

him excluded from all but only errors *in calculo*; seeing old Sir Walter, who was a judicious man, did not quarrel, nor discover them in fourteen years time, but during all that space homologated them. *Vol. I. page 529.*

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1692. *December 9.* HELEN MIRK *against* BRUCE of Kinnaird.

HELEN MIRK *against* Bruce of Kinnaird. He having extracted a decret as-  
soilyeing him, on his consigning the principal sum, and 200 merks of expenses;  
and she having raised a reduction of it, and calling for the grounds and warrants  
of the decret; and some of the interlocutors being amissing, she urged for get-  
ting the extract of her certification.

Kinnaird ANSWERED, That his decret *in foro* could not be taken away for  
want of the warrants, which might fall by through the clerk's servant's negligence,  
or be abstracted by their fraud. The President thought, where decreets were  
impugned *ex intervallo*, they should not be declared null for want of the grounds;  
but if it was questioned *de recenti*, they were bound to produce them, but the  
point being of general concern to the whole lieges, they resolved to hear it in  
their own presence, and, in regard the woman was poor, and not able to employ  
the best advocates to plead it, the Lords would nominate some of the most emi-  
nent for that purpose; for they considered, if the abstracting the minutes and in-  
terlocutor would annul decreets, the lieges who had recovered sentences *in foro*  
after great expense and trouble, had no security at all.

In this case, Kinnaird offered to prove the existence of these interlocutors, free-  
ing him from the annual-rents, on his consignment, by the oath of my Lord Pit-  
medden, the reporter, and of the extractor, and others; but the Lords, as for-  
merly, in Heugh Wallace's case *against* my Lord Forrester, thought it a danger-  
ous preparative, to make up the tenor of interlocutors by any witnesses what-  
soever. *Vol. I. page 529.*

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1692. *Nov. 3,* and 15. *Dec. 10.* JOHN HAMILTON and KEITH's Relict,  
*against* BEATON of Balfour.

*Nov. 3.*—JOHN HAMILTON, Brewer in Edinburgh, and the relict of Mr. George  
Keith, *against* Beaton of Balfour. The Lords repelled the compensation pro-  
poned on Keith's debt, because the 2000 merks bond was conceived to him and  
his wife in liferent, and so his debts could not prejudice her liferent, constituted  
by her contract of marriage. But she being provided by her contract to 1200  
merks yearly, the question occurred, whether she might affect the 2000 merks for  
her jointure, so as to make the stock liable as long as it lasted; or if she could  
only reach the yearly annualrent of the 2000 merks. And the Lords inclined to  
the first. *Vol. I. page 516.*

*November 15.*—The case of Hamilton and Keith against Beaton of Balfour, mentioned 3d current, is debated again in presence; and the Lords of new repelled the compensation of the husband's debt against the wife's liferent; and although a blank-bond is presumed to be his to whom it is delivered, and that a compensation upon the party's debt to whom it is given, existing before the filling up of another person's name in the blank, ought to be received; and that Mr. George Keith declared Hamilton's name was filled up in the said blank-bond for his own behoof; yet the Lords found, seeing the sum was *surrogatum* in place of the wife's liferent she had renounced, therefore it ought not to be compensated by the husband's debt to her prejudice, especially seeing Hamilton, the trustee, deponed his name was filled up to the wife's behoof. And though it was alleged that the bond was first delivered to the husband, yet the Lords thought this not relevant, seeing he was *custos* of his wife's rights and papers, and that it was a donation by her to him *stante matrimonio*, which the wife now revoked; albeit some of the debts assigned by Keith to Balfour were not affected by her liferent, but *jure proprio* belonged to her husband, as the annualrents of the same did *jure mariti* during his life. But the Lords did not think it the meaning of the parties that this sum should have belonged to her, whether she had survived her husband or not; but only *subsidiarie* for her liferent, in case it could not be *aliunde* made up to her out of her husband's other estate. And found this was no transaction, or that this was to be repute as a bargain for the liferent at so many years purchase, as it might have been then sold for; but that the stock of the 2000 merks, in Balfour's hands, is to be made forthcoming for her liferent annuity, so far as that sum will go. But found it relevant that she had intromitted with funds that would pay her, so that she could not reach this till that was consumed, to be proven by her oath only, being in a concluded cause, and no terms of probation to be farther granted.

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*December 10.*—The Lords re-advised that cause pursued by Hamilton and Mary Keith against Beaton of Balfour, mentioned 15th Nov. last, who alleged, that any mention of her liferent, in the bond charged on, was by a clause which was wholly conceived in Balfour's favour, and Keith obliged himself to pay it, or cause John Hamilton, his trustee, allow it in the fore-end of Balfour's sum, and so his compensation was well founded. Some urged, that witnesses might be examined when John Hamilton's name was filled up in the said blank-bond; for if it was before Mr. George's obligation to Balfour, then there was no doubt but the husband could dispose of it. But the alternative, in Mr. George's bond, moved the Lords to adhere to their former interlocutor; seeing it bore that he should either cause his trustee allow it to Balfour, or pay it himself; and that Balfour having not made the election *debito tempore*, he seemed to have taken himself to Keith's own payment, especially seeing the bond bore Hamilton's name was then filled up as trustee, though it was offered to be proven it was not due till afterwards; and, therefore, the Lords found Hamilton's oath could only rule this affair, and he had deponed that the husband had filled up his name as trustee for his wife's behoof.

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