

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

was objected,—that he was Brown's good-brother, having married his sister; and against another, that he was his cousin-german.

It was ANSWERED to the first,—That the affinity being by Brown's sister, she is long since dead; and so the affinity ceased, at least the ground of suspicion of the witness's partiality: and as to the other, cousin-german by our custom doth not exclude a witness; nor doth our law esteem him a conjunct person, which was never extended to an uncle and nephew.

It was REPLIED, That affinity doth not cease by the death of the wife; neither doth the respect that might bias the witnesses; and, upon that same account, a cousin-german is not an unsuspected witness; and, in heritable rights, witnesses should be above exception.

The Lords rejected both the witnesses; unless it could be made appear there was *penuria testium*; in which case they allowed them to be received *cum nota*.

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1679. *January 17.* GEORGE CHEYN *against* The LORD ROSE-HILL.

GEORGE Cheyn having charged the Lord Rose-hill for payment of 5000 merks contained in a bond granted by the Earl of Northesk, his father, and him,—he suspends on this reason, That the bond was never a delivered evident by the Earl of Northesk, the principal debtor, but it was subscribed by him and the suspender for borrowing of the sum; but was detained in Northesk's own hands, or his lady's, or others in his family, blank in the creditor's name, till the Earl fell in his late indisposition of losing his speech, and so becoming unable to manage his affairs; after which no person was in capacity to deliver the same. And as to George Cheyn, there was never money borrowed from him by the Earl, or his son; and if he accepted of a blank-bond after the Earl's indisposition, which was known to all, he was *in pessima fide*; and therefore, though writ ordinarily can be taken away by writ, or oath of party, yet it hath been often sustained,—when bonds were pursued for, against one representing a defunct, or made use of to exhaust his moveables,—that the allegiance that the bond was undelivered, or retired, lying in his charter-chest at his death, was probable by witnesses: and the case here is as favourable; for, after the Earl's indisposition, no bond subscribed by him could be delivered, more than if he had been dead.

The charger ANSWERED, That such pretences might be alleged against every bond; and that Rose-hill, being in health, might have delivered the bond.

It was REPLIED, That there are here special circumstances, by the Earl's indisposition, which put this bond in the case as if it had been granted by a defunct: nor could Rose-hill have delivered the bond, he not being the principal debtor. And it is known there are many such bonds subscribed by Northesk, which, if they were sustained, would ruin his estate. It is also known by some of the Lords who treated betwixt the Lord Rose-hill, his mother and brothers, that this bond was not in Cheyn's hands, but in the heirs, and was to be given up to Rose-hill. Although it was pretended that my lady had received the bond, and delivered the money out of her own closet, yet there was no pretence that the money was Cheyn's, but the law presumes it to be my Lord's money; and