

No 45.

Found in conformity with  
Bowssie against Ogilvy,  
No 43.  
p. 9188.

1714. February 2.

DAVID PAGAN Merchant in Glasgow *against* JAMES DALZIEL late Bailie  
in Dumfries.

DAVID PAGAN creditor to the deceased John Cannon. having arrested in the hands of James Dalziel Cannon's father-in-law, and pursued a furthcoming, he referred the libel to Dalziel's oath, who deponed, that he promised to have paid to John Cannon 3000 merks of tocher, with his daughter Mary Dalziel, which Cannon promised to secure with 4000 merks upon land, to be liferented by the said Mary Dalziel, which he never did; and deponed that he had paid to Cannon the half of the said 3000 merks.

THE LORDS upon advising the oath, assoilzied the defender from the L. 1000 paid before the arrestment, and found that he is not bound to make the L. 1000 resting the time of the arrestment furthcoming, but might retain it until his daughter be secured in her liferent, according to the terms of the marriage agreement:

Albeit, it was *alleged* for the pursuer; That James Dalziel's saying in his oath, that John Cannon was to have advanced 4000 merks, to be liferented by the wife, cannot state a debt against John Cannon, whose representatives, if pursued to implement, could not be liable for the liferent provision, unless instructed by Cannon's oath, or writ. *2do*, The defenders making voluntary payment of the first L. 1000 to Cannon, without receipt or obligation to employ it for the wife's liferent use, argues that it was not designed to be so employed:

In respect, it was *answered* for the defenders; Though his oath would not afford action against Cannon's Representatives, it still affords exception against all who pursue in his right; who having no other mean of proof but the defender's oath, must take it as it is intrinsically qualified. Which oath must be considered as a minute of a contract of marriage; and in the case of such mutual obligations, as the performance of the one draws on the performance of the other; so the one's non-performance affords an exception, and a ground of retention to the party ready to perform against him who fails or draws back, as was decided, 10th January 1682, Creditors of Telfer *contra* Campbell, No 53. p. 5836., and Hutchison *contra* the Creditors and Heirs of Chalmers, (mentioned below.)

*Fol. Dic. v. 1. p. 596. Forbes, MS. p. 21.*

\*.\* A similar decision was pronounced, 23d December 1703, Heirs and Creditors of Chalmers against Hutchison, No 50. p. 4388. *voce* FIAR ABSOLUTE, LIMITED, where it was also found, (as in the case which follows) that the non-implemment of provisions to children, or heirs of a marriage, will not furnish a defence against payment of the tocher to the husband's creditors, if the wife be once secured in her liferent.