

1672. *January 20.*

A certain woman pursuing the heir of the granter, for payment of a sum contained in a bond, it was ALLEGED, She could not seek implement of the bond, because it was *sub hac conditione, si ejus consensum in nuptiis adhibuerit*, which she did not. To this it was ANSWERED, That *matrimonia debent esse libera*, that clauses restricting the liberty of marriage are reprobated as dishonest, that *habentur pro nullis seu non adjectis*, and notwithstanding thereof the thing is due; that though she has not married with his consent, yet she has not married *personæ turpi* but honourably *et sine desparagio*, which must be reputed an implement of the condition *per æquipollens*. REPLIED, Clauses prohibiting marriage *simpliciter* are rejected, but not such as circumscribe it within such and such bounds; that such conditions cannot be fulfilled otherways than *in forma specifica*; that Craig allows of such conditions, *page 161. ibique ll. ac Doctores citati.*

They were to have the Lords' answer, whether or no she could acclaim any benefit by the bond whereof she had forefaulted the express condition. *L. 134, in principio, D. de V. obligationibus, L. 2. C. de inutilibus stipulationibus. Vide infra, No. 394, capit. 20. extra, de sponsalibus. Vide Dury, 16th December 1629, Home against Tenants. Perezius ad tit. C. de donationibus quæ sub modo, &c. Num. 4. Advocates' MS. No. 306, folio 126.*

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1672. *January.*      ROBERT PITILLO *against* ———.

I CALL to mind that in the month of July 1671, the Lords found, in a case of Mr. Robert Pitillo's, that the cedent's oath might be taken in prejudice of the assignee, where it was confessed that the assignation was without onerous causes; though before, it was counted a brocard, that the cedent could not swear in prejudice of the assignee, unless the assignee first had confessed the assignation to have been to the cedent's behoof.

*Advocates' MS. No. 307, § 1, folio 126.*

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1672. *January.*      LORD HALTON *against* The LAIRD OF AYTON.

IN a case betwixt my Lord Halton and the Laird of Ayton about a comprising of Glastry, (bought in by Argyle,) which was founded on a gift of escheat given in 1664 to Andrew Patersone, without any back-bond to be countable, the Lords restricted the gift, and consequently the comprising, to Patersone's true debt, as if he had given back-bond, because, by an act of Exchequer, no gifts should be given without back-bonds. Upon which his just debt was found more than paid by his intromission, and so the comprising fell in consequence. *Vide infra, No. 382, [December 1672, Stuart against Stuart's heirs.]*

*Advocates' MS. No. 307, § 2, folio 126.*