and favour, and out of mere pity and commiseration. And, seeing he founds upon it, he clearly homologates and acknowledges the disposition: and his pretence, that he only mentions it to demonstrate he had not paid an adequate price before, is captious and impertinent; for, if he repudiate the same, he can found no argument on it.

As to his reasons of reduction, ANSWERED to the *first*, anent the trust,—That there can be nothing more false and calumnious; for now, by the Act of Parliament 1696, no trust can be proven but *scripto vel juramento*; and let him choose any of the two he pleases. And, as to the *second*, against the onerous adequate cause; he oppones both the disposition and ratification, wherein he has acknowledged the same; and what can law require more than that? As for the pretended interdiction, it is published *in anno* 1675, and Ferguson of Craigdarroch, who lived last of all the interdictors, died in 1685, now twenty-five years ago; so to trump up an interdiction, after it has been so long dead and buried, is a downright mockery.

The Lords found no ground for modifying any aliment in this case; but prejudice to Gilbert to insist for his liferent-bond of pension, as accords.

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1710. *July* 11. ——————— *against* CARNEGIE.

A QUERY was made to the Lords on this ground:—In a process against Carnegie of Finhaven's eldest son, a point was referred to his oath. It was suggested, that, by a palsy, he had been these many years bygone struck dumb; but it had affected neither his judgment nor hearing, so as he wrote his mind on any subject most judiciously; and though he was deprived of the use of his tongue, whether he might not be allowed, after he was sworn, to set down his oath in writing. And the Lords found, in this extraordinary case, he might; and that it fell not under the Act of Sederunt, discharging the giving of oaths in writ.

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1710. *July* 12. HELEN HUNTER and PATRICK JOHNSTON *against* SIR THOMAS MONCRIEFF of that ilk.

HUNTER and Johnston against Sir Thomas Moncrieff. By contract of marriage in 1661, betwixt the said Sir Thomas and Bethia Hamilton, she is provided to the liferent of 28,000 merks of principal sum, and, in case of no children, to the half of the conquest; and thir provisions are declared to be but prejudice to her of the half of the moveables. She being the first deceaser, without any children, Helen Hunter, her niece, and nearest of kin, confirms herself executor to her, and, with concourse of Patrick Johnston, her husband, pursues Sir Thomas Moncrieff of that ilk, for the half of the moveables, debts, and sums of money he had at the time of his first lady's death, extending to a great sum, as falling under her aunt's communion of goods, by the reservation in her contract

of marriage, the same falling under a bipartite division, by the dissolution of the marriage without children.

ALLEGED for Sir Thomas,—That any interest his wife's nearest of kin could pretend in his goods was fully discharged by herself; in so far as, ten years after the marriage, in 1672, when Sir Thomas's fortune and estate was much increased, there is a second contract entered into, innovating the former; and, lest it might be pretended to take advantage of her, Mr Alexander Hamilton, her own father, and Mr James Hunter, her brother-in-law, are express consenters, whereby she is provided to the manor-place of Moncrieff, parks, and orchards, and to 2000 merks *per annum* of liferent; and this she accepts in full contentation and satisfaction to her of all farther liferent, terce, or third, and of all she can ask or crave, either moveable or heritable, by her contract of marriage, or any other manner of way whatsomever; and thereby renounces all further liferent, terce, or third; upon which second contract she was infeft in the lands of Moncrieff, and so has clearly excluded herself, and all her nearest of kin, from any share or interest in Sir Thomas's moveables.

