

The Lords did sustain the same *pro tanto* ; and ordained the creditors to have preference to so much of the estate as they would choice, equivalent to the sums : that the lady's executors might have access to the rest.

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1679. *January 9.* ALEXANDER OGILVIE *against* OGILVIE of LOGIE.

ALEXANDER Ogilvie pursues Ogilvie of Logie, alleging, That he, being in terms of marriage with Helen Ogilvie, Logie's sister, he encouraged the pursuer to insist, and told him that his sister had a jointure, and that he was owing her 1000 merks by bond ; so, having advised him to go to Edinburgh for a warrant to be married, without proclamation,—in his absence he procured from his sister the retirement of the bond, and, in place thereof, did offer her a bond to her daughter by the first marriage :—and, therefore, concluding that he ought to renew the bond to the pursuer, as before.

The defender ALLEGED, That the libel was not relevant, because a wife is only incapacitated to do deeds prejudicial to her husband, after proclamation of the marriage ; and though that should be extended to the time of the contract of marriage, yet here there was no contract of marriage. And, though the defender had said he was owing his sister 1000 merks, yet, the pursuer having made no contract, he went on upon his own hazard. And the sum in question being heritable, he could have no right thereto *jure mariti*, but to the annual during the marriage. But, before either contract or proclamation, the woman was free, and might have gifted the sum to whom she pleased.

The pursuer ANSWERED, That, before contract or proclamation, though the woman's disposition could not be quarrelled, as in prejudice of the husband, simply ; yet where fraud is admixed, by inducing the man to marry on expectation of the sum, and, *medio tempore*, evacuating the same, that makes him liable to repair the damage occurring *ex propria fraude*.

The Lords would only sustain the summons and reply, in these terms,—that the marriage was agreed upon, the defender being present, and this sum agreed to be a part of the tocher ; and that, after the said agreement, he had induced the woman to give up the bond.

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1679. *January 15.* MR PATRICK REID *against* JAMES WOOD.

MR Patrick Reid, as assignee to a decret against James Wood, having charged him thereupon, he suspended on double-poinding ; wherein Mr Patrick was preferred, and a decret extracted. He suspended again, and a second decret of suspension was extracted ; and now he raises reduction and declarator, and insists on this reason,—that the last decret was unwarrantably extracted, there being a stop by deliverance of the Lords upon a bill.

It was ANSWERED, That the pretence of any stop cannot recal any decret, unless, *de recenti*, at the time of the extracting, it had been complained of, that

the clerk had extracted, notwithstanding of a stop in his hand. But if Wood himself had obtained a stop, and did not deliver it to the clerk, it can be no ground of reduction; and, though he did, it can be no ground to quarrel the decret, except *de recenti*: for the putting on, or taking off of such stops, being no material interlocutors, are never mentioned in decreets; and if, upon the pretence thereof, decreets should be reduced *ex intervallo*, these not being kept as warrants of the decret, none could be secure. *2do*. Wood has given a bond of corroboration, bearing expressly, That, in corroboration of the decret, he obliges him to pay the sums decerned;—and so can never quarrel the decret upon any ground before the corroboration.

It was REPLIED, That the corroboration was no voluntary deed, but was to shun caption; and, if the decret was unwarrantably extracted, it was not a lawful but unwarrantable violence, to take the party with caption. And it was found, in the case of Thomas Rue against Andrew Houston, upon the 3d of July, 1668, That the giving a bond by a party taken with caption, for the debt of the horning, being without abatement, was no transaction, nor hindered the debtor to suspend and reduce the debt in the horning, and the new bond in consequence; in the same way as, if payment had been actually made upon distress, the same might be repeated, if the decret were reduced.

It was DUPLIED, That though a simple bond of borrowed money, given for satisfying of a decret upon caption, and obtaining a discharge of the debt, did not hinder repetition upon quarrelling the decret; yet that never was extended to a bond granted in corroboration of the decret, which has the same effect as if the grounds of quarrelling were repeated and renounced.

The Lords repelled the reasons of reduction, and would not stop the execution: But there being in the same summons a declarator,—that the debt contained in the decret was originally due to Andrew Balfour; and Wood having assignation to a debt due by Balfour, might affect this sum, being conveyed by Balfour, to Reid his son-in-law, without a cause onerous;—

It was TRIPLIED, That Reid had deponed it was for a cause onerous, *viz.* for employing a sum which Balfour was obliged, by his contract of marriage, to employ for the heirs of the marriage; and whereof Reid's wife was the heir; and for the sums advanced to Balfour for his entertainment in prison, and for his funeral charges.

The Lords sustained the declarator; and found the obligation to employ, no sufficient cause in prejudice of a creditor of the father: and found the other causes ought to be instructed otherwise than by Reid's oath.

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1679. *January 15.* BROWN of NUNTOUN, &c. *against* The TOWN of KIRK-CUDBRIGHT.

IN a declarator of the right of a salmon-fishing on the Water of Cree, claimed by the town of Kirkcudbright, and Brown of Nuntoun, with concurrence of the Bishop of Galloway, as superior,—probation of possession and interruption being allowed *hinc inde*,—Brown adduced certain witnesses: and against one it