recovered, so, on the other hand, it were absurd to put them to adjudge any man's lands who they suspected stood obliged to their debtor. But the foresaid general clause salves both these inconveniencies. *Vol. I. Page* 643.

1694. *November* 15. BAILLIE of JERVISWOOD *against* The DUKE of GORDON.

RANKIELER reported the Duke of Gordon's bill of suspension against Baillie of Jerviswood, 1*mo*. That he was not bound to receive him by precept of *clare constat* but with that clause *salvo jure meo*. 2*do*. That, having got his lands, both property and superiority, erected into a regality in the late times, he must design his lands as lying within his said regality. ANSWERED to the *first*,—That the Duke ought to condescend on his right; especially since it is insinuated that he thinks the gift of forfeiture is yet sufficient, notwithstanding of the act rescissory. To the *second*,—The regality being obtained the time of the charger's forfeiture, it must fall with it. REPLIED,—No superior is bound to condescend; because there may be casualties of the superiority, or recognitions. And, 2*do*. He having impetrated the erection, not as proprietor, but as superior, it must subsist.

The Lords sustained both the reasons; and ordained the charter to bear both the clause of *salvo jure*, and mention that they lie in such a regality.

Vol. I. Page 643.

1694. *November* 15. ROBERT ROW *against* CAPTAIN JOHN CAIRNS, Brewer.

THE Lords sustained the reason of suspension,—That the Sheriff had committed iniquity in dividing his oath, whereby he declared he was indeed trusted for Row's sum as well as his own, but that he did not become debtor for it, nor undertook to do more diligence for it than for his own; and, though he had him once under caption, yet he did let him go, because Row refused to bear part of the charges; and therefore turned the decreet into a libel, unless he would subsume that the debtor turned insolvent afterwards, and that he was in a better condition then; and if he had been detained he might have gotten his money. For the Lords considered he was but a *nudus depositarius*, and had lost much more of his own, and did undertake no diligence; and therefore suspended the letters, unless they would prove damage and prejudice in his dismissing him in manner foresaid. *Vol. I. Page* 643.

1694. *November* 15. RAMSAY of IDINGTON and FAIRHOLM *against* The LORD MORDINGTON and his CREDITORS.

IN their concluded cause it came to be debated, Whether the contract betwixt old Dr Sibbald, and Anna de Malvairn, his wife, proved that their separation was by a judicial sentence, seeing it only bore it *narrativè;* and if their asser-

tion could prove against a third party;—which the Lords thought it could not. But it stuck with severals, that this assignation, though *in rigore juris* null, being signed by a wife *vestita viro*, without his consent, was supplied in that defect by the posterior contract, and was confirmed by the husband's dying without ever quarrelling it; and that there was none competing who derived a right either from the wife or husband, or their heirs; and it was *jus tertii* to others. Yet the Lords, by a plurality, found this production did not satisfy the terms of the act, and points admitted thereto by the interlocutor; and therefore assoilyied. See Dury, 14*th March* 1634, *Gib;* where a voluntary contract between a man and his wife is sustained where there was no separation by a sentence.

Vol. I. Page 643.

1694. *November* 16. Robert Wilson and His Curators *against* His Wife.

Robert Wilson and his curators having raised a reduction of a disposition granted to his wife, upon the reason of deathbed: when the probation came to be advised, the Lords found it clearly proven, that, at his going to kirk and market, he fainted by the way, and was supported. But it was not cleared, when his sickness began, and if he had contracted it before subscribing that disposition; which was absolutely necessary: for, if a right be granted by one in health, though he die within an hour after, without going either to kirk or market, it would be valid. Therefore, the Lords assoilyied from the reduction. Whereupon a bill was given in by the pursuer, representing, that, through mistake, the witnesses had not deponed upon the time when he took the disease, and had not answered that interrogatory; whereas, if the Lords would allow them yet to be reëxamined, they would clear that point above exception.

The Lords thought that of dangerous consequence, to begin a new probation, when you had the power and management of it in your own hand; therefore, they refused any farther diligence, the cause being now advised, and found not proven. For an act of litiscontestation is a judicial contract and novation, on which both parties put the whole cause; and, if these points be not proven, then, of consent, he engages to lose the cause. Yet sometimes the Lords, for their own clearing, will admit probation in this state of the process, if it can be shortly expede, and draw not out the cause to any length. *Vol. I. Page* 643.

1694. *November* 14 *and* 20. French of Frenchland *against* The Earl of Annandale and Sir Charles Maitland of Pitrichy.

November 14.—Phesdo reported the bill of suspension given in by French of Frenchland against the Earl of Annandale, and Sir Charles Maitland of Pitrichy, as assignee, by the minister of Moffat, to the vicarage-teinds thereof. The reasons were, 1*mo*. That the advocates, who took a day for producing them to depone, had no warrant, and were not employed, but appeared officiously.

This the Lords repelled, else it would cast all the decreets *in foro*.

2*do*. That the term was circumduced against them, under trust, when my