modo*. 2*do*, The pursuer does not quarrel her intromission as vitious, because the whole moveables were disponed to her, but founds upon the quality of the bond, which necessarily implied an obligation upon the defender to intromit by authority and inventory, that it might appear whether or how far the debts due to the defunct did exceed the debts due by him; and the Lady having deprived the heir of the means of discovering the extent of the defunct's debts, she must be understood to have taken the disposition to the moveable debts *per aversionem*, in satisfaction of her whole claim. 3*tio*, The defender's oath was not *deferente adversario*, as to the present debate, but was in an exhibition at the pursuer's instance, as the defender's husband's heir, before her right to the moveables and debts did appear. 4*to*, The

seals being put on in presence of friends, ought not to have been removed, and the warrant to inventory did import that the writs might be secured till they were inventoried. But however, it was the defender's part to have procured a warrant to inventory, and to have intromitted only at the sight of a Judge. 5*to*, As to the indiscreet sealing of the doors of the rooms, the fact is denied. But supposing it, the Lady might either have obtained the seals to be removed by the warrant of a Judge, or at least in presence of famous witnesses, and obtained new seals to be put upon the writs. No 9.

'THE LORDS found the Lady's intromission with the writs *per aversionem*, without any inventory, relevant to infer a presumption that the debts due to the defunct did exceed the debts due by him to the value of the sum in the Lady's bond, or that the same were so accepted by her; and repelled the allegeance founded upon her oath in the exhibition.'

Fol. Dic. v. 1. *p.* 208. *Dalrymple, No* 113. *p.* 157.

1724. *January* 23.

ROBERT BUNTYNE of Ardoch and MR THOMAS FLEMING *against* WALTER BLAIR and COMPANY.

No 10.
Demurrage found due, though the master of a vessel went 60 miles for a notary, there being none nearer, notwithsanding of the usual form of taking protest at the mast.

BY charter-party in August 1721, Buntyne and Fleming let out their ship, the Cathcart, to Blair and Company, for a voyage from Clyde to Maryland; where after her arrival in Choptank river, she was to lie for the space of 90 days for taking in the merchant's cargo of tobacco; and the merchant's freighters were, by the same charter-party, bound to pay 30s. of demurrage, for each day the said vessel and company were detained through the said freighters, or their supercargo, or their factor's default, longer than the lie-days agreed upon.

The ship arrived in the said river the 4th February 1722, whereby her lie-days expired the 4th of May; at which time the cargo not being fully provided, the master unmoored the ship as a signal of her readiness, and he acquainted the supercargo that he was ready to sail, and that he was going to Annapolis to take a protest against him in the hands of the only notary public in the province. The protest was accordingly taken, yet notwithstanding the ship was detained, waiting for the loading till the 22d of August.

The owners of the ship brought an action for demurrage, conform to their charter-party, before the Judge-Admiral, and obtained a decreet; which being suspended, it was *pleaded* for the defenders,

That in the greatest part of maritime affairs, where damages, or any other considerable consequence was to arise from the acting or omission of either party, the law had required that instruments should be taken at the time, to the end that witnesses might more particularly remember what past; as was found 14th February 1678, Calderwood *contra* Angus*, and in a late case, the

* *Vide* PROOF.