

was no freight due from Leith to Eyemouth, for what deals, &c. he carried for him ; seeing he was, by the charter-party, to come there however, and take in a loading of corn, that portage being only as ballast. *2do.* That being blown away by storms to Norway, he could not claim the freight, average, nor demurrage.

ANSWERED to the *first*,—*Invecta et illata in navem* are hypothecated in law *pro nauulo*, even without a paction. And to the *second*,—The *vis tempestatis* being *casus improvisus*, without the skipper's fault, he ought not to suffer.

The Lords decerned ; but recommended to the Ordinary to settle them.

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1694. *July 26.* ROBERT NASMYTH, Bailie of Hamilton, *against* JAMES HAMILTON of AIKENHEAD.

THE Lords found a bond, thus conceived, To a husband and his wife, and to the longest liver of them two, and their heirs, executors, and assignees, did not make the wife fiar of the sum, because she was the longest liver, as was contended, but only liferenter ; for, in all these cases, *potior est conditio masculi*. But it would have been otherwise if it had been to the heirs of the longest liver ; for that termination of heirs would have determined the fee to her, if she had outlived the husband.

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1694. *July 26.* ELIZABETH PETER *against* PORTERFIELD of FULWOOD.

IT being alleged for Elizabeth Peter, relict of William Montgomery of Mackbyhill, *against* Porterfield of Fulwood, That her consent to his wadset was in her minority, and she had revoked it now ; and, though it was not done *intra annos utiles*, yet it was sufficient, she being then *non valens agere*, because clothed with a husband.

The Lords found, a wife's *quadriennium utile* ran, whether she was married or not in that time ; and that she, not revoking, could not reduce.

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1694. *July 27.* LORD POLWART *against* SIR JAMES DICK.

MY Lord Polwart *against* Sir James Dick, who refused to take a second term in Polwart's reduction and improbation, because he offered immediately to debate the nullity of Polwart's right, being entered by the king ; whereas Home of North-Berwick was Heugh's superior, these lands not being annexed to the Crown, but expressly reserved out of the act of annexation, (being act 29th, 1587,) where it is disputable whether the superiority, or only the property, be excepted, as Polwart alleged.

The Lords, thinking this debate foreign *hoc loco*, they repelled it *against* the

taking of terms, not having been proponed at the first time ; but reserved it in debating the reasons ; and allowed Sir James a diligence for recovery of any writs he needed in the mean time.

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1624. *July 27.* SIR ANDREW MURRAY of MURRAYSHALL *against* The LORDS STORMONTH and DRUMCAIRN.

THE LORDS, finding a disconformity between the two principal doubles of the contract, that Stormonth's copy had more filled up in a blank than Sir Andrew's, they thought the said addition very suspect, and that Sir Andrew seemed to be wronged : however, they could not perfectly judge, till they saw the book of files, being the actings of the curators of Stormonth, and wherein they alleged Sir Andrew was also a subscriber ; therefore, they, before answer, ordained these books to be produced.

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1694. *July 27.* DUNDAS of BREASTMILL *against* WEDDERBURN of GOSFORD.

THIS was a charge, upon a decret, for 3000 merks, bearing that it proceeded on Gosford's consent. He now denied the same, having never offered more at the communings than £100 sterling, and there was nothing under his hand to prove it ; and it could not be made up *ex reminiscencia judicis* ; and if he gave it this way, it must expose him to the pursuit of other creditors.

The Lords found the decret null, for want of probation of his consent, the clerk's assertion not being sufficient for it ; but recommended to Gosford to settle with him.

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1694. *July 27.* MUIRHEAD, late Factor of Covington, *against* GEORGE LOCKHART of CARNWATH.

HE ALLEGED, That the former laird had *via facti* lifted some of the rents from the tenants ; and, if he had exacted it over again, it would have broken them, and cast the roums waste ; and that he had taken a decret against them, referring the rests to their oaths.

The Lords did not think this so exact diligence as factors ought to use ; yet, in respect of the circumstances, and that the master was *vir ferox*, they allowed probation, before answer, of the above mentioned circumstances ; reserving to themselves to consider, when proven, if they would amount to exoner the factor.

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