

of 2000 merks of portion contracted by her ;—it was alleged for the defender, That the pursuer *habuit intus*, seeing the portion was not paid and she had no discharge thereof. Answered, Wives do not always take discharges of their tocher, as third parties do, when they are obliged for them ; and the husband ought to have left a discharge : And the marriage having subsisted for the space of seven or eight years, the tocher ought to be presumed satisfied, as the Lords found in the case of David Dick's wife against ————— her first husband's heir. The Lords sustained the answer, and the defender having thereafter referred the verity of this allegiance to the relict's oath, the Lords, in respect she was now clothed with a second husband, ordained her to depone, only to affect herself in case she survived the husband.

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1684. *January.*      ROBERT HANDISIDE *against* WILLIAMSON.

IN a competition betwixt an arrester and the possessor of a prior precept, drawn by the common debtor, and accepted by the person in whose hands the money was arrested ;—it was alleged for the arrester, That the precept, as gratuitously given after the arrester's debt, was quarrellable upon the Act of Parliament 1621 ; and the onerous cause being referred to the possessor's oath, he depone that himself was not creditor to the drawer, but his brother was. The arrester objected against his oath, that the quality is extrinsic, and it must be otherwise proven that the brother was creditor to the drawer ; and, *esto* that were proven, the arrester's diligence should be preferred, unless it were made appear, *scripto*, before the arrestment, or by the arrester's oath, that the precept was given for the brother's debt. It were again a dangerous preparative to allow persons, whose rights are quarrelled as wanting an onerous cause, to impute them to the payment of a creditor who had done no diligence, and so to disappoint the diligence of another creditor. The Lords, before answer, ordained the debtor, drawer of the precept, and the possessor's brother, to be examined if the precept was truly granted at the time for the behoof of the brother ; who had sold some goods to the drawer for ready money ; and, as was alleged, had verbally ordered his brother to receive his money or the precept.

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1684. *January.*      MARY BRUCE *against* SIR PATRICK HEPBURN.

MARY Bruce, relict of John M'Pherson, having, after his decease, adjudged certain sums of money belonging to him, for satisfaction of bygone and future annuities during her lifetime, of £10,000, which the defunct was obliged, in his contract of marriage, to employ upon land or annual-rent, to him or her, the longest liver ; and had not performed it ;—this adjudication was quarrelled by Patrick Hepburn, another adjudger, within year and day, upon this ground, That she had not liquidated the terms to come to a certain sum at the rate of so many years ; which is a nullity ; because, 1. A creditor can no more adjudge or apprise for future annuities, than he can poind them ; 2. There is

no total sum qualified, upon which the adjudication is redeemable; 3. Such an adjudication could not expire in ten years. Answered for the adjudger, The foresaid arguments take only place where the ground of an adjudication is *obligatio dandi* by payment, and not where it is *obligatio ad factum præstandum*, as this is; and here the obligation, in the contract, to settle a sum in favours of the wife, betwixt and such a day, became prestable *in totum* after elapsing of the day, although the particular payments fall to be due at the several terms of her life, and these could not be valued estimate to a liquid sum, it being uncertain how long she would live; and it were unreasonable that other creditors should carry away all, in the case of her surviving the years of the modification. It were also a defect in law, to find no diligence equal to the performance of a debtor's obligation; and in this case the adjudication of the property of the sum, or of an annual-rent effeiring to £10,000 out of it, is but in effect a real security, and always redeemable upon securing the adjudger by infestment, conform to the obligation in her contract of marriage. Again, an adjudication of lands upon an obligation to dispoise the same, is not redeemable by payment of money, seeing the lands in special are *in obligatione*, which could not be fulfilled *per equipollens*; and, as there may be arrestment *declaratorie*; before the term of payment in moveables, so there may be an adjudication; which is not execution, but only a diligence. The Lords found the answer relevant, and sustained the adjudication as formal.

Thereafter it was contended for the relict, That the other posterior diligences, though within year and day, could not come *in pari passu* with her adjudication, whereof the ground is an obligation to infest, and not to pay: and not liquid to a particular sum before the leading of it; and, consequently, falls not under the Act of Parliament, which seems only to respect diligences for liquid sums, which may be proportioned in a competition;—December 12, 1677, *the Lady Frazer against the Creditors of the Lord Frazer and the Lady Marr*. Answered, The reason of the Act of Parliament militates equally in all cases; and the interest of this adjudger may receive an estimation in a competition with other diligences. The cited practise seems not to be well founded: besides, there is this difference between the two cases, that the obligation, to the Lady Frazer, was to infest her in particular lands in lieu of others renounced by her, which stated her in the case of one having a special disposition; whereas the obligation here is but to employ a sum in general. The Lords allowed the other diligences within the year, to come *in pari passu*.

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1684. *January*. JEAN CALLENDER *against* My LORD SALINE'S DAUGHTERS.

A MAN having a bond of 3000 merks, to himself and his wife, in liferent, &c. whom he was formerly obliged, by contract of marriage, to provide to the liferent of 5000 merks; she, after his decease, pursuing for the annual-rent of the bond, the debtor pleaded compensation upon sums belonging to him which the pursuer's husband intromitted with. Answered, The compensation can only affect the fee, and not the liferent, which is secured to the pursuer by the provision in the bond. Replied, It is usual for men to provide the liferent of sums