

signing the mails and duties of a roun called Presses, and others, to Sir Alexander during life: which he accordingly possessed. But the contract stands reduced at the instance of Sir Robert, son to Sir Alexander. And now the said Elizabeth Home being confirmed executrix to her father Sir Alexander, charges Trotter, the tenant in Presses, for payment of the rent of the said roun; and he having suspended, while the charger and suspender are in dispute, compearance is made for the said Sir Robert Home, heir of provision to Sir Alexander, who made the following exceptions against the charger's right:

*Imo*, That the foresaid contract, (which is the only title whereon the charger pretends that the mails and duties of the Presses did belong to Sir Alexander,) stands reduced at Sir Robert's instance. *2do*, That the charger as nearest of kin can have no interest therein, because the moveable debts of the defunct are a burden affecting the executry. And it does not yet appear that the moveable debts of Sir Alexander or Sir John, (whom he represented) are paid: for that can be only known upon the event of the count and reckoning betwixt Sir Robert and Sir Patrick. And Sir Robert, as heir of provision to his father, is concerned to prevent a misapplication of any part of the moveable estate which is subject to his relief, for the moveable debts of his father or grandfather.

ANSWERED for the charger,—*Imo*, That the tack 1671, was renounced by Sir Patrick in favours of Sir Alexander, by the contract 1694, and his liferent reserved, as said is. And though in the question betwixt the heir of provision and Sir Patrick, the said contract was so far reduced, as to stand for a security only for any onerous cause or valuable consideration paid by Sir Patrick; yet the same can nowise prejudice the executrix of her claim: for her father's liferent was nowise thereby reduced; nor was the renunciation in favours of Sir Alexander thereby reduced, nor in question. To the second, answered, that the executrix her claim, is nowise to be involved in the question betwixt the heir of provision and Sir Patrick; and that she is equally founded, whether the debts were paid or not: for, if not, then the disposition in the contract 1694 was to stand, though only as a security to Sir Patrick, who had undertaken the debts; and if paid, Sir Alexander had the full right to the lands.

The Lords preferred the executrix to the rents of the lands of Presses in question, reserving to Sir Robert his relief against the executrix, for the father or grandfather their moveable debts, at his father's decease, as accords.

*Act. Alex. Falconer. Alt. Hay. Robertson, Clerk. Vol. I. page 163.*

1715. *July 30.* JOHN DOUGLASS *against* COCHRAN of Ochiltrie.

IN this action, (wherein a decision is already marked, the 13th instant,) a new defence being this day proponed, viz. that the pursuer had not yet proven Ochiltrie's accepting a disposition, after contracting of the debt; the pursuer demanded that Ochiltrie should be obliged to deny or affirm the same, in the terms of the act of sederunt.

ANSWERED for the defender,—That the act of sederunt must be so interpreted, that parties who are absent, (as Ochiltrie is,) must not instantly be concluded either in denial or acknowledgment; but the procurators must have a due time to acquaint their clients for a warrant, either to acknowledge or deny the fact.

The Lords nevertheless held the defender as confest, on the receiving a disposition after contracting the debt.

*Act.* Col. Mackenzie. *Alt.* Boswel. Gibson, *Clerk.* *Vol. I. page 178.*

1716. *June 21.* STEWART of Carsewell *against* BANNANTINE of Kaims.

SIR JAMES LAMONT of Inneryne being debtor by bond, in the year 1640, to Alexander Stewart of Carsewell, and Isobel Wallace, his spouse, in liferent, and Robert Stewart, their son, in fee, in 2800 merks; the mother and son, after the father's decease, conveyed the same to one William Home to lead apprising thereon; which he did *in anno* 1646. And thereafter, in the year 1666, the said mother, and Alexander, her second son, the other being dead, having entered into contract with Sir Dougald Stewart of Kirktown, dispoised the said bond, apprising, trustee's back-bond, &c. in favours of the said Sir Dougald Stewart: for which cause, he, and Bannantine of Kaims, as cautioner, obliged themselves to pay to the mother, and failing of her to the said son, 2520 merks. Which son Alexander, in the year 1675, granted an obligation in favours of Archibald Campbell, his brother-uterine, that he should assign to the said Archibald all bonds and obligations of whatsoever nature, which he had or should acquire, belonging or granted to the said Alexander Stewart, his father, or Robert Stewart, his brother, by whatever persons, &c. Whereupon Archibald Campbell obliged the trustee's heir to denude; and thereafter, without noticing the contract 1666, enters into a new transaction with Sir Dougald Stewart's heirs, and dispoises to them the subject. But, Mr. James Stewart of Carsewell, heir to Alexander, having insisted against Bannantine of Kaims, cautioner for Sir Dougald Stewart in the foresaid transaction, for payment of the 2520 merks therein contained, he obtained decret; the extracting whereof was nevertheless stopped, upon a petition of the defender, alleging, that the debt belonged to the said Archibald Campbell, (who also had transacted it in manner foresaid,) conform to the above obligation by Alexander Stewart, his brother-uterine, in his favours; and, having raised process of proving the tenor thereof, craved that extract might be stopped till the said process were discussed. And a double of the above obligation, by Alexander Stewart to Archibald Campbell, having at length been produced by the pursuer himself; who contended, that, though the principal were produced, it would not be relevant to stop his decret:

It was ALLEGED for the defender,—*Imo*, That by the contract 1666, which was the pursuer's title, it does appear, that the original ground of this debt was the foresaid bond in the year 1640, and apprising led thereon by the trustee; which