

confirmation, in law he is preferable ; his right being first made public by possession. It was replied to the second, That his disposition was for most true and onerous causes, as it bears ; and, there being no reduction *ex capite fraudis*, he is not obliged to answer these grounds.

The Lords did find, That nothing was to be decided but as to the preference of their rights in question ; and did prefer the annualrenters to Carmichael upon these grounds, That they had the first infestment, and that any possession Carmichael had was by the voluntary deed of the common debtor, who ceased to labour as formerly, and had suffered the tenants to take new tacks from Carmichael, being freed from their old tacks ; as likewise, that, before Carmichael's infestment or possession, the annualrenters had given in their signatures to be confirmed in Exchequer, and had raised and executed summonses against the tenants, and could not proceed farther until after the term of payment, and so were not *in supina negligentia*. But I was of that opinion, that they ought all to come in *pari passu*, without preference ; being moved upon this reason, That both their rights being private, and made public at one and the same time by confirmation, the law did make none of them preferable to others who had obtained no possession by legal diligence, which could only make them public ; and so their confirmations being of one date, and the only deed which did make them first public, they ought to come in *pari passu*.

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1676. July 25. WILLIAM BAXTER, and MR PATRICK FALCONER, his Assignee, against JAMES MAXWELL of Kirkonnell.

UMQUHILE Halbert Maxwell of Kirkonnell, being debtor, by bond, in the sum of £1400, to the deceased Patrick Baxter,—William Baxter, his son, did pursue John Maxwell of Kirkonnell, as representing the said Halbert, for payment ; in which action, there being a defence of prescription proponed, and a reply of interruption, before decret the defender died : Whereupon the pursuer intented a transferring, and got a decret for payment against James Maxwell, as heir to John, and, by progress, to the said Halbert : Whereupon, being charged, he did give in a bill of suspension ; and the reasons being remitted to the Ordinary :—

It was ALLEGED for Kirkonnell, That the decret of transferring was under reduction, upon the reason of minority and lesion, he being out of the country the time of the decret ; and, if he had compeared, he would have renounced to be heir to Halbert, which would have freed him from personal execution : Likeas, he is yet content to renounce, that Halbert's estate may be adjudged. 2d. The bond, which was the ground of the pursuit, being an heritable bond, by a charge of horning, became moveable, and so did fall to Patrick Baxter's executors, and not to his heir William, who had obtained a decret.

It was ANSWERED, That the decret, being *in foro contradictorio* against Kirkonnell, who compeared by his advocate, who proponed a peremptory defence of prescription, he can never be heard to suspend and reduce ; and as

to the *second*, the pursuer's title as heir not being controverted, the decret was good ; likeas, yet, they are content t<sup>o</sup> conform.

The Lords, having advised the bill and answers, and finding, That Mr John Ellis, who was made advocate, compearing, disclaimed the same ; did repone Kirkonnell as being minor the time of the decret, and out of the country, that he might yet renounce to be heir, to the effect that Kirkonnell's estate, who was a debtor, might be affected by an adjudication : but found, that minority and lesion was sufficient to secure him against personal execution, or burdening of any other estate, who had them from the debtor, notwithstanding the decret was *in foro*, and extracted, and after litiscontestation ; and so they ordained, after confirmation, Baxter and his assignee to extract a decret for that effect.

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1676. July 25. MARION DODS, and DAVID DICK, her Husband, *against* NINEAN HOME.

JAMES Scott, in his contract of marriage with Marion Dods, being obliged to provide her to the liferent of the annualrent of all sums of money he should conquest during the marriage ; after the death of the first husband, she having married David Dick, she did pursue Ninean Home, as being debtor to her deceased husband in the sum of 1000 merks, for payment of the annualrent thereof to her during her lifetime.

AS WAS ALLEGED, the defunct, James Scott, did leave the half of the said principal sum to the defender in legacy, which was so acknowledged by the said Marion Dods, his relict, that she, being executrix-creditrrix to her deceased husband, did only give up and confirm 500 merks, as only due of the said bond. *2d.* He ought to have compensation ; because the said James Scott, as factor for the said Ninean, did uplift sums of money due to him, extending to the sums craved.

It was REPLIED to the *first*, That the bond being heritable, and the said Marion creditrix by her contract of marriage, could not be prejudged by any legacy : and for giving up an inventory, the time of the confirmation, of a less sum than was truly due, cannot prejudice her ; seeing she might have eiked the same.

It was REPLIED to the *second*, That there can be no compensation ; because she, being provided by contract to all sums due to her husband, compensation is only receivable against the heirs who may be distressed for payment, but cannot meet her ; who is a lawful creditor to the defender by her contract of marriage.

The Lords did find, That the legacy, or confirmation of the testament, could not prejudge the wife of the benefit of the contract of marriage, whereby she was a lawful creditrix ; and so they repelled the defence : but, as to the compensation, they did sustain the same ; and found, That a husband getting a bond from a debtor, and being satisfied by intromission, or become debtor for as much as would compensate the debt during the marriage, that would compensate