

court-day to depone; without regard to which they had extracted the decreet against her. Though there was a *jus quæsitum* to the charger by his first extract, yet it was considered that both ought to be regulated by the warrants signed by the judge; therefore the Lord Ordinary granted diligence for production of the same, that it might appear which of the two extracts were most conform to the principal warrants, as also to cite the clerk to answer for giving out contradictory extracts; but, the woman having neglected to take out a second diligence, the term was circumduced against her. On a bill to the Lords, they reponed her still, reserving to themselves the consideration of the expenses at the conclusion of the cause; for they thought it very unfavourable on the pursuer's part to prosecute a woman for indiscreet language, where she was provoked by his riding through her corn; and however it might be an injury, yet it could not be properly a slander, there having been few or no witnesses present; and if she did not utter the slanderous words libelled, then it would be a scorning of God and man, and a lie to confess them before the congregation; and therefore reponed her again to her oath, &c.; and thought it could not be properly called a slander, where it could only be proven by the party's oath.

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1696. June 10. FRANCIS BRUCE *against* MARY SMITH and THOMAS AIRD.

LAUDERDALE reported Francis Bruce against Mary Smith and Thomas Aird, now her husband. He, as executor decerned, pursues her for delivery of a 1000 merks' bond, that he may confirm it as brother to her first husband, to whom she had disposed that bond in her contract of marriage.

ALLEGED,—She could not exhibit; because, by a clause in the contract, in case there were no children of the marriage, and she survived, the 2000 merks therein provided was to divide equally betwixt his heirs and her; and so she had *jus retentionis* in her own hand for implement of that obligation.

ANSWERED,—He, being executor, was only liable to fulfil, and, having found caution, it ought to be delivered to him; and, if she had any claim, the creditor's action lay solely against him, whom she must pursue. *2do*. The most she could plead were to retain the half, seeing the whole subject divided between his heirs and her, and so every bond.

REPLIED,—She opposed the clause of the contract, and *frustra petis quod mox est restituendum*; and why should unnecessary processes and charges be multiplied, seeing *tutius est incumbere rei quam personæ*, and her own 1000 merks was declared to return to her in case of no bairns, and her surviving; and his *nudum officium* as executor could not entitle him to uplift it from her.

The Lords found she had right to retain the whole. But it being moved, That, in case the creditors distressed the executor, and they should be preferred to the relict, and the rest of the estate were not able to satisfy them, that she might find caution to relieve the executor in that event;—the Lords found she was not obliged, seeing she got it not as a creditor to her husband, but as a substitute fiar, failing of bairns of the marriage.

In the same process, he pursuing for the moveables, her defence was *quoad*

the half,—I have right by my contract, bearing my acceptation of the jointure in full of all, except a half of the household-plenishing, to which it is declared she shall have right. The Lords thought this clause would not debar creditors, if they were *in campo*, from affecting that half; and therefore ordained her to find caution to relieve the executor at her first husband's creditors' hands, if he happen to be distressed, to be liable proportionally with the rest of the moveable estate, as accords of the law; reserving her defences in any such process when it shall be intended: For, when the parties design that the relict should have a share in the moveables, not subject to the husband's debt, it is, by an express clause in the contract, provided to be free; and, however this may be quarrelled by the creditors, as in defraud, (unless they be disposed *per verba de præsenti*,) yet it will always operate so much as to force the husband's representatives to make it up to her.

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1696. *June 12.* SINCLAIR of FRESWICK and WILLIAM MAXWELL *against* MR JOHN MOWAT.

THERE being a petition given in by Sinclair of Freswick, and William Maxwell, macer, against Mr John Mowat, advocate, the Lords demurred on this point,—Where a comprising is disposed with warrandice against the disponent's and his author's facts and deeds, excepting the deeds of two persons named, whom they supposed to be the party they heard had granted some writ thereanent, but now, after trial, it is found to have been done by another; whether the exception ought not, in justice and equity, to be extended also to this contravention, though not mentioned, seeing it has been so meant amongst the parties, that at least some deed should be excepted from the warrandice; and these, by mistake condescended on in the right to the apprising, having done nothing, it must be presumed that this was what the parties designed. But, if any deed against the warrandice can be instanced in those named in the disposition and conveyance, then this presumption ceases. Next, it was argued,—This distress extended no farther than to the purging the acquirer's damage and true interest, and refunding the sum they paid for the comprising, and not to the whole extent of the sums disposed and therein contained; for which was cited, *l. 13, D. de Evict. l. 13, et 24, C. eod. tit.*; and Stair, 26th January 1669, *Boyl* against *Wilkie*.

The Lords remitted their points to be farther heard by the Ordinary.

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1696. *June 12.* MARGARET FRASER and RORY MACKENZIE of PRESTONHALL *against* LORD LOVAT.

WHITELAW reported Mrs Margaret Fraser, relict of Major Munro, and Mr Rory Mackenzie of Prestonhall, her uncle, against the Lord Lovat, her brother,