

an assignation granted by Sanderson to Robert Brown and James Ker, and was preferred to them in a sum granted by bond by Sir George Maxwell to Ker for the two parts, and Brown for a third, which bond was granted in place of a former bond due to Sanderson by Colonel Stuart. It is now *alleged* for Brown, That Veitch's sum ought only to burden Ker's part of the bond, because Sanderson the common author was denounced at the instance of Brown long before he granted the assignation to Ker, and therefore Peter Pallat succeeding in the right of Brown, could be burdened with no share of Veitch's debt. It was *answered*, *imo*, That, before Sanderson's rebellion, Ker had a joint interest with him in Stuart's debt, which is instructed by a declaration under Sanderson's hand, in which Veitch is witness, which must import Veitch's knowledge and consent to the truth of the declaration. *2do*, Ker and Brown having accepted a bond from Sir George Maxwell to both, two thirds to Ker, and one third to Brown, Brown had acknowledged and homologated Ker's right, and could not quarrel the same, even by reduction, likeas now he hath no reduction.

THE LORDS found, that Veitch's subscribing as witness to Sanderson's declaration, did not import his knowledge or acknowledgement of the contents of the writ; and found, that Sanderson's declaration, after Veitch's diligence by horning, and a gift of escheat, now insisting upon the debt in the horning by reduction, could not prove or be effectual against Veitch, unless it were proved by a writ anterior to the rebellion: They found also, that the accepting of a joint bond did not so homologate as to hinder either party to reduce the others assignation, it being then standing, and the ground of that bond.

Fol. Dic. v. 1. p. 373. Stair, v. 2. p. 408.

1677. November 8.

SINCLAIR of Balcraigie *against* RICHARDSON and her Spouse.

ELIZABETH RICHARDSON, and Alexander Barclay, her present husband, are charged by Sinclair to pay a sum contained in a bond granted by her, and ——— her first husband, and which she judicially ratified upon oath. They suspend, *imo*, Because the bond *quoad* the wife is *ipso jure* null, being granted *stante matrimonio*; and the oath could not validate it, especially it bearing borrowed money. *Answered*, *imo*, The oath not being sinful ought to be kept; *Capitulum octavum, Extra, De jure-jurando, Omne juramentum quod non vergit in salutis eternæ dispendium est servandum.* *2do*, The bond is the price of her wedding clothes. *3tio*, She has homologated it, for she has given it up in the confirmed testament.—THE LORDS sustained the reason, and repelled the answer; and found the oath could not be obligatory, *ubi accedit obligationi de jure prohibita*. Found the *2d* answer relevant to elide the reason, and assigned a day to prove it was for the marriage clothes, and would not put them to a new process.

No 28.

by his debtor. Found, that his knowledge of the contents of the deed, and acquiescence in it, could not be inferred from this circumstance.

No 29.

In a pursuit on a bond granted by a wife during marriage, it was alleged she had homologated it, by giving it up in a confirmed testament. This the Lords repelled, thinking it hard to prejudge an ignorant woman, who knew no bet-

No 29.
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for the same. Repelled the 3^d of the homologation, it being hard to prejudge an ignorant woman, who knows no better but to follow the advice of her procurators, who gave up this debt.

Fol. Dic. v. 1. p. 379. Fountainball, MS.

. Stair reports the same case :

