

1673. January 17. JAMES RAE against ALEXANDER GLASS of SAUCHIE.

JAMES Rae having made an assignation, to Sauchie, of several bonds, which were a great part of his fortune ; there was a reduction and declarator intented, at Rae's instance, wherein this defence was proponed,—That the assignation, bearing borrowed money, could not be taken away, as being in trust, but *scripto vel juramento*. And yet, notwithstanding, the defender was willing to condescend upon onerous causes, adequate to the sums assigned ; which he should either instruct *scripto*, or whereupon he was content to depon.

The Lords having ordained count and reckoning before the auditors, there was an article condescended on by Sauchie for making up of an onerous cause, *pro tanto*,—That the pursuer had granted a bond to Sauchie's wife, who was his niece, wherein he was obliged to pay her 7000 merks to help her portion, which now belonged to Sauchie *jure mariti* ; being in his possession, and a moveable bond.

It was ALLEGED for the pursuer, That the bond was not obligatory ; because it did bear a special provision, inserted therein, that he should consent to her contract of marriage ; which he never did.

It was REPLIED, That the pursuer was present when the contract was subscribed by the parties-contractors, and did subscribe as witness to the contract ; which must import a consent to the marriage, unless he had then declared his dissent to the marriage ; which he never did ; but, on the contrary, did remain in family with the defender and his wife many years thereafter : Neither was there any cause why he should have dissented, Sauchie being a fit husband, every way, both for means and parts ; which hath since appeared by his purchases.

It was DUPLIED, That the contract of marriage, bearing nothing as to the bond of provision to be a part of the tocher, for no remuneration of a jointure granted, answerable thereto, the subscribing as a witness did not purify the condition of the bond, unless he had expressly consented thereto : likeas, in many cases the Lords had decided, that a liferenter, compriser, or annualrenter, subscribing a disposition made by the common debtor, only as witness, cannot prejudice him of the real right of the said lands ; nor a superior of his rights of casualties due to him out of the lands dispoed.

The Lords did find that the articles could not be allowed as a part of the onerous cause ; seeing that, as to all real rights, it was *in dubitate juris*, and was so constantly decided : and therefore, in this case, a personal bond, which was only given out of love and favour, the condition could not be purified, unless he had fulfilled the same *in terminis*, by subscribing as consenter ; especially seeing, the defender being master of the bond, he ought to have made mention thereof in the contract of marriage.

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1673. January 20. ALEXANDER, WILLIAM, and THOMAS FORBESSES, against FORBES of PASLING.

THE said Alexander, William, and Thomas Forbesses, having a legacy of