

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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lief; and any right he made to Fren draught being affected with a back-bond, that the said lands should be burdened with the debts for which he was creditor or cautioner; no posterior factory granted by the Viscount could free the factor, unless they had been so applied.

It was REPLIED for the pursuer, That he was not obliged to take notice of any such reservations or back-bonds, which were not known to him, and could only affect the Viscount and his representatives; so that, he being only obliged to employ his intromissions in general for payment of the Viscount's debts, which accordingly he had done, he ought to be exonerated; and albeit he was a witness in Gregorie's disposition bearing that reservation, yet he was not obliged, nor did know the whole tenor of the disposition; and so having given out the whole sums intromitted with, without being interrupted, in law he cannot be liable.

The Lords did decern the factor to be free, as having *bona fide* followed his commission before interruption; and found, that his being a naked witness could not bind him, unless Gregorie had interrupted him, or that he had taken him personally obliged to pay his yearly annualrent, but reserved him a poinding of the ground, as accords.

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1677. June 26. KINCAID against GORDON of ABERZELDIE.

IN an action of declarator, at Kincaid's instance, against Aberzeldie; for payment of a debt due by his father, as vitious intromitter with his moveables, and as intromitting with the rents of his father's lands, wherein he died infert; as likewise, there being a reduction of his right, as being paid of the sums contained in an apprising, to which he acquired right, being an apparent heir, conform to the late Act of Parliament:

It was ALLEGED for the defender,—That, his father being denounced to the horn, and his escheat declared, his intromission can only be questioned by the donatar, and was no ground of a passive title.

It was REPLIED, That, the apparent heir having no right from the donatar, his intromission was vitious, and made him liable.

The Lords did sustain the defence, notwithstanding of the reply, and found, that the donatar's gift being declared by a decreet, the defunct rebel nor his representatives could have no right thereto; and the goods belonging to the king and his donatar, his representatives in law, could never have any title to the moveables, or moveable heirship; and so their intromission could not be any passive title, to make them liable to other creditors.

It was ALLEGED farther, That the intromission with the rents of lands was no behaviour, because his father was denuded by a comprising, to which the defender had right before his intromission.

It was REPLIED, That there was no infertment upon the comprising; without which an apparent heir was liable for behaviour.

The Lords did sustain the defence, notwithstanding of the reply; but found, that his intromission ought to satisfy the comprising *pro tