1673. *January* 17. JAMES RAE *against* ALEXANDER GLASS of SAUCHIE.

JAMES Rae having made an assignation, to Sauchie, of several bonds, which were a great part of his fortune; there was a reduction and declarator intented, at Rae's instance, wherein this defence was proponed,—That the assignation, bearing borrowed money, could not be taken away, as being in trust, but *scripto vel juramento*. And yet, notwithstanding, the defender was willing to condescend upon onerous causes, adequate to the sums assigned; which he should either instruct *scripto*, or whereupon he was content to depone.

The Lords having ordained count and reckoning before the auditors, there was an article condescended on by Sauchie for making up of an onerous cause, *pro tanto*,—That the pursuer had granted a bond to Sauchie's wife, who was his niece, wherein he was obliged to pay her 7000 merks to help her portion, which now belonged to Sauchie *jure mariti*; being in his possession, and a moveable bond.

It was ALLEGED for the pursuer, That the bond was not obligatory; because it did bear a special provision, inserted therein, that he should consent to her contract of marriage; which he never did.

It was REPLIED, That the pursuer was present when the contract was subscribed by the parties-contractors, and did subscribe as witness to the contract; which must import a consent to the marriage, unless he had then declared his dissent to the marriage; which he never did; but, on the contrary, did remain in family with the defender and his wife many years thereafter: Neither was there any cause why he should have dissented, Sauchie being a fit husband, every way, both for means and parts; which hath since appeared by his purchases.

It was DUPLIED, That the contract of marriage, bearing nothing as to the bond of provision to be a part of the tocher, for no remuneration of a jointure granted, answerable thereto, the subscribing as a witness did not purify the condition of the bond, unless he had expressly consented thereto: likeas, in many cases the Lords had decided, that a liferenter, compriser, or annualrenter, subscribing a disposition made by the common debtor, only as witness, cannot prejudge him of the real right of the said lands; nor a superior of his rights of casualties due to him out of the lands disponed.

The Lords did find that the articles could not be allowed as a part of the onerous cause; seeing that, as to all real rights, it was *in dubitate juris*, and was so constantly decided: and therefore, in this case, a personal bond, which was only given out of love and favour, the condition could not be purified, unless he had fulfilled the same *in terminis*, by subscribing as consenter; especially seeing, the defender being master of the bond, he ought to have made mention thereof in the contract of marriage.

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1673. *January* 20. ALEXANDER, WILLIAM, and THOMAS FORBESSES, *against* FORBES of PASLING.

THE said Alexander, William, and Thomas Forbesses, having a legacy of

1000 merks left them by their goodsire, did intent action against Forbes of Pasling, as executor nominate and confirmed, for payment thereof.

It was ALLEGED, That the pursuers' legacy was *speciale legatum,—viz.* One thousand merks, to be paid out of the rents of the lands due by the tenants; but so it is, that the tenants were owing no rents, having paid the rents to the defunct; and the most that the executor was obliged to do, was to assign the pursuer; which he was content instantly to perform.

It was REPLIED, That albeit the tenants were not due in any sum, yet the legacy ought to be fulfilled, there being sufficient moveables to pay the whole debts and legacies; and where there is *speciale legatum*, albeit the same should perish as to the being or subsistence of the thing itself, yet the executor is obliged *prestare valorem;*—as was found in a case betwixt Falconer and M'Dougall, where a sum of ten thousand merks, due by the Earl of Murray, being left in legacy, and assigned by the defunct, in his own time, his executor was found liable to pay the like sum to the legator.

The Lords did sustain the action against the executor; and found, that an offer to assign was not sufficient, *post tantum tempus*, he never having done diligence against the tenants: but did not give their interlocutor *in jure* upon the first point, supposing that the defunct had truly uplifted in his own time, if in that case the executor should be liable; as to which it is thought he should be liable, albeit it be *speciale legatum;* seeing, by the law, if a defunct should leave that which belongs to another, and not to himself, his executor is liable *prestare valorem*, and a special legacy is *in favorem* of the legator, and so cannot put him in a worse condition than a common legator.

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1673. *January* 20. MR ANDREW BRYSONE *against* MARGARET BRYSONE, his Sister, and JOHN FOULIS, Fiar of Ratho, her Husband, for his Interest.

IN a reduction at Mr Andrew Brysone's instance, as having acquired the lands of Craigtoun, wherein he was infeft, against Margaret Brysone, his sister, for reducing her infeftment of an annualrent effeiring to seven thousand merks, granted to her by her father, before he disponed the said lands, as being done *in lecto ægritudinis*:—

It was ANSWERED, That he, being a singular successor, could not reduce a right *ex capite lecti*, unless he had been heir served to his father. *2do.* Her right depended upon her mother's contract of marriage; whereby he was obliged to provide the said Margaret to seven thousand merks, as her portion, being a bairn of the said marriage, wherewith he had burdened the right of the said lands, purchased by the said Mr Andrew.

It was REPLIED, That the said provision was satisfied as to the sum of two thousand merks, in so far as the defender's father had provided her to the sum of two thousand merks, contained in a bond granted to him in liferent, and the defender in fee, by the Laird of Broomhall.

It was DUPLIED, That the said bond, bearing nothing that it was in satisfaction of the portion contained in the contract of marriage, it cannot be imputed in satisfaction thereof *pro tanto;* especially seeing, besides the portions provided