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 decreet, 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 decreet, 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, 6*th 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 decreet, 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

well as you; and so more privileged, being prior in diligence. This being an ordinary practice, both before inferior courts and your Lordships, That though I can prove my claim by writ, yet I will refer the verity of it to your oath; and if ye would deny it, then I will resile and prove it by writ. And as for the pretended collusion, it is no otherways probable but by the executor's own oath.

To which it was DUPLIED,—That he needed no reduction where the nullities of the decreets founded on were intrinsical, and resulted from the decreets themselves, and so needed no other probation: and the executor should have suspended upon double poinding, in which case I would undoubtedly have been preferred to these other pretended creditors. And where he says he had writ to prove it, though he referred it to her oath, it is duplied, Though that may lawfully be done where ye have to do with him that is *dominus bonorum*, yet it is noway lawful to do the same with an executor, who is only an administrator, *et nudum habet officium*.

It is certain a sentence obtained upon a probation by oath, will never militate against a creditor by bond; but if, in fortification of the oath, they offer to restrict the debt also by writ, I think it should be received.

The executor had another defence here, viz. that she was not liable to pay, (in case the foresaid decreets should not operate exoneration,) but only to assign. It was ANSWERED,—He behoved first to say he had done diligence. Second, he could not be heard now to offer to assign, because it was after six years, during which time he might have received the sums. REPLIED,—An executor was obliged only to do diligence by pursuing, obtaining decreet, and charging; all which he had done; and then *cedere actionem;* which he now offered.

Advocates' MS. No. 258, *folio* 113.

1671. *November* 18.

ONE being convened upon the passive titles to pay a debt owing by his father, and the pursuer insisting against him, as lawfully charged to enter heir; it was ALLEGED the charge was unlawfully and unwarrantably given, in so far as it was not executed against him till after the execution on the summons, and that being the passive title on which ye intended to make me liable, it behoved to precede the summons, and exist before the same. To which it was REPLIED,—That it needed not pre-exist, but behoved to exist, though supervenient; as well as a summons against a man as heir, will be sustained against him, though he was not heir served and retoured the time of the executing the summons, but be served long thereafter.

The Lords found there was not *par ratio*, and therefore refused process against him as lawfully charged on that summons.

Advocates' MS. No. 259, *folio* 114.