

served ; and that there was no antecedent communing about it : and Bannatine deponed, That a mean servant of the Justice-Clerk gave him the disposition as now it is subscribed, and desired him to carry it to Sir Alexander, which he did ; and Sir Alexander subscribed the same, and gave it to him to be delivered to Frank Stuart, which he did accordingly ; and that nothing was expressed by either party what their intention or meaning was ; neither yet what was meant by the assignation by Frank Stuart to Mr Patrick.

The Lords found, That the clause “ for all other right,” &c. not being in the dispositive clause ; and that it did not appear who was the framer of the disposition, or by whose order, (the writer thereof, who was the other witness, being dead ;) and that Mr Patrick, acting by a tack, acknowledged Sir Alexander’s right of property : that therefore the disposition could not be extended to the property of the estate of Rentoun, but only to the superiority, or the feu-duty thereof ; as having been holden of the Abbacy of Coldinghame, erected in a temporal lordship to Frank Stuart’s predecessors ; and comprehended in the said lordship as a part of the vassalage thereof, and as no part of the property.

*Vol. II, Page 658.*

1679. *January 8.* CREDITORS OF EAST-BARNS *against* The EXECUTORS thereof.

INGLIS of East-barns did grant an infestment to Patrick, his eldest son, of his estate, bearing, for relief of debts,—wherein his son was cautioner, conform to an inventory : whereupon the son was infest in February ; and, in December thereafter, he did infest his wife in an annualrent out of that same estate, in place of a provision of a contract of marriage. Whereupon she craved preference : because both infestments being base, hers, though posterior, was preferable ; because, being for implement of a contract of marriage, it requires no other possession but the husband’s, and so was valid from its date : whereas the son’s infestment was clad with no possession, till the ladies’ infestment ; at least any possession he had was but simulate,—he being unmarried, with his father in the family,—and got only a simulate delivery of the goods on the mains, which was ploughed, and a part of it sown by the father. *2do.* The son’s infestment was fraudulent, without an adequate cause onerous ; in prejudice of the lady, who is an anterior creditor by her contract of marriage.

It was ANSWERED for the creditors, That they had proven possession in all that could be attained by the son’s right, *viz.* by a real delivery of the possession of the mains, and all the goods upon it ; and the father, being a beadle, never meddled thereafter, though he lived two years ; but the son bought plough, oxen, seed, and paid the servants’ fees. All which the Lords found proven. And the question arising, whether the possession of the mains would extend to validate the infestment as to the rest of the estate,—

The Lords found, That it would validate the same, in so far as might be extended to the lands in the same infestment with the mains ; and, as to the fraudulency of the son’s right, the creditors offered to prove, that it was for a cause onerous, equivalent to the worth of the land. But the question arising, that, if the cause onerous were not equivalent, whether the son’s infestment should be sustained and preferred, in so far as the cause onerous was instructed,—

The Lords did sustain the same *pro tanto* ; and ordained the creditors to have preference to so much of the estate as they would choice, equivalent to the sums : that the lady's executors might have access to the rest.

*Vol. II, Page 665.*

1679. *January 9.* ALEXANDER OGILVIE *against* OGILVIE of LOGIE.

ALEXANDER Ogilvie pursues Ogilvie of Logie, alleging, That he, being in terms of marriage with Helen Ogilvie, Logie's sister, he encouraged the pursuer to insist, and told him that his sister had a jointure, and that he was owing her 1000 merks by bond ; so, having advised him to go to Edinburgh for a warrant to be married, without proclamation,—in his absence he procured from his sister the retirement of the bond, and, in place thereof, did offer her a bond to her daughter by the first marriage :—and, therefore, concluding that he ought to renew the bond to the pursuer, as before.

The defender ALLEGED, That the libel was not relevant, because a wife is only incapacitated to do deeds prejudicial to her husband, after proclamation of the marriage ; and though that should be extended to the time of the contract of marriage, yet here there was no contract of marriage. And, though the defender had said he was owing his sister 1000 merks, yet, the pursuer having made no contract, he went on upon his own hazard. And the sum in question being heritable, he could have no right thereto *jure mariti*, but to the annual during the marriage. But, before either contract or proclamation, the woman was free, and might have gifted the sum to whom she pleased.

The pursuer ANSWERED, That, before contract or proclamation, though the woman's disposition could not be quarrelled, as in prejudice of the husband, simply ; yet where fraud is admixed, by inducing the man to marry on expectation of the sum, and, *medio tempore*, evacuating the same, that makes him liable to repair the damage occurring *ex propria fraude*.

The Lords would only sustain the summons and reply, in these terms,—that the marriage was agreed upon, the defender being present, and this sum agreed to be a part of the tocher ; and that, after the said agreement, he had induced the woman to give up the bond.

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1679. *January 15.* MR PATRICK REID *against* JAMES WOOD.

MR Patrick Reid, as assignee to a decret against James Wood, having charged him thereupon, he suspended on double-poinding ; wherein Mr Patrick was preferred, and a decret extracted. He suspended again, and a second decret of suspension was extracted ; and now he raises reduction and declarator, and insists on this reason,—that the last decret was unwarrantably extracted, there being a stop by deliverance of the Lords upon a bill.

It was ANSWERED, That the pretence of any stop cannot recal any decret, unless, *de recenti*, at the time of the extracting, it had been complained of, that