

No 352.

tained the said Christian's oath, to prove her intromission, or promise, which was not sustainable, she being clad with a husband to his prejudice. It was *answered*, That the oath was relevant against the wife herself, to affect her goods, after the dissolution of the marriage, and that there was no iniquity, seeing this restriction was not proponed and repelled.

THE LORDS found, That this restriction ought to be adhibited, but seeing it was not proponed, they repelled the reason of advocation, but allowed the restriction to be adhibited by the bailies.

The *second* reason of advocation was, That the bailies had sustained process, libelled at the instance of these factors, and not at their constituent's instance, and concluding to pay the factors.

THE LORDS repelled also this reason, and found, That the factors might proceed in this order, but that the defender might prove against them by the constituent's oath.

The *third* reason was, That the bailies had sustained the pursuit upon a factory, which is null, not being subscribed by the constituent, or by two notaries for him, but only by one notary. It was *answered*, That the factory was sustained, because it was offered to be proved, That by the custom of Holland, whereby the factory was granted, one notary was sufficient.

Which the LORDS sustained, and therefore repelled this reason also. THE LORDS likewise found, That a wife's oath of calumny was not receivable in prejudice of her husband, because her confession thereby being holden as confessed, would be probative as well as her oath of verity.

Fol. Dic. v. 2. p. 240. Stair, v. 2. p. 394.

1676. February 11.

MARSHALL *against* BASSIL.

No 353.

A WOMAN who was tutrix to her son, having married a second husband, whom the minor chose to be his curator, in an *actio tutelæ* against the mother and her second husband, where her intromissions were referred to her oath, it was *objected*, not a relevant proof against the husband. *Answered*, It being known to the husband, that his wife was left tutrix, and that she had administrated accordingly, the pursuer cannot be prejudged by the marriage, being *ante rationes redditas*. THE LORDS did find the charge was relevant to be proved by the wife's oath to bind the husband, he himself being curator, and knowing that she was tutrix, and so constituted debtor to count.

Fol. Dic. v. 2. p. 240. Gosford.

* * This case is No 63. p. 5852, *voce* HUSBAND and WIFE.