MR JOHN SINCLAIR (pursues), as assignee by Major Nairn to a bond of 330 merks granted by Elizabeth Richardson, and umquhile John Robertson her first husband. The said Elizabeth and her present husband suspend, on this reason, that the bond being granted by the said Elizabeth, then a wife, is *ipso jure* null. It was *answered*, That she had judicially ratified the bond, and sworn never to come in the contrary. It was *replied*, That such ratifications or oaths, whatever they can work for exclusion of defences competent against valid rights, yet they cannot validate a right *ipso jure* null, as this bond is, which, if it had been considered by the Lords, they would not have ordained horning or process upon it, though no party had appeared. The charger further *alleged*, That the true cause of this bond, (though it bore borrowed money) was Elizabeth Richardson's bridal clothes, taken off by Major Nairn, and profitably employed to her use, and therefore being *in rem versam* before she was married, the bond granted therefor, though after she was married, ought to be sustained. It was *answered*, That this bond was null, and was not a sufficient ground of a charge, and therefore the letters ought to be suspended, reserving the action for bridal clothes, as accords. It was *replied* for the charger, That the Lords, by their ordinary custom, do sustain defective decreets and charges of horning as libels, and allow parties to reply or give in special charges, as this charger now doth, upon the true cause of the bond, applied to the suspender's use, and insists likewise on this special charge, that it is beyond doubt the husband subscribed the bond, and the said Elizabeth Richardson is confirmed executrix-dative. The suspenders *duplied*, That she is a privileged creditor for implement of her contract of marriage, which will exhaust the inventory. It was *triplied* for the charger, That if she had confirmed herself executrix creditrix for implement of her contract, she would have a preference; but that she hath not done, but simply confirmed as executrix dative, and she herself hath given up this bond as a debt, whereby it is *debitum testamentarium*, and so is preferable to all other debts, especially to her who gave it up, and not her own debt, and thereby preferred it to her own. It was *answered*, That the giving up of a debt was only to diminish the *quot*, and no ways to pass from a privilege, it being then uncertain how far the inventory would reach, and testamentary debts are only such as are given up by the defuncts, and not by executors, and even then do only secure the executor when paying *bona fide*, without sentence, before the intenting of any other cause; and albeit the suspender hath not confirmed her-

self executrix *qua* creditrix, yet as she might have compared in any process against her husband's executor-dative, and craved preference, so may she much more, being executrix-dative herself, propone preference by way of exception.

THE LORDS found, that albeit the bond be null, as subscribed by a wife, and not validated by a judicial oath or ratification, yet they sustained it *in quantum in rem versam*, without the necessity of a distinct process, and allowed such probation as was competent for instructing the true cause thereof, but if it was only by the wife's oath, they reserved to themselves, whether it should be effectual against her husband, or against herself; and found likewise, the allegiance relevant upon the preference of the contract of marriage to this debt, albeit the relict was confirmed executrix creditrix, and gave not up the provision in her contract as a debt, but did give it up as a debt in the inventory. See HUSBAND and WIFE.

Stair, v. 2. p. 555.

1678. June 15.

LOTHIANS against LOTHIAN.

ANABEL, Alison, Bessie, and Jane Lothians, pursue a reduction against Katharine Lothian, and Mr Matthew Ramsay her husband, of a disposition granted to them by Charles Lothian, of a tenement in Edinburgh *in lecto*, to the pursuers prejudice, who were heirs portioners to the said Charles their brother, as well as the said Katharine, and so to restrict her to a fifth part of the tenement, that she might have nothing *per preceptionem, et jure precipui*, more than the rest. *Alleged*, They could never quarrel the said disposition as done on death-bed, because the pursuers had homologated the same, in so far as it was offered to be proved, that the pursuers, that same very day, had gotten and accepted from the very same person, their brother, a disposition of another tenement in their favours; which being of one date with the right quarrelled, before the same witnesses, and by the same author, it is equivalent as if they had consented to one another's dispositions. *Answered*, *Non relevat*, seeing the lesion was manifest, her tenement being near as good as that which is disposed among them four. *2do*, They never accepted it, nor are infest on it. *3tio*, If need be, they will renounce it, that it may divide equally *collatione bonorum*. *4to*, The one disposition relates not to the other, nor makes the least mention one of another; and so the one not being conceived as the cause the one of the other, it can never import an homologation. The Lord Newton repelled the allegiance, and found there was no homologation here.

Fol. Dic. v. 3. p. 271. Fountainball, v. 1. p. 2.

No 29.

No 30.

It was found no homologation of a death-bed deed, that the party challenging it, had accepted of another deed the same day from the deccast.