

*stetit* that the boy stayed not out his whole time, or that he ran away because of hard and unaccustomed usage, or that he died.

REPLIED,—He acknowledged no difference betwixt an indenture and a simple bond save this, That an indenture was *probatio probata* to itself, and he needed no more to instruct the cause of the debt to be for prentice-fee but the indenture itself; whereas an absolute bond would militate against me without any remedy, if the party to whom I granted the bond be dead. But he being in life, I will cause his oath serve instead of a back-bond, and I will make him confess that the true cause of it is for prentice-fee; which being once done, then there remained no imaginary difference betwixt it and an indenture. But what defence would elide him charging on the indenture must undoubtedly meet a charge on this bond; and, therefore, if no prentice-fee due upon indenture could be craved when the boy died so shortly after, neither can it be sought upon a bond.

DUPLIED,—They offered them to prove that it was the custom of the burgh of Edinburgh, though prentices died within the years, yet the hail prentice-fee was due; and where the master died, then ere his relict or executors can have right to the prentice-fee, they must bind the boy to a master of the same trade for the years yet remaining.

They were to have the Lords' answer on it.

Then Sir J. Harper added another reason, That *esto* the Lords find prentice-fee due, though the prentice die presently after his entry, (which they will never do,) yet in this case it will never be due; because he offers him to prove the boy was starved with hunger and cold, in default of the charger.

ANSWERED,—He offers him to prove it was in his father's default, who hindered him to come home to his house to diet and bed. *Vide supra, numbers 133 and 134, [February 1671.]*

*Advocates' MS. No. 256, folio 113.*

1671. November 14. Anent a STEP-FATHER MARRYING HIS STEP SON'S RELICT.

THIS day it was questioned amongst the advocates, What was to be judged of a marriage where a step-father married his step-son's relict. *Exempli gratia*, if John Boyd, bailie, could marry Adam Steven his step-son's relict, (supposing Adam had been married and were dead,) or if rather it were not incest. That same question will occur in a step-mother, if she might lawfully marry her step-daughter's husband, the step-daughter being dead. The advocates were divided in their opinions. Sir George Lockhart thought it lawful. In my humble opinion, I think it noway safe; seeing *inter eas personas quæ locum parentum liberorumve inter se obtinent, nuptiæ contrahi non possunt usque in infinitum*, they being *ascendentes et descendentes*; so that if Adam were now on life and not Eve, he could not find a wife whom he could lawfully marry. *Item, in recta linea quicunque gradus prohibentur in cognatione seu consanguinitate, iidem prohibentur in affinitate*. And though the relation that intervenes betwixt me and my step-son's wife, be only *affinitas affinitatis* or *affinitas in secundo gradu, uxoris meæ filius* being to me *in primo genere affinitatis, illius uxor in secundo*, and so ought to

be no impediment of marriage betwixt us; and though I may lawfully marry the relict of my wife's brother, *cap. Non debet, et ibi Glossa, ext. de consanguinitate et affinitate*,—Covarruvias *de matrim. part. 2, cap. 6, p. 7, num. 6*; yet I conclude with Papinian, *lege 15. D. de ritu nuptiarum, uxorem quondam privigni conjungi matrimonio vitrici non oportet, nec novercam in matrimonium convenire ejus qui privignæ fuit maritus*. The reason is well assigned by Vinnius *ad par. 6tum num. 2do Instit. de nuptiis*: not because they are *in linea ascendentium et descendentium in secundo genere affinitatis*, as Gothofred would have it, *ad. D. l. 15*, but because natural shamefacedness and honesty will not suffer me to marry his relict, whose mother was my wife, and so became in a manner my son; no more than a man can marry his son's relict. And though it be not expressed in the tree published at the 16th act of Parliament in 1649; yet by analogy it will be easy for any man to find it there defended and discharged; seeing there is too great a commixtion of blood therein.

*Vide Antonium Matthæum ad Tit. de Adulteriis, capite 7, No. 26; infra, No. 492, § 8, in July, 1676.* A man may lawfully marry his wife's brother's relict. *Vide Trentleri selectas disputationes, titulo De nuptiis, thesi 3tia.*

*Advocates' MS. No. 257, folio 113.*

1671. November 17. DUMBAR against HAMILTON.

THIS was an action at the instance of a creditor, against an executor confirmed, for payment of a sum contained in the defunct's bond.

ALLEGED exoneration, because the inventory of the testament is exhausted by lawful sentences recovered by me before your citation.

To which it was ANSWERED,—That no respect can be had to the decreets produced, neither can they infer exoneration to the executor; because the first proceeds upon manifest collusion, in so far as it is given upon no earthly probation but the oath of the pursuer in that decret, whereto the executrix referred the same: which manner of probation can never prejudge a real creditor, who proves his debt by bond. Yea, though the pursuer had offered to prove the truth of the debt by the executrix her oath of knowledge, (which case is much more favourable than ours;) and she accordingly had confest the same, though that would have affected her, yet it would never have imported a discharge or exoneration to her, at the hands *creditoris chirographarii*; ergo, much less must it liberate her in our case. As to the other decret, the same is evidently upon collusion, in so far as it is at the instance of a woman, as heir to her father; and no title produced in her person. *Vide Dury, 6th March 1627, Scott against Cockburn.*

To thir it was REPLIED,—That he could not be heard to quarrel thir decreets *hoc loco*, because the parties, obtainers of the decreets, are not cited nor present to maintain their own decreets; whose *jus quæsitum* by the decret, can never be taken away, but either by a deed of their own, or in a reduction whereto they are called to defend their rights, and not summarily here, they not being heard; seeing, if they were called they would, it may be, allege that though they referred the debt to the executor's oath, yet they had writ for verifying the same, as