

De rei vindicatione ; l. 19, p. 13. D. De auro et argento legato ; et l. 30 D. de usurp. et usucapionibus ; l. 7, p. 2. D. Ad exhibendum.

On the other hand, it was reasoned, That statutes were *strictissimi juris*, and we were not to disced from their letter, neither were they to be screwed up or extended by a notional equity or pretended parity ; that they being composed of disparat materials, they could not be truly termed silk stuffs, nor fall under the compass of a prohibition laid upon silk stuffs ; that in the law of accessions the most precious thing was not ever the principal.

This deliberation took no result or conclusion ; only I have observed the most part of people to have ventured upon moyhairs, which wants not its own difficulty and danger, till the ambiguity be removed. But to be convinced how raw and ill contrived that act is, in causing a multitude of doubts, see in the animadversions upon that sumptuary law beside me.

*Advocates' MS. No. 389, folio 215.*

1673. June 2. LADY WAMPFRAY *against* The LAIRD.

THE Lady, with concurrence of sundry of her friends, having raised a Reduction against her own husband, and his brother Sheins, and others, his friends, of her contract of marriage and disposition of her estate, whereof she was heretrix to him, by reason of minority and lesion ; it was objected, she could pursue no actions without the concurrence of her husband, much less he opposing them, and, least of all, actions against himself ; that women, because of the fragility and shamefacedness befitting their sex, were, by the law of God, of nature, and of the Romans, and the municipal laws of all other nations, *in manu, potestate, et custodia, vel patris vel mariti*, and were *sub perpetua eorum tutela vel cura* ; and being married, had no more *personam standi in judicio* without their husband, than a pupil or a minor had without the authority of his tutors or curators interposed. Yea, *Gellius, Noctium Atticarum libro 10, cap. 23*, tells us, that *vir* was *mulieri iudex*, out of Cato. And *Bodinus, p. 25, De Republica*, cites the same Cato persuading the Oppian Law to the people, for reviving the power of husbands, for having their wives *in perpetua tutela*. *Maritis reverentia est exhibenda, l. 14 D. Solutio matrimonio*. See *Calvinum, in Lexico, ad verbum Uxor*. Charron on Wisdom, 2, cap. 46, p. 170.

It was ANSWERED, That *regulariter* the husband must indeed concur in all the wife's judicial actings, yet he being naturally bound to assist her in all her lawful pursuits, if he shall refuse, the Lords, in such an emergent, or in other singular cases and special considerations as they see just, will ordain him to concur, and in case of refusal, authorize her by herself. And which is no novelty, but marked by Dury and Hadington to have been done on the 9th of January, 1623, Marshall *against* Zuill ; yea, Dury at the 13th of July, 1638, tells us, the Lords granted inhibition to the Lady Glenbervy against her husband ; and the same Dury in a case exactly parallel with ours, at the 8th of July, 1642, English *contra* Aitkit, observes, The Lords sustained process at a wife's instance against her husband, for reducing her contract of marriage, *ob minoritatem*, he reclaiming and disowning the same

Neither is this our law only, but also the practice of France, as Hadinton shews at the foresaid decision. And as for that allegiance, that the husband is perpetual curator to his wife, the same is false; seeing it appears, *ex parag. penult. ibique Vinnio, Instit. De Excusationibus tut. et curat*, that is only when she is within age.

The Lords repelled the allegiance, and sustained process at her instance against her husband; only appointed her a *curator ad hanc litem*, to concur with her. Craigie wrought mightily for her. See her Information beside me. *Vide Stair's Practiques, Tit. Of Marriage. No. 10.*

*Advocates' MS. No. 390, folio 215.*

1673. *June.* CAPTAIN GILLEIS *against* GERBRAND CLAES.

IN the beginning of June, (about the 11th of it,) 1673, fell to be debated this point, If causes could be advocated from the Admiral Court to the Lords; upon this occasion: One Captain Gilleis, craving adjudication before the Admiral against Gerbrand Claes, skipper of the Bounder, a ship so called, brought up by him; the Admiral, before answer, allowed a conjunct probation, and granted a commission for examining some persons in foreign parts. The pursuers raise an advocacy thereof to the Lords, upon the ground of iniquity. Against which it was objected, That the Lords could not advocate such a case from the Admiral, who was sole judge competent *in prima instantia*; yea, was supreme and independent, and a sovereign Court, and subaltern to none;\* and that it was so designed in our acts of Parliament, particularly by the 15th act of the Parliament, 1609; and that this was not only our custom, but the practice of all nations in their Courts of Admiralty.

To which it was ANSWERED, That it was beyond all controversy but the Lords of Session were, in all civil matters, sovereign to all the civil Judges in Scotland, and, consequently, to the High Admiral, maritime causes being civil; so that if he should either err through ignorance, or commit iniquity by partiality, no doubt causes may be advocated from him before sentence, or may be suspended and reduced after sentence. And that appeal lies from them to the Lords of Session, appears evidently from the 12th act of Parliament in 1661: where also they seem to be ranked with other inferior courts; likeas, their actings are in the same way quarrellable as the Sheriff's decreet in perambulations may be, though by act of Parliament, the Sheriffs are sole judges to them in the first instance. Also, in some cases, decreets of the Commissioners of Plat are subject to the Lords' review and jurisdiction. Yea, Hope, in his Title of the Session, folio 131, tells that the Lords judged a spulyie committed on the sea *in prima instantia*, though the Admiral reclaimed, and only permitted him to sit and vote with them. And in Holland, where is the best regulated Admiralty in the world, trading being the

\* The law of our country has very rationally provided a remeid from this Court, because the Judge has the tenth part of all found prize. Which argument W. P. makes use of, that if it were not conscience led him to assoilyie, he has more advantage by adjudging; but they answer this very easily, that the pensions or bribes he has from Holland, to free their ships, compenses his tenths ten times.