

and George Fleming, her present husband, for payment of a debt due by one Hog, her first husband, as vitious intromissatrix with his goods; and decreet passing against her, she now, in a suspension of that decreet, craves retention of the goods, in respect she had paid all the preferable privileged debts, as the medicaments to her husband, his funerals, the servants' fees, and house-maill.

ANSWERED,—These cannot be allowed now; because they were founded upon before obtaining the decreet, and then repelled because not liquidated nor cognosced. REPLIED,—I have now obtained a decreet of cognition of the same, and they being uncontrovertedly preferable, as they would have defended against the passive title if they had been liquidated then, so they must have the same effect now.

The Lords considered, If the pursuit had been recent after the husband's death, so as there had been no competent time to have constituted herself the creditor in those debts, then she might plead retention now; but, she having suffered three or four years to elapse, the Lords found her liable; else there should never be a confirmation, but relicts would intromit at their own hands summarily, and, when pursued, would obtrude these privileged debts: and that she had not called the creditor who interpellated her to the decreet of cognition; for though, *regulariter*, she needed not cite him, yet, having obtained a decreet against her before she intented the cognition, she ought not to have miskenned him.

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1698. July 12.

BOSWAL *against* JOHN LOCKHART.

I REPORTED Boswal, glazier in Edinburgh, against John Lockhart, now of Lee. The deceased Cromwell Lockhart of Lee employed this glazier to repair and furnish his house of Lee with new glass, which extended to £200. Cromwell dying shortly after, Boswal applies to Richard, his heir, and obtains his bond for the sum, with this narrative, That it was for work done to his elder brother, Cromwell. He also deceasing, Boswal raises a process against John Lockhart, now of Lee, for payment.

ALLEGED,—Richard, the granter of the bond, was but a qualified restricted fiar, under irritancies, and prohibitory clauses *de non alienando et non contrahendo debitum*; and so the bond can neither affect the tailyied estate, nor yet him, as heir of entail.

ANSWERED,—The bond is not for Richard's own debt, but bears expressly to be Cromwell's debt; and, he being the maker of the tailyie, it is plain, from law, the same falls not under the prohibition of the tailyie, as Stair shows, *tit. 18, book 4, page 591*; and, though the assertion of an heir of tailyie, that it is his predecessor's debt, cannot be probative, else he might continue debt enough on the estate, yet, to put the case beyond all debate, he offered to prove, in fortification of the narrative of this bond, the work was so truly wrought to Cromwell in his time, and so adminiculate and astruct the verity of its narrative.

REPLIED,—Neither the bond nor its narrative being obligatory, the same could not be now made up by a probation by witnesses, because the account fell

under the triennial prescription of Act 83, Parliament 1579; otherwise a debt might be made up against a tailyed estate after it was prescribed.

DUPLIED,---He needed not pursue within the three years, in this case, because the bond interrupted the prescription; and, though it may be null as to other effects, yet it is always sustained to have the effect of an interruption where I offer to prove the account, even as a bond given by a minor is null; yet, if I instruct it was *in rem versum*, it will be sustained.

TRIPLIED,---To make this acknowledgment and narrative an interruption, is to open a door to all fraud for subverting of tailyes; and this pursuer was *in mora* in not constituting his debt against the first contractor, at least the debtor in the bond.

The Lords found it relevant to sustain the narrative of the bond, so as to affect the tailyed estate, if the pursuer prove the work was truly furnished to Cromwell, the maker of the tailye, and that it extended to the value of the sum in the bond, and was not prescribed, but within three years of the furnishing, when the bond was granted. All which cautions were adhibited to prevent collusive debts upon entailed estates. *Vol. II. Page 10.*

1698. November 3. SIR WILLIAM BRUCE of KINROSS *against* The EARL of MORTON and his TENANTS.

SIR William Bruce of Kinross, pursuing maills and duties on his decret, obtained in February last, against the Earl of Morton and his Tenants of Aberdour, before the Sheriff of Fife, a bill of advocation is presented on thir reasons: *1mo.* That Aberdour is a regality, and not bound to answer to the Sheriff-court; *2do.* That the Lady Rothes, being Sheriff, her sister is Sir William's daughter-in-law; *3tio.* They had a reduction depending of all Sir William's rights, which, being prejudicial, behoved to draw the maills and duties to the Lords, *per contingentiam causæ.*

The Lords repelled the reasons, and refused the bill: The *first*, in respect of this answer, That, if it was a regality, it had no court nor judicatory; and, Sir William being infest, was Lord of it himself: The *second*, Because the affinity fell not within the prohibition of the Act of Parliament: The *third* was repelled, Because the reduction was not produced in the field; and, though it were, the single raising of a reduction can never stop execution: likeas, Sir William had certification against my Lord Morton's rights. Some thought the Lords not competent now, seeing there was a protestation for remeid of law in the case, and which was so far advanced that it was tabled by a citation in the last session of Parliament. *Vol. II. Page 12.*

1698. November 3. WILLIAM JOHNSTON *against* ROBERT JOHNSTON, his Brother.

WILLIAM Johnston, in Haddington, having pursued his brother Robert for re-