

The lady, in the vacance, had led some witnesses before the Bailies of Edinburgh, on pretence they were removing out of the kingdom, and would not stay till the session sat down : and who loaded Captain Nairn with much cruelty and insolence to her. He had likewise taken a precognition before the justices of peace, wherein some persons of no good fame had deponed about the Lady Innernytie's consulting with them for poisoning her husband. But they being taken by no warrant of the Lords, but brought in ultroneously, they were both laid aside, and nothing advised but the depositions taken before themselves. Where the difficulty occurred, that there was a list of debts, with their instructions, amounting to £400 or £500 sterling, given in, and by an aliment to her they would be visibly lesed ; for they run a double hazard both of his death and hers ; and in both events they lost their debts ; and so much the rather were the creditors to be considered in the modification, that it was alleged several of the debts were originally hers, and only corroborated by him ; and so she was more obliged to see them paid by the ties both of law and honour.

When the Lords came to state what should be the quota of her aliment, during their living apart, a variance arose on the rental ; the Captain making it only £1700 free rents, and the lady more than thirty chalders of victual. Some proposed to halve it betwixt them ; others thought twelve chalders of victual sufficient to her, and even that to be subject to a proportion of cess ; but, in regard it was not clear if any of the debts were my Lady's, contracted in her viduity, nor was the rental fully agreed on, therefore they remitted it to an Ordinary to adjust these matters of fact, before they proceeded to modify a quota.

Among his other points of maltreatment, one was his keeping misses in the house. It was started if this fell directly under that category, seeing bad usage relates more to beating, &c. Yet it was thought to be a maltreatment of the worst kind ; and is one of the fatal consequences of unequal marriages betwixt a young man and an old woman, which are seldom attended with tranquillity or a blessing,

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1712. *January 31.* ROBERT COLVIL, Minister at Glenluce, *against* WILLIAM BIGGAR of WOOLMET.

WILLIAM Biggar of Woolmet being debtor to sundry persons in considerable sums, and, amongst the rest, to Mr Robert Colvil, minister at Glenluce, he convenes his creditors, and, with their consent, grants an absolute disposition of his estate in their favours ; who pitch on five of themselves to be trustees, who are infest for the behoof of the whole, and empowered to sell the lands, if not paid before Whitsunday 1708 ; and in the mean time to apply the rents for paying their annualrents *primo loco*, and their principal sums so far as it would go : and upon this they gave him a supersedere of all diligence, both personal and real. Mr Colvil, wanting three or four years' annualrent, and thinking the trustees minded themselves more than they did him, raises an adjudication.

Against which Woolmet OBJECTED,—The craving this adjudication was more humour than interest ; for he had very fairly denuded himself of his estate, both real and casual, both to prevent the creditors casting out needless expenses, in

adjudging, arresting, or the like, and heaping the same upon him : which method had proved very successful in *Edzell and Thomas Robertson's case*, and sundry others where it was tried ; and that Colvil is one of the consenters who agreed to it, and, having accepted, cannot resile now, unless the trustees first repon him to his own estate ; and, except a small competency to himself, the rents go to his creditors ; and Mr Colvil may have his proportion effeiring to his sum. And the very design of the disposition was to be free of adjudging and overwhelming him with the expense of diligence. Neither will an adjudication advance your payment ; for it has the course of ten years, and in this way now laid down you may get payment much sooner ; so the compulsitor you build on will not operate your design. And by Mr Colvil's resiling now, were to impose a trick upon Woolmet, and hound out all his creditors on him, though he is denuded of his estate in their favours : *et malitiis non est indulgendum* ; contrary to Mr Colvil's express consent and paction.

ANSWERED,—Denying he agreed either to the disposition or nomination of the trustees ; *esto* he had, the condition was only conditional that he was paid of his annualrents, and the lands roused to pay the principal sums ; none of which is done : but he and the trustees collude together ; and, at this rate, a debtor might easily ensnare his creditors, by giving them a disposition in a trustee's name, and gratify such as he pleased, neglecting the rest, and so bind up their hands from either pursuing him or affecting his lands. But law is more just and equal than so. Suppose I have accepted a wadset, and am in possession, will that hinder me in farther security to adjudge ? In the Roman law, neither a legal nor a conventional hypothec could stop the creditor from seeking a *missio in possessionem bonorum debitoris*, which was the *pignus prætorium* ; and if they were not satisfied *intra annum*, then followed the *venditio bonorum auctoritate judicis*. And seeing no course is taken for paying my sum, what can hinder the free current of law to take place ? especially seeing the disposition bears a clause, that, if any of the creditors disagree, the rest shall be at liberty to proceed in diligence ; from which I can never be precluded, unless I had accepted the right in satisfaction, and discharged or renounced my debt. And seeing I have no benefit by the disposition, I am willing to repudiate it.

The Lords thought the minister too hard on his debtor ; and therefore found he could not adjudge, it being proven that he accepted the disposition, and consented to the nominees ; but thought, in a reduction, he might be liberated of it, but not in this process. This was only carried by the President's vote, and was designed as a spur to get the man his annualrents. *Vol. II. Page 714.*

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1712. February 2. NICOLAS MARJORIBANKS *against* DOUGLASS and DUNDASS of BREISTMILN.

MARJORIBANKS *against* Douglass. James Murray of Skirling having sold his lands foresaid to Lieutenant-general Douglass ; but there being some incumbrances, particularly one by Dundass of Breistmiln, unpurged, there was 27,000 merks of the price retained for clearing thereof, the annualrent whereof was paid to the said James, by way of aliment, for several years. And he being now dead, Nicolas Marjoribanks, his widow, raises a new summons of aliment, on this