different from reponing against decreets, where the parties are holden as confessed, because of not compearance to depone; against which the Lords do often repone, when the parties have lawful defences.

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1669. *July* 22. LEITH *against* The EARL of MARSHALL.

IN the foresaid action, Leith, upon his right *jure mariti*, for the sum upon the wadset, being required, as said is,—it was ALLEGED, That the requisition could not make the sum moveable; because, by the pursuer's own charter produced, the clause of requisition therein narrated was not *ad hunc effectum* to make the Earl of Marshall personally liable, so that he might be charged with horning for payment; but in case of requisition, and not payment, Elizabeth Keith, spouse of the said Leith, was only to have possession of the lands and not to be redeemed until she should be paid of 12,000 merks, which was 2000 merks more than her portion.

The Lords found, That the requisition contained in the charter granted by the Earl of Marshall, being only in the terms foresaid, that the requiring of the sum did not make the same moveable, so as to give right to the husband *jure mariti;* but declared, that the contract, to which the charter was relative, should be produced, to the effect they might see, if the Earl of Marshall was personally liable upon requisition, and that execution might be raised against him.

In this process, these points were likewise debated; 1*st*, Whether or not the husband, after marriage and requisition, having continued to possess the lands, and to intromit with the maills and duties, and hold courts, it was a passing from the requisition, so that he could never recur thereto, and crave the sum as being moveable? 2*d*, If both the wife and husband, having disponed the right of wadset to the husband's brother, they could recur to the clause of requisition, and crave the sum as moveable.

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1669. *July* 24. CHILDREN of SHORSWOOD *against* MAGDALEN SHORSWOOD.

IN an exhibition and delivery, pursued by the children of the brother and sister of Thomas Shorswood, against Magdalen, another sister, of an assignation to an heritable bond granted by Cunningham-head to the defunct: It being ALLEGED for the defender, That she, being heir-portioner, was not obliged to deliver the same; seeing it was never delivered by the defunct himself; without which the pursuers could have no right, the bond being heritable:—It was

ANSWERED, That the defunct's liferent, being reserved, with a power to dispose of the bond at his pleasure, during lifetime, he had just reason to keep the same in his own custody; and that it was offered to be proven, that, on death-bed, he gave the key of his cabinet, where the bonds and other papers lay, that, after his decease, they might be delivered according as he had ordained; so that the debate was, if the assignation, being made to an heritable bond a year and a half before his sickness, with the foresaid reservation, and an order given for delivery upon death-bed, did give the assignee a right to pursue for delivery.

The Lords, finding this to be of a general concernment, would not pronounce their interlocutor upon this point: but it being confessed by the defender, that she did likewise take out of the cabinet an assignation to a wadset made in her own favours, and if both the wadset and this bond had remained undelivered, the pursuers would have had more for their share, as heirs-portioners, than the bond in question would amount to;—they ordained, That the defender should deliver up this assignation to the pursuer, or otherwise should return again her own assignation and wadset taken out of the cabinet, to the effect the whole heirs-portioners might pursue their rights as if none of the assignations had been delivered.

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1669. *July* 24. CRAWFORD *against* ANDERSON, Provost of Glasgow.

IN a reduction of a disposition, made by one Fleming to Anderson, of his lands, upon the Act of Parliament 1621; Anderson confessed that his right was only in trust; and that, within half a year after his infeftment, he did give a back-bond, bearing the trust, and an obligement to dispone, he being satisfied of any debts due to himself; after which, he had paid several sums of money to Fleming's creditors, whereof he could get no relief but by making use of his right.

It was ALLEGED for Crawford, That he had comprised Fleming's estate as a lawful creditor, and was publicly infeft thereupon long before any payment made by Anderson to Fleming's creditors, which was voluntary, and had done no diligence; and therefore his right, being in trust, as said is, no such payment could make the same onerous; seeing, if that were sustained, it would be a door to defraud lawful creditors, who had done diligence, and, by such contrivance, to prefer any other the common debtor pleases.

The Lords did sustain the reduction, notwithstanding of the answer, and found, That Anderson was *in mala fide* to pay any creditors, to whom he was not obliged after the pursuer's public infeftment; and that, notwithstanding that Anderson's right was before the contracting of debt, whereupon comprising was led; so that it did not fall under the Act of Parliament 1621; and the back-bond given thereafter being voluntary, and no diligence done against him