pari of fifteen. If a sentence were pronounced, or advised and voted, by fewer than nine, (as I know several such done in the Lords' afternoon-meetings,) I think they may be quarrelled, and reduced, as pronounced *a non habentibus potestatem;* for, at most, they are but like a committee, and could only but prepare, and report against next day to the full number. But none has yet adventured to quarrel these decreets upon this nullity. *Vide* 10*th June* 1677.

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1679. *June* 4. JAMES EUART *against* JANET CHAPMAN and HARY BROWN.

JAMES Euart, vintner, charges Janet Chapman, and Hary Brown her spouse, upon a bond granted by her before her marriage, for £200 Scots, as the balance of the account of her intromissions as taverner in running his wines. The husband suspends on this reason, That the bond was null, and could not militate against him, because, though it was granted by her before her marriage with him, yet it was after she was contracted, (which interpretatively is reputed to be done *stante matrimonio,)* and after the proclamation of the banns in the church, at which time she could contract no debt to affect him; as the Lords have oft found. And Dury tells it was so decided, 29*th January* 1633, *Scot.*

REPLIED,—The husband must still be liable, because such crying in the church may be clandestine, and cannot put him *in mala fide,* nor a creditor know it. *2do,* The bond is homologated by partial payment. *N.B.*—If it be made by the wife, without her husband's knowledge, *non relevat* to bind the debt upon him. *3tio,* It was *in rem mariti versum,* because it is offered to be proven, that, with the said pursuer's money, she bought their household furniture. *4to,* The husband must here be liable, because it is not a bond for borrowed money, *contra S. C. Velleianum,* but depends on an antecedent cause, as being *institor* or *præposita tabernæ,* and she who has sold his wines and liquors, and received the price thereof. *5to,* It is offered to be proven they were proclaimed after the granting of this bond.

Thir four last seem relevant; but it may be asked whether the last is receivable against the husband, by way of reply, or if he must be pursued in an action to pay it. And, in both cases, the bond (though proceeding on an account, being *in æstro amoris,*) must be loosed, and they must count over again; in which count, the master stating a charge of her whole intromissions, she must discharge herself, or else the charge will be admitted to probation; in which case, since he permitted her to go out of his service, the practick of the Lords will not sustain it relevant to offer to prove by her oath, that she was intrusted with such a quantity of wines and other liquors, and sold and disposed thereof, (and here, in such a case as this, though she be clothed with a husband, yet her oath must be taken for clearing the debt,) and received the price; but it must also be referred to her oath *simul et semel,* that the same is yet resting owing, and unaccounted for by her: because it is presumed that master and taverner clear accounts, at least once a-week; and that he would not have suffered her to go out of his service, till she had paid him.

But this presumption militates but slenderly in Mr Ewart's case, because he

suffered her to go forth of his service, upon the account she gave him bond for what she was owing him; and, that bond being now quarrelled by her husband, Mr Ewart ought not to be precluded from the same manner of probation he would have got if he had been put to pursue her, and constituted the debt against her, at the time of the granting of the bond.

That the Lords found it only relevant complexly,—that they intromitted,—and that it is yet resting owing, unpaid,—is observed by Dury, 21*st January* 1636, *Couts;* and the same was again decided by the Lords, within these few years, between *Alexander Cromby, Vintner*, and one *Leidington.* As also, in a parallel case, (12th Jan. 1678,) between *Dundass* and *Holborn*, about levy-money, for raising a company. See also 13*th of November* 1677, *Wilson.*

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1679. *July* 10. PATRICK CUNNINGHAM *against* GEORGE SCOT of GIBLESTON.

MR Patrick Cunningham, writer, as having right from his wife, who was assignee, by Francis Hamilton, her former husband, pursues Mr George Scot of Gibleston, steward-depute of Orkney, for the sum of 500 merks, contained in a bond granted by him to the said Francis.

ALLEGED,—1*mo*, The bond is posterior to the assignation by Francis to his wife, and so cannot carry the right of this sum; 2*do*, It is *omnium bonorum*, and so fraudulent; 3*tio*, It was not intimated in the cedent's life; 4*to*, Francis, the cedent, was his debtor for a parcel of whalebone, prior to the assignation, and so he must have compensation.

REPLIED,—He assigns to all debts that shall be due to him at the time of his decease. The 2d is *jus tertii* to the debtor. As to the 3d, it shall be confirmed before extract. The compensation mentioned in the 4th is neither liquidated nor verified, and so is no way receivable, *hoc loco*, against a liquid bond; as the Lords found, Durie, 1*st December* 1626, *Balbegno;* 6th *December* 1626, *Campbel;* and many times since.

This being reported, the Lords repelled Mr George's compensation, founded on the intromission with the whalebone, by Francis Hamilton, cedent, unless he would prove it *scripto*, or by Mr Patrick's oath of knowledge; and ordained the sum to be confirmed; and sustained the *dispositio omnium bonorum tam præsentium quam futurorum*, to extend *etiam ad bona acquirenda*, and as a sufficient active title.

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1679. *July* 10. DAVID SETON *against* JANET LUCKLAW.

IN the action pursued by David Seton, brother to Carriston, against Janet Lucklaw, for payment of a legacy of 1000 merks, left by one to whom Janet was executor;

ALLEGED,—*Absolvitor*, because they had the said David's general discharge.

REPLIED,—1*mo*, That when he subscribed that discharge he had not seen the testament, and so knew not of the legacy; and he offered to prove, by her oath,