

have suspended? The Lords found neither Cockburn nor Drummond ought to have paid on the Commissaries' decret, without suspension; and that the Commissaries should not have repelled that relevant defence of being *in rem versum*; and therefore found the said defence yet competent and relevant against the cautioner's heir, notwithstanding the Commissaries' decret; and assigned a term to prove it.

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1706 and 1707. MR WILLIAM AYTON of that ilk *against* The LADY AYTON and her CHILDREN.

1706. *February 23.*—MR William Ayton of that ilk *against* the Lady, his mother-in-law, and her Children. He, as heir served to Sir J. Ayton, his father, *cum beneficio inventarii*, pursues reduction of the provisions made by his father to my Lord Colvil's sister in his second contract of marriage, giving her twenty-two chalders of victual, and 40,000 merks to the bairns, besides £16,000 Scots he gave them since; which being exorbitant, and procured *delinimentis novercalibus*, and far beyond what the estate could bear, and contrary to the provisions made to him in his mother's contract, he craved to be reduced, as *contra fidem tabularum nuptialium*, the obligations of the first contract being onerous and prior, and so ought to be first performed.

ALLEGED,—The pursuer having served himself heir simply, and not as heir of provision and of the first marriage, he can never quarrel his father's deed, but is liable to fulfil all his obligations, and becomes both debtor and creditor; *aditio hereditatis* being *actus legitimus qui nec diem recipit nec conditionem*.

ANSWERED,—Though his retour does not expressly bear *ratione provisionis in contractu matrimoniali*, yet materially it imports it; seeing it mentions that *lator præsentium* is the son of the first marriage. Likeas, he is served on the Act 1695, *cum beneficio inventarii*; and having both the characters and capacities, as heir of line and heir of the first marriage in his person, he may make use of any of them that he pleases: as was found in *Livingston of Saltcoats'* case *against Mrs Margaret Menzies*; and between *Janet Kennedy* and *Matthew Cuming*.

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1707. *July 18.*—The case mentioned 23d February 1706, betwixt Lord Rankeillor and Lady Ayton, and now, on my Lord's death, transferred in his lady's person, was reported. And the competition falling betwixt Sir John Ayton's children of the second marriage, as assignees, and the executors-creditors of Sir John; it occurred to some of the Lords, whether the assignments were granted for implement of the provisions matrimonial, which relation to their mother's contract would make them more onerous. But, after inspection, it was found that they proceeded on the narrative of love and favour. And though the children declared, that they would make no other use of them than to fortify their provisions, yet it was urged, that this was contrary to the express will and narrative inserted by the father, in his assignments to them. The children further alleged,—That, in the case of the bairns of Douglas of Monswal, the Lords sustained provisions to bairns as preferable, in respect he had a sufficient visible estate at the time, able to pay both his debts and his bairns' provisions. But this interlocutor was altered after the Revolution.

The Lords preferred the executors-creditors to the children's intimated assignations; but ordained them to assign after their own payment, with this express quality, That the same should not compete with the other extraneous onerous creditors. Which brings in the children in the last place, after all the creditors, if the estate be sufficiently able to satisfy them all; and no otherways.

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1707. July 18. CAPTAIN MACDOWAL *against* MACDOWAL of FREUCH and GEORGE FULLERTON of DREGHORN.

CAPTAIN Macdowal, against Freuch and Fullarton. Macdowal of Freuch being forfeited, for joining with the rising in arms at Bothwel Bridge; and Colonel Graham of Claverhouse, afterwards Viscount of Dundee, being made donatar to his forfeiture; George Fullarton of Dreghorn, Freuch's uncle, composes with the donatar, and for a great sum acquires a right to the forfeiture. Captain Macdowal, being a creditor on Freuch's estate for 30,000 merks, but unconfirmed, applies to Dreghorn, what he would give him for his debt: and though, in the circumstances as they then stood, he needed not have owned him in a sixpence, yet they agreed on 7000 merks; which the Captain accepted in that desperate case in full of his whole claim, and gave an assignation to Dreghorn, blank in the name, to his portion foresaid; which was afterwards filled up in the name of James Edmonston of Dreghorn and Freuch's behoof, in 1682. After the Revolution, Freuch being restored amongst the rest, by the rescissory act 1690; and likewise having recovered the composition paid to the Viscount of Dundee, by affecting his lands of Dudhope, and from the Duke of Douglass, donatar to Dundee's forfeiture; Captain Macdowal intents a process against Freuch and Dreghorn, craving to be reponed and restored to his own place, against the transaction so disadvantageously made, quitting 30,000 merks for 7000, plainly arising from the terror incussed by the forfeiture; and so it was either *sine justa causa* or *ob causam nunc finitam*, per l. 1, sec. 2, *D. de Conduct. sine causa*; and since you Freuch are fully restored, and have the benefit of your estate, it is against natural equity that, *ex meo damno*, you should be enriched; l. 14, *D. de Conduct. Indeb.* and l. 206, *de Reg. Jur.* and much more when I am damnified by a voluntary deed of yours, by running to Bothwel-bridge: And as there was a fault on your side, so there was evident *vis et metus* on mine; and it is unjust to obtrude your restitution to cut me off from my right on your estate: But it should be equally to us both, as the Emperor Dioclesian determines in l. 12, *C. de Sententiam Passis et Restitutis*. Where a criminal is restored against a sentence of deportation, if he would protect himself thereby *contra creditores suos*, it is *improbis conatus*, a dishonest attempt.

ANSWERED for Freuch,—That it is a most extraordinary action to reverse a transaction so deliberately entered into, and accepted with much thankfulness, as a singular favour, when he could not have expected a farthing: And the rescissory act 1690 annuls no transactions but those made by the rebels' wives or widows; which, being the only exception in the act, *confirmat regulam in casibus non exceptis*. And the 16th Act of Parliament 1695 declares, That the person restored shall have the benefit of the eases of all the debts purchased during the forfeiture.