to put him *in mala fide* to pay any creditor, it was against reason to take from him the estate without any allowance of those sums whereof he could get no relief: But, notwithstanding, the Lords reduced his right, as being upon trust, which he had declared by his back-bond; and, finding it to be a contrivance, would have no respect to any voluntary payment he had made.

This decision, though it was hard, as being the first of this nature, yet was done upon a just consideration to obviate fraud and contrivances to prejudge lawful creditors. *Page* 77.

1669. *July* 28. CAMPBELL of ORMSAY *against* CAMPBELL of GLENCARADEL.

SIR Archibald Campbell of Glencaradel, *in anno* 1614, having disponed his lands and estate in favours of his grand-child; with an express condition, that, so soon as he should attain to the possession of the lands, he should assign to his brethren a bond of 4000 merks due by the Earl of Argile; his said brethren did pursue for delivery of the bond, and an assignation thereto. The defenders did make offer of an assignation; but ALLEGED, That they were not obliged to produce the bond, which was never their evident, but retained by the goodsire, who had power to dispose thereof during lifetime.

The Lords, notwithstanding, found, That they were obliged to produce the bond; unless the defenders would offer to prove that there was such a provision, and that, conform thereto, the goodsire had uplifted and discharged the sums therein; seeing the said 4000 merks were granted as a provision from the goodsire; and the estate being disponed to the eldest brother, with a condition to assign that bond, behoved to be interpreted *cum effectu;* and, without delivery of the bond, the assignation could signify nothing.

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1669. *November* 20. MARY STIRLING, and POLTOUN, her Spouse, *against* BAILIE JUSTICE.

IN an exhibition, pursued at the instance of the said Mary, and her husband for his interest, against Bailie Justice, of a principal bond which he had in his custody, as tutor to the said Mary's son; the said Bailie did produce an extract out of the register: It being ALLEGED, That the principal ought to be produced and taken out of the register; because it was put there after the death of the principal debtor, whose estate was to be comprised for this debt; and so could not work against him, but only against the cautioner, who was then alive; especially seeing the defender had registered the same after intenting of the exhibition, and so did it *dolo malo.*

The Lords did, notwithstanding, assoilyie the defender, and found, That in this or the like cases, where bonds are registered against any one party who was living, it ought to exoner the tutor from exhibition; and the liferenter or curators of a minor, succeeding to the tutor, ought to pursue a registration against the heirs of the principal debtor, or any other cautioners who were then living the time of the registration.

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1669. *November* 27. WILLOX *against* COUTS.

CHRISTIAN Howison being married to David Knolles, burgess of Aberdeen; after there was a son begotten of the marriage, she did resign, in favours of the husband, a tenement with barn and barn-yard belonging thereto, and in favours of herself in liferent, and the heirs of the marriage; which failing, to his heirs whatsoever. At which time the husband gave bond, bearing, That for as much as all the means he had was by his wife's virtue, therefore he obliged him and his heirs whatsoever, failing heirs of the marriage, gotten or to be gotten, to pay to his wife, her heirs or assignees, the sum of 500 merks, at the first term after the last of their deceases; whereupon Dr Willox, executor of the said Christian, did pursue Alexander Couts, who was heir by progress to the husband, for payment of the 500 merks.

It was ALLEGED, That the defender was not obliged in payment, because the condition of the bond did never exist; in so far as there was an heir of the marriage who survived the father, and was infeft in the same tenement of land; to whom the defender succeeded, but not to the husband who was obliged by the bond.

It was REPLIED by the pursuers, That the meaning of the bond could not be otherwise interpreted; but whensoever that tenement of land should fall to the husband's heirs, by the death of the heirs of the marriage, the sum of the bond should be due; seeing it expressly bears to be payable at the death of the last heirs.

The Lords were much divided about the interpretation, seeing the heir of the marriage did succeed the father; for, if the defender had been heir to the husband, in that case they found, that undoubtedly the sum would have been due: So it being otherwise, they recommended to the parties to agree.

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1669. *December* 2. ARKINLEYS *against* CAMPBELL of GLENCARRADALE.

IN the above mentioned removing, pursued at Arkinley's instance as being infeft in his father's estate, which was forefaulted, upon the resignation of Duke Hamilton who was donatar to the forefaulture, against Glencarradale, as possessor of the lands of Auchattan Moglen, which was contained in his seasine:

It was ALLEGED for the defender, That he bruiked by tolerance from Camp-