

promised that he would not exact the money, or part of it; *dissent*. Auchinleck and Kaimes.

*N.B.* This was afterwards altered, and the quality found intrinsic.

1766. *November 20.* CAMPBELL *against* M'NEILL.

IN this case the Lords found, that a man bound, by his contract of marriage, to give his estate to his eldest son, could not give such additional provisions to his wife and children as would have obliged the heir to sell the estate, although by doing so he might have raised a sum of money which would have paid the additional provisions, and afforded a considerable reversion to the heir; *dissent. tantum* Pit-four.

1766. *December 19.* WEMYSS *against* HIS MAJESTY'S ADVOCATE.

THIS was a question about the interruption of the prescription of a bond due by the Earl of Cromarty, who was forfeited for his accession to the rebellion in 1745.

This bond was not made a claim upon the Earl's forfeiture, in terms of the vesting Act; but afterwards, and as late as this year, 1766, a new subject of the Earl's was surveyed, *viz.*—The money given for the heritable jurisdiction belonging to the Earl, and a claim for this bond was entered in due time after this second survey. The fact was, that, at the time of the forfeiture, and when the estate was vested in the Crown, the prescription was not run, but it was run before the first survey was made in the year 1749.

The Lords were unanimously of opinion, that till the forfeited estate is surveyed, the creditor not being *valens agere*, the course of the prescription must stop, as in the case of minority; and that, therefore, in this case the prescription stood still from the time the Earl's estate was vested in the Crown till the survey; that the claimant, by not entering his claim within six months after the first survey, was barred from claiming payment out of the subjects then surveyed; but that, with respect to the subjects not then surveyed, the prescription stood still, so that the whole time, from the estate being vested till the second survey, was to be deducted from the prescription. This appears to me to be a very new decision in point of prescription, as it makes a different prescription for every different subject which the debtor may be possessed of; for here, with respect to the lands there was one prescription, and with respect to the jurisdiction money there was another, and till these subjects were discovered and surveyed, the prescription did not run with respect to them. It was therefore the same case as if there had been two debtors in this bond,—the one possessed of the lands, the other of the jurisdiction. The prescription, with respect to the one debtor possessed of the lands, would run only from the time of the survey of the lands, and the prescription with respect

to the other from the time only of the survey of the jurisdiction. Or it is the same case as if there were two co-heiresses of an heritable bond, and the one was minor and the other not; the prescription would run with respect to one of them while it stood still with respect to the other.

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1767. *February 19.* CAMPBELL of OTTER *against* WILSON.

THIS was the question of prescription which was mentioned before, 6th August 1766; and this day the Lords adhered to their former interlocutor concerning the liferented lands, although there was produced a charter following upon the Earl of Argyle's disposition, which charter bore no reservation of the maills and duties of the liferented lands, but only excepted them from the warrandice, and therefore I think the decision was wrong, as the charter was undoubtedly a title to possess the liferented lands; *dissent.* Coalston and Stonefield.

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1767. *February 26.* COLQUHOUN *against* CHEESLY.

A MAN was served and retoured heir in general to his father. A creditor of the father brought a process of constitution against him, in which he libelled upon all the passive titles, and particularly that of being served and retoured. The defender was personally cited, and decret in absence was taken against him in common form; but the extractor omitted in the extract to say that he was holden as confessed upon the passive titles, for as to the grounds of debt they were produced. This decret was made the ground of an adjudication, which being produced in a ranking and competition of creditors, it was objected that the decret of constitution upon which it proceeded was void and null, because there was no proof of the passive title. It was said that it was as necessary that the passive title should be proved as the debt; that in this case it might have been proved by producing an extract of the retour from Chancery, or by holding the defender as confessed, which no doubt might have been done, as he was personally cited, not otherwise, unless he had been out of the country: That, in such cases, the custom of old was that the libel bore a reference to the oath of the party, and he had a day assigned him for deponing, upon which, if he failed to appear, he was very properly held as confessed; but in modern practice this is extremely abridged, for the defender is not cited to depone, no day is assigned for him to depone, and neither in the minute, nor in the decerniture of the Judge, is he held as confessed, but, in the extract of the decret, this is put in by the extractor. Now, though in this manner the practice has become very irregular and slovenly, yet it would be departing still farther from the ancient form if the Court should dispense even with the operation of the extractor.

The Lords found the adjudication and decret of constitution null and void, though some few examples were produced of decreets extracted in the same way;