

It was REPLIED, That the commissaries could give no such privilege by their confirmation; their power being only to grant the title and office of executrix; but without a process, could not prefer one creditor to another.

The Lords found, that the relict having intromitted by virtue of a title, albeit the commissaries, by their confirmation, could not prefer her; yet, she being a privileged creditor by law, as to the debt due by the contract of marriage, as she would be preferred in a double pouding, she might so found a just defence against this pursuer, upon the foresaid privilege.

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1676. July 5. The EARL of ABOYNE, and the LORD PITTRICHIE, against  
The LAIRD of GIGHT.

IN the above-mentioned action, at the instance of my Lord Pittrichie, after decret pronounced in Pittrichie's favours, finding the minute null, because of non-performance on Gight's part; notwithstanding thereof, the Lords, upon an offer to make a sufficient security and performance, did grant a certain term for production of such securities as would make a perfect progress; and, after production, both parties being to be heard, and the Earl of Aboyne admitted for his interest,—it was ALLEGED for Pittrichie, That the writs produced could not satisfy the minute:—

1st. Because Gight is obliged to dispoine to Pittrichie the lands of Auchincrive and Shalmanae, with the teinds thereof, by a collateral security flowing from himself, to be holden of the king; whereas he himself hath no right from the king; but only a security by a disposition, from the comprisers of his estate to the Laird of Phedertie, and from Phedertie to Gight, but which are to be holden base.

2d. It was ALLEGED for the Earl of Aboyne, That there being a decret *in foro contradictorio* in favours of Pittrichie, he was *in bona fide* to contract with him; and, being a singular successor, Gight could never be reponed to his prejudice, and therefore craved that the Lords would declare, that, albeit it should be found that Gight had satisfied by production, it could only be the ground of a personal action against Pittrichie, but could never militate against Aboyne's real right, nor reduce the same.

It was REPLIED to the first, That the minute was opposed; which is not conceived by way of obligation, to dispoine the lands to be holden of the king, but only *impersonaliter*;—viz. That Pittrichie should have these lands sufficiently secured to him, to be holden of the king; which can never be controverted by himself, or any other person whatsoever; seeing, he hath not only a gift of recognition but a declarator passed thereupon, whereby he is already the king's immediate vassal: and now having a perfect right from the whole comprisers, and Gight himself, unless he can condescend that some other than the king, Gight, or the comprisers, hath a better right, he can never quarrel the production, or the security offered.

It was REPLIED to the second, That the Earl of Aboyne can be in no better case than Pittrichie; because, albeit he be a singular successor, yet his right

was granted after *res fuit litigiosa*, and during the dependence of the process betwixt Gight and Pittrichie ; there being a reduction raised of Pittrichie's decret, the event whereof is specially reserved in the disposition made to the Earl of Aboyne.

The Lords did reponne the Laird of Gight against the foresaid decret *in foro* ; he having purged himself, by oath, that he was not master of the writs now produced, when sentence was given, but had recovered them since by diligence, and dealing with Phedertie, and so was not *in mora* : and likewise they found, that he ought to be reponed against the Earl of Aboyne ; because *res fuit litigiosa* the time of his right, which was burdened with the event thereof : which sentence, as it was founded in justice and equity, so it was generally approven by all who were not interested ; seeing it restored Gight to a considerable estate and ancient family, which had been totally taken away upon a naked failie of non-performance of a security to tithes, the value whereof was most inconsiderable.

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1676. July 6. ALEXANDER and GEORGE ERSKINES *against* JOHN REYNOLDS, Bailie of Montrose.

THE deceased Alexander Reynolds, after his contract of marriage with Elizabeth Guthrie, did grant her a bond for payment of the sum of two thousand merks to her, or any she should nominate, at the first term after his or her decease ; which being assigned, with consent of her husband, after the marriage, to Mr James Rate, and transferred by him, in favours of Alexander Lessly, her son of a prior marriage,—after his death, Alexander and George Erskines, as executors, and having right to the bond, did pursue John Reynolds, as representing his father *nomimbus passivis*, to make payment of that debt ; and likewise did libel a declarator, that, after contracting of that debt, he being *locupletior factus* by his father, who did grant him an assignation to sums of money and other goods, extending to forty thousand pounds, which he had uplifted ; and did thereupon conclude that he should be liable for the debt : the pursuers, not being able to overtake the defender as heir, or upon any passive title, did insist upon the foresaid declarator, as being *locupletior factus*, by a provision after contracting of the debt.

It was ALLEGED, Absolvitor ; because any provision, made in favours of children, can never be a ground whereupon to pursue a declarator to make them liable for their father's debt, until first all the representatives of the father, such as heirs, executors, or vitious intromitters, be discussed ; whereas the pursuer's mother was known to be vitious intromissatrix with the father's goods ; and of purpose to gratify the pursuers, who were grand-children by a first marriage, did make them to pursue the defender, who was son to his father of a prior marriage, and so was most unfavourable : besides that, the libel upon such a passive title had no foundation, neither in our law nor practick.

It was REPLIED, That the declarator ought to be sustained notwithstanding ; because it is uncontroverted, that children's provisions are liable to creditors for