ANSWERED,—It is acknowledged that the clause founded on excluded herself, in case she had survived Sir Thomas her husband, but is noway calculated for the case that truly existed, of her deceasing before him; for her nearest of kin's interest is neither renounced, extinguished, or discharged by that second contract: neither does her accepting the new jointure renounce their claim, but that event is wholly unprovided for, and so *casus omissus habendus est pro de industria omissa*, or her acceptance is only declared to be in satisfaction to herself; and if it had been designed to exclude her executors, it behoved to have been framed and conceived in thir terms,—that she renounced any thing could fall either to herself, in case of her surviving her husband, or to her executors in case she happened to die before him; and the clause not running in thir terms, it is impossible, without subverting our fixed styles, to make the one case to comprehend the other, where it is not expressed. And the clause has an exception of what should fall to her by the decease of her father; and there being no exception in favours of her executors, it is plain there was no design to exclude them: for *exceptio firmat regulam in casibus non exceptis.*

REPLIED,—All this reasoning is sophistical, and downright contrary to the design and meaning of the parties-contractors; which was plainly to innovate the first contract, and substitute a new more ample jointure in place of the former, which is as fully renounced as words can make it; and it is absurd to common sense to think that Sir Thomas Moncrieff, who was so anxiously careful to prevent disputes betwixt his relict and his heir, would leave himself exposed to be attacked to divide his moveable estate, and give [one half] of it to his wife's executors in his own lifetime, and that he would put them in a better condition than his own wife. That he would exclude her from any part of his moveables, and yet leave himself open to be harassed by her executors, is such a wild imagination as could never enter into a rational man's head. And though the clause does not *nominatim* exclude the executors, yet *verba non sunt captanda nec Judaice interpretanda;* and what other sense can these words of "her renouncing all right any manner of way" admit, but to secure Sir Thomas *in omnem eventum*, and to be a final settlement and total renunciation.

The Lords found the pursuer, as executor and nearest of kin to Sir Thomas's

first wife, had no interest in any part of his wife's moveables, but was secluded by the second contract.

There was a second point started by the pursuer, but, not being fully debated, was not considered by the Lords at that time; and it was this, that the second contract being entered into *stante matrimonio*, it was *donatio inter virum et uxorem*, and could not impair nor restrict her matrimonial provisions; as she outlived her husband, she would have fallen to have the half of his moveables, and the half of his conquest, which would mightily exceed her 2000 merks of jointure provided to her by the second contract; and her father's consent could not prejudge her from reclaiming; and craved to be reponed against such evident lesion. *Vol. II. Page 585.*

1710, *July* 29.—An Appeal to the British Parliament was given in by Johnston of Garmoch against the interlocutor of the 12th current, mentioned *supra*, finding the second contract passed betwixt Sir Thomas Moncrief and his first lady, cut off any pretence her executors had to a share of his moveables or conquest. *Vol. II. Page 594.*

1710. *July* 27. ROBERT NEILSON *against* JANET COUTTER.

LORD Forglen reported Neilsons against Coutter. James Neilson, merchant in Rucan, in May 1701 dispones his goods and debts to Janet Coutter his spouse, with the burden of several legacies to his friends and relations, having no children; and particularly of £40 sterling to James Neilson, his brother's son, under the express quality and condition, that the said James being then abroad, if he should, after getting information of the said legacy, and of his death, come personally, within seven years after the testator's death, and demand it, then he should have it; but, failing of that, then he appointed the legacy to accresce to Robert Neilson the testator's brother, with annualrent during the not-payment. The testator dies in 1701, and the seven years elapse without hearing from James, to whom the £40 sterling was left; whereupon Robert Neilson supposing his right of substitution now existed and took place, in regard James, the first institute, had not claimed his right within the seven years, and so had forfeited the same, and being devolved to him, he pursues Janet Coutter to pay the legacy to him.

ALLEGED,—The first legatar's right is not irritated nor fallen; because the seven years cannot run from the testator's death, but from the time he got notice and information of it: but, *ita est* they produce a letter from him, dated in June 1709, from Maryland in America, bearing that he had accidentally met there with a Scotsman, that had acquainted him of what his uncle had left him of his death, and the conditions annexed to it; and if it were absolutely necessary, he would come home and receive it; and desired her advice. And it is plain, by the principles of all laws, that, so long as he was ignorant of the conditions, it was impossible for him to purify the same; for *non dicetur conditio deficisse ubi conditioni parere non potuit.* And you, Mr Neilson, the next substitute, ought to have sent him notice thereof, and not suffer the time to elapse; and if