

1676. December 12, &c. JOHN MARSHALL *against* CHRISTIAN HOLMES.

CHRISTIAN HOLMES having obtained a decret before Sir John Harper, as Sheriff-depute of Lanrick, against John Marshall, for the liferent of 300 merks of her husband's intromitted with by him, the whole conquest being provided to her in liferent : (*Item*, The diets and acts of the process were confounded ; the probation not renounced ; the term not circumduced ; the party not cited to hear sentence. *Vide infra*, 8th November, 1677, Barbara Grant, No. 648.) Marshall raises suspension and reduction on this reason, that the decret was pronounced *spreto mandato judicis superioris*, there being an advocation ready to produce, on notice whereof the judge precipitated and decerned, but it was written after. This being taken to the Inner-House by my Lord Halton, they repelled that part of the reason, viz. that the advocation was produced, albeit after pronouncing of sentence, yet before the same was redacted *in scriptis* by the clerk, since the judge, after he had pronounced sentence, was *functus officio* ; but find the other member of the reason relevant, viz. that before production of the advocation, the judge had only pronounced these words, *Decerns*, and after the advocation was pronounced, he did specify the terms and qualities of his sentence, and did dictate the same to the clerk, in regard the sheriff-depute ought to have done nothing in the matter after the advocation was presented ; and find the said reason instructed by the instrument produced under the hand of the clerk of Court, and another notary. But the Lords, *ex gratia*, in respect of the dubiosness that might be in the case, turn the decret into a libel. See Dury about a case like this, 8th March, 1634, Thorneton. See Laufrancus Balbus, *Decisione* 357.

Thereafter we proponed our defence against her libel, (though Holmes' procurators alleged we were only reponed *in statu quo* at the time of the advocation, but this was a mistake,) viz. that the said relict, pursuer, had got her third part of the stock and fee of the haille inventory of the testament confirmed ; and so having betaken herself to that legal division, she could not recur now to seek likewise the liferent of the haille, these being incompatible, to be both liferenter and fiar as to one and the same inventory or sum.

ANSWERED,—*Non relevat*, unless we say, Accepted in satisfaction of all she could claim by her matrimonial provision.

This being taken by Newton to interlocutor, the Lords found, on the 2d of February, 1677, the allegiance bearing that the pursuer has accepted and taken a third of the moveables, relevant to seclude her from any liferent of the moveables or moveable sums, but that the same did not prejudice her as to her liferent of any sums that are heritable *quoad fiscum et relictam*.

Whereupon we offered us to prove, that she had gotten a third even of the heritable sums in the testament, and so could crave no liferent of the remanent ; since, by that same rational ground in law, whereby the Lords found she had secluded herself of the liferent of the moveables, in regard she had taken the third of them in stock and property, even so here, by getting the third part of the principal heritable sums she has passed from the liferent of the other two parts that fall to the children ; and so, by compensation of the third of the fee with the liferent of the haille, her liferent is extinguished and satisfied.

The Lords found this our condescendence relevant to seclude her totally, only the question arose about the manner of proving it. The Lords would not admit it other-

wise probable than *scripto vel juramento*, to take away her written obligation in her contract of marriage; but we prevailed this far, that she should be ordained to depone in presence of the debtors condescended upon by us, who paid in to her the third part of the heritable sums they were owing; but declared, that if Marshall, the defender, had them not ready to confront with her at the day assigned to her for deponing, (to which purpose they allowed him an act for citing them,) their not comparing should be no hinderance to her from deponing. So that, when the day came, and she offered to depone, we could not get it stopt on the production of a diligence executed against them, and in seeking a farther diligence by caption; because the Lords supposed it was *animo protelandi*, and that he kept them back, and might have had that influence and moyen to have brought them in upon the first citation. See the informations.

On the 10th of November, 1677, her oath being advised, the Lords found it did not prove the defence that she had got the full third; and therefore decerned, but declared, what she got more of the moveables than is proven before the Sheriff in that decret, they will allow them to compensate *pro tanto*; for she affirmed, in her oath, these sums were given her for alimenting the bairns, and not in satisfaction of the conquest.

*Advocates' MS. No. 518, folio 269.*

---

1676. *December 13.* FRANCIS MONTGOMERY *against* LORD MELVILLE.

THIS day was Mr Francis Montgomery, brother to Eglinton, and my Lord Melville's interlocutor about his *jus mariti*, and that the assignation was sufficient to purge vitious intromission, and that he was liable in *quantum locupletior factus erat*, &c. The case must be inquired into.

*Advocates' MS. No. 521, folio 270.*

---

1676. *December 13.* DR HALIBURTON *against* LORD BALMERINO.

DR HALIBURTON, one of the creditors of the last Lord Coupar, had a favourable interlocutor against the Lord Balmerino, who had got that estate. The Lords found, where an apparent heir, (such as Balmerino was to Coupar,) caused comprise the predecessor's estate for a debt owing by the said apparent heir himself before his interest exists by his predecessor's decease, it shall infer *gestionem pro hærede*, (as in the Earl of Nithsdale and Glendyning's case was determined by act of sederunt in 1662;) if the apparent heir enter in possession by that comprising, either by communicating it to others, who bruik by it and have no other better right, or by uplifting the mails and duties, or by entering vassals. And Haliburton was very clear he could fasten some of thir qualifications on Balmerino. But their re-