

1709. *December 29.* WILLIAM DUFF of Bracco, *Supplicant.*

BRACCO, having pursued a sale and ranking of the estate of Edinglassie, against the heritor and his other creditors ; and carried the process so far on, without applying for expenses till the decret of ranking was ready to be extracted, and the sale ready to be advised : The Lords, upon a petition offered by Bracco, remitted to the Ordinary in the ranking to modify a sum for satisfying the expenses already bestowed, and to be expended for perfecting the sale and ranking ; and to grant warrant to the factor of the estate, for payment thereof.

*Page 382.*

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1709. *December 30.* SIR JOHN JOHNSTOUN of Caskiben *against* JOHN PEDDER, Commissary Clerk-depute of Aberdeen.

SIR JOHN JOHNSTOUN having obtained a precept of poinding against several debtors, pursued by him before the Commissary of Aberdeen ; and thereupon charged Isobel Drum, relict of Alexander Burnet, merchant there, for the sum of L. 111. 9s. contained in the precept as due by her : She suspended ; and Sir John required from John Pedder, who signed the precept, an extract of his decret, in respect the charge could not be discussed upon the precept. Which extract John Pedder refused to give out, because there was no decret against Isobel Drum ; but his servant had rashly extended the precept upon the decret, against the whole debtors in the libel, without noticing precisely the persons decerned against ; and he, following the servant's faith, had by inadvertency signed it. Sir John having nothing left to instruct his debt, but the decret, which was refused, by Isobel Drum's dying in the mean time ; he pursued John Pedder for payment of the L. 111. 9s. and for damages.

The Lords sustained the defender's giving out the precept without having a decret for his warrant, relevant to make him liable for the L.111. 9s. mentioned therein to be due by Isobel Drum to Sir John Johnstoun. Albeit it was alleged for the defender, that his escape was innocent and pardonable, and such as might have fallen out in the hands of the most exact man.

*Page 383.*

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1710. *January 6.* ELIZABETH BLAIR, Lady Kirktoun, *against* HENRY HUNTER of Kirktoun, her Husband.

HENRY HUNTER, to oblige his wife to return to his family, which she had deserted, through his severity and maltreating of her, granted a bond to pay to her year-

ly 400 merks, in case they should divert and live separately. A total breach happening after this reconciliation, so as there was no likelihood of their longer correspondence as man and wife: The Lords, upon her application, modified to her a yearly aliment of 300 merks, in money and victual, for which she extracted a decret. But in respect the same was less than the provision in the bond, she thought fit to charge her husband to implement his bond; who suspended upon the reasons following: 1. The charge at the instance of a wife against her husband, without the authority of a judge, is intrinsically null. 2. The bond is null, as being granted *contra bonos mores*, in the view of separation to happen, the Lord knows when; and more odious than *pacta de hæreditate viventis*, which are reprobated in law. 3. Such a bond granted to the wife for sums payable *stante matrimonio*, both recurred to the husband himself, *jure mariti*; and is revocable, as a donation.

ANSWERED for the charger,—Bonds for aliment, either in case of decease, or separation, *ne maritus in uxorem seivret*, are onerous; and not like gratuitous deeds, which are revocable, *ne conjuges mutuo amore se spolient*. And where the ground of separation is found just, by sentence of a judge, (as in this case,) the marriage is effectually dissolved, as to all the legal consequences during the separation; for no debt contracted by her in the separate state can affect him; nor would the administration, or profits of any estate, falling to her by succession, come under the *jus mariti*. So that the bond of aliment, granted in the view of a separation which hath happened, can no more be now revoked, than if the husband were actually dead.

REPLIED for the suspender,—What is necessary for the charger's aliment, is already cognosced and determined according to the suspender's fortune; and the excess charged for being *sine causa*, recurs to him, and is revocable.

The Lords suspended the letters *simpliciter*.

Page 384.

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1710. *January 19.* MR. JOHN DICKSON, Clerk to the Justices of Peace of Berwickshire, *against* MR. JOHN HUME, Advocate.

The Justices of Peace of Berwickshire, having set a fine of L.50. Sterling, upon Mr. John Hume, for which he was put to give bond to Mr. John Dickson their clerk: Mr. Hume, when charged upon the bond, suspended, and raised reduction of the sentence. At discussing the suspension, the Lords restricted the fine, as exorbitant, to L.30. Sterling; and found the letters orderly proceeded, for the restricted sum.