should he have given her the fee of the said sum, which was *excessus notabilis*, and was so found by the Lords, 27th June 1677, and 22d June 1678, Birnies *contra* Murrays, No 341. p. 6124. and No 58. p. 3242. where all now alleged is there founded on and repelled. THE LORDS, by plurality, thought it incongruous to loose a decreet *in foro* on nullities, where the allegeances against it (*esto* it were open) are irrelevant; and, therefore, finding it was *bene judicatum* in 1678, and what is now said, shewed no material injustice then committed, therefore, they sustained the decreet, and assoilzied from Murray's reduction. In this case, conveyances of fees to wives by husbands were thought unfavourable, and instances remembered of the Duke of Lauderdale and the Lord Whtelaw.

Fol. Dic. v. 2. p. 206. Fountainhall, v. 2. p. 520.

No 351.

1744. *December* 19. CHRISTIES *against* CHRISTIE.

No 352.
A defender being found liable by an interlocutor which was laid open on a reclaiming bill, and thereafter a new topic insisted on as relevant to subject him, whereupon he was assoilzied without reviewing the former interlocutor, the decree was opened to the effect of reviewing it, and determining how far it ought to be adhered to or altered.

GEORGE CHRISTIE, tenant in Kinglassie, purchased the lands of Auchmuir, and took the rights to himself in liferent, and to George and William his two sons equally in fee. After which he acquired the feu-duties of the lands of Kynninmound, which he took to himself in liferent, and to William in fee; and on this, in virtue of powers reserved, he disponed the lands of Auchmuir to his son George; but this deed, which was written by William, wanted witnesses.

Upon George the father's death, and the observation of the defect, a declaration was obtained from William, that he should never quarrel his father's settlement; but this wanted the writer's name and designation.

The matter came to a plea between George the son's daughters, and their uncle William, in which it was referred to his oath, if he had not signed the declaration, to which he deponed *affirmative*; and also, if he had not promised never to quarrel his father's disposition; to which he deponed, "He knew his father's intention, that his brother should succeed to the whole lands, which he promised to implement; but he was also assured their father intended there should be mutual tailzies betwixt them, failing heirs-male of their bodies; and that he made the said promise only on condition of the said intended tailzie."

THE LORDS found the promise proved, and the quality extrinsic; but this being opened on a petition, the matter was never determined, and the cause taken up on another point, in which the defender prevailed, and was assoilzied; and of this decreet *in foro* a reduction was brought on this ground, that the interlocutor by which the defender was found liable, stood yet unreversed; and the pursuers having only failed prevailing on another topic, he ought not to have been assoilzied.

"THE LORDS, 6th November 1744, upon report of the Lord Tinwald, in respect it appeared from the extract of the decreet under reduction, that by in-

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terlocutor, 12th January 1725, it was found proved by the defender's oath, that he promised to fulfil and implement his father's disposition or destination to his brother, notwithstanding of any informality therein, and not to quarrel or impugn the said nullity; as also, That he promised and offered to renounce his right to the lands in question; and that the quality adjected to his oath was found extrinsic; and albeit the defender reclaimed against this judgment, and, upon a deliverance, before answer, was examined before two Ordinaries, and again ordained to be re-examined before the Lords in presence; yet no judgment was given on these proceedings, but the cause taken up on a different medium, and to a different effect not relative to the foresaid interlocutor; and that the defender was assoilzied only in consequence of advising the proofs and debate upon this last part of the proceedings; and in respect it was not denied the pursuers of the reduction were then minors, found the reasons of reduction relevant to lay open the decreet *ad hunc effectum*, to hear parties how far the foresaid interlocutor ought to be altered or adhered to, upon the facts and circumstances alleged in the said decreet, and the proceedings had in consequence of the reclaiming petition against the said interlocutor; but declared, that the rest of the interlocutors in the foresaid decreet were to stand *tanquam res hactenus judicata*." And this day, they "refused a reclaiming bill, and adhered."

Act. *W. Grant.* Alt. *L. Craigie & Scrimgeour.* Clerk, *Kirkpatrick.*

D. Falconer, v. 1. p. 29.

1747. *February* 19.

STEWART of Stewarthall *against* BARBARA SCOT, and ANNE STEWART, Relict of Mr COLIN MACLAURIN, and her Children.

No 353.

Two parties claiming right to the same subject, and the debtor being decerned by decree-arbitral to pay to the one, and after by decree of the Court of Session to the other, who was no party to the submission, he called them both in a new process, where it was pleaded neither of the decrees

MR WALTER STEWART, advocate, by his contract of marriage with Barbara Scot, became bound to secure to her in liferent, and to the heirs of the marriage in fee, the conquest of the marriage, not exceeding 20,000 merks Scots, as also to secure to himself and the children, the sum of 4000 merks, besides the said conquest, under this burden, "That because the said Barbara liferented the conquest restricted to 20,000 merks, whereby the child or children of the marriage had no fund of aliment above the said sum of 4000 merks, which was not liferented; therefore she was bound and obliged that she should either aliment the child or children of the marriage, until their respective marriages or majority, or otherwise should renounce or assign her liferent, or so much thereof, as, with the foresaid sum of 4000 merks, should be equivalent to the extent of the foresaid full provisions, in favours of the heirs or bairns of the marriage;" to wit, the whole 20,000 merks to a son, or three or more daughters, but restricted to fifteen, if there should be but two, and ten, if one daughter.