

rights, which were only general of all reversions ; but was special, and clad with immemorial possession, he ought to be preferred to the annualrent, and assoilied from the pursuer's declarator.

It was ANSWERED for Francis Kinloch, That notwithstanding his right ought to be declared ; because the rights whereupon the bishop now alleges are defective, in so far as there is nothing produced to verify the resignation by Gordon of Sheirns, in favours of Murray of Lochmabane, nor the charter under the Great Seal proceeding thereupon, nor the resignation of Lochmabane in favours of King James. 2d. Before any such right, flowing from the king, upon the forfeiture of the Earl of Bothwell, the king was denuded of the said reversion, *in anno* 1591, in favours of the Duke of Lennox ; and so the right made to Gordon of Sheirns was *a non habente potestatem*.

It was REPLIED for the Bishop, That he having produced sufficiently, gifts and resignations, flowing from Gordon, as said is, upon the redemption from Lady Anna Maitland ; albeit some charters are not produced, which are in the public registers ; yet, he and his authors having continually and peaceably possessed, and the same never having been quarrelled by the Duke of Lennox, nor by Doctor Seaton, from whom the said Francis pretends to have right, since the year 1591, until of late ; that the new Bishops of Dumblane have right by presentation, it was more than sufficient to defend them in the possession of this annualrent, as a part of that benefice ; to which not only *decennalis et triennalis possessio* gives a sufficient title ; but much more having an immemorial possession, as said is, above a hundred years.

The Lords did of new consider this case, upon the foresaid allegiances and answers, and, notwithstanding of their former interlocutor, did justly assoilie the Bishop from the said declarator, and preferred him to the said annualrent, as being mortified to the deanery of the Chapel Royal ; but did only recommend to the Commissioners of the Treasury to make address to the king, for granting a precept for reparation of the said Francis some otherwise, as his majesty should think fit ; in respect the king had declared, under his royal hand, that he had received from Sir George Seaton the money due upon the wadset, which the pursuer had purchased for an onerous cause.

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1677. February 22. FRANCIS IRVINE, Brother to the LAIRD of DRUM, against
The VISCOUNTESS of FRENDRAUGHT.

IN a pursuit, at the said Francis's instance, as having right to several debts due by the said Viscountess, as intromissatrix with his goods and gear,—It was ALLEGED by the Viscountess, That she was confirmed executrix-creditrix, and her own debts would exhaust the whole inventory of the testament ; and having given in a condescendence, bearing, that, by a bond of provision in contemplation of her marriage, she is provided to four thousand merks of yearly jointure, if there should be no heirs-male of the marriage, unless she resolved not to marry, but resolved to be tutrix to her own children ; whereupon she craved, that she not being married, and being content to be tutrix to her son,

if he had any present estate, that any intromission she had might be a security for implement of the said provision.

It was ALLEGED for the pursuer, That her provision to the four thousand merks was only in case she had no children of the marriage ; but so it is, that there is a son of the marriage ; and albeit there is no exception in the provision and restriction to three thousand merks, that, in case that there were children, yet if she did not marry, and was content to be tutrix, she should have the full four thousand merks ; yet she cannot crave the benefit thereof, because it was still in her power to marry ; and such conditions are null in the law, *quia matrimonia debent esse libera*.

The Lords having considered the bond of provision, and the conditions and restrictions of the yearly four thousand merks provided to the Lady in jointure ; which was not only to stand good in case there were no children of the marriage, but likewise albeit there were children, in case she should resolve not to marry, but to be tutrix ; therefore, they found, that she should have full right to the four thousand merks so long as she remained unmarried ; and that if any craved to be tutor to her children, she would crave to be preferred, as being willing to undergo that burden.

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1677. February 23. ALEXANDER LESLY of OVERTULLOCH, *against* The Viscountess of FRENDRAGHT, DAVID GREGORIE, and MORISONE of BOGNIE.

In a pursuit, raised at the instance of Alexander Lesly, against the Viscountess of Fren draught, and her son David Gregorie, and Morisone of Bognie ; to hear and see it found, that he having accepted of a factory from the Viscount, for intromission with his rents within the parish of Forgue and Innerkeithine, to be applied for satisfaction of the Viscount's debts, for which he himself was cautioner ; and which having accordingly uplifted and applied, he ought to be exonered.

It was ALLEGED for the Viscountess,—That the said lands, belonging to David Gregorie, by an expired comprising ; by her contract of marriage with the Viscount, it was specially provided, that the money contracted by her, as her portion, should be employed for relief of such creditors as had comprised his estate ; and the rights thereof, taken for the Viscount and her in liferent, and their son in fee : and, accordingly, the said right was acquired from David Gregorie and Morisone of Bognie ; and, therefore, the factory granted by the Viscount only could exoner the pursuer, unless he had particularly applied his intromission for payment of these creditors.

It was ALLEGED for David Gregorie, That any disposition he made to the Viscount, being with a special reservation of an annualrent out of the said lands, effeiring to the principal sum of five thousand merks, for which he remained creditor, and in which disposition the factor himself was witness, he was *in pessima fide* to apply his whole intromission with the rents to other creditors ; and so was liable to him for the whole annualrents which he had misapplied.

It was ALLEGED for Bognie, That he being a true and a lawful creditor ; and the disposition of the said comprised lands being taken in his name, for his re-

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