

concern and prejudice: albeit in this case there was a singularity, that the Footsmyre was a great myre, which could not be sown until it was drained by art and expense; and albeit it first was sown with corns, and a tack taken of the teinds, yet the same not continuing to be profitable, it seems reasonable the heritor might inclose it, and make it a yard for herbs and roots, which, in law, is not liable either to parsonage or vicarage teinds. But the vote run upon the general.

Page 543.

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1676. June 17. ALEXANDER ERSKINE *against* REYNOLDS.

IN a pursuit at Erskine's instance, as having a right to a bond by progress, granted by Alexander Reynolds to Elizabeth Guthrie, his future spouse; against the children of the said Alexander Reynolds, as being *locupletiores facti* by their provisions made to them by their father;—it was ALLEGED, That that could not be sustained as a passive title, to make them liable to all their father's debts, being neither heirs nor executors; and any bond of provision made to them, cannot be taken away but by a reduction upon the Act of Parliament, 21st King James VI.

It was REPLIED, That the pursuer, being a lawful creditor, hath his election to pursue either heir or executor, or any children having got provision from him after he was debtor,—all provisions made to children after debt contracted being liable to the creditors.

It was DUPLIED, That the father having an opulent fortune when he granted the provisions to his children, his heirs and executors can only be pursued who represent him.

The Lords ordained the defenders to give their oaths if they were *locupletiores facti* by bonds of provision; reserving to them all their lawful defences, that their father had an opulent estate when he granted the same; and that his heirs, executors, or vitious intromitters, being pursued, might be made liable: and, upon the first of July thereafter, found, that the defenders should condescend upon their father's estate.

Page 544.

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1676. June 20. BROWN and GORDON *against* SMITH.

IN a multiplepointing, raised at the instance of the tenants of Litsie, who were pursued for the mails and duties;—it was ALLEGED for Brown, That upon a precept, and seaine following thereupon, he was infest in an annualrent out of the said lands, a full year before John Smith, and so ought to be preferred.

It was ANSWERED and ALLEGED for Smith, That he ought to be preferred notwithstanding; because he had a public right by an assignation to a procuratory of resignation, to be holden of the superior from the common author, who was

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never infeft himself, and so could grant no real right ; whereas he was infeft by charter from the superior.

It was REPLIED, That the common author having a disposition, which was a personal right, he might assign the same ; which being intimated by a seisine taken therein, he could not thereafter assign the same to his prejudice.

The Lords found, that the common author, having no real right in his person, could not grant a right of annualrent, to be holden base of himself ; and preferred Smith, as being infeft by the superior, as assignee to the procuratory of resignation.

Page 545.

1676. June 20.

VEATCH *against* PALLET.

In the preceding process betwixt these parties, wherein Veatch was donatar to Sanderson's escheat ; being preferred to Pallet for the sums contained in his horning, out of the first of the sums contained in Sir George Maxwell's bond, granted to Pallet, who became debtor to him in place of Colonel Stewart, against whom Pallet had got sentence ; thereafter it was craved that he might be preferred to the annualrent, as well as the principal sum ; seeing, by the Act of Parliament, after denunciation, annualrents are due, albeit the bonds bear none.

It was ANSWERED, That the Act of Parliament makes only the debtor himself, who is denounced for not-payment, liable in annualrent ; but Pallet being a lawful creditor, and, by his diligence in England, having constituted Colonel Stewart his debtor, and thereafter Sir George Maxwell becoming debtor to him *proprio nomine*, to punish him who was nowise liable for another's disobedience, was contrary to all law.

The Lords did prefer the donatar, not only to the principal, but to the annualrents. Which seems hard, seeing the reason of the Act could not militate against Pallet, who was never *in mora*, nor liable.

Page 545.

1676. June 29.

JAMES CRAWFORD *against* HELEN WATSON.

HELEN Watson, being confirmed executrix-creditor to her husband, Alexander Bell, by her contract of marriage ; but conjunctly with the said James Crawford, and some others, creditors of her defunct husband, was pursued by Crawford, as vitious intromissatrix, in so far as she had intromitted with more than her just proportion of the moveables ; they being divided amongst the whole creditors confirmed.

It was ALLEGED, That, in the confirmation by the commissaries, it was declared, that notwithstanding they were all conjunct executors-creditors, yet it was with that express quality, that she should have the preference, in so far as she was executrix by her contract of marriage ; which gave a right to her whole intromission, not exceeding the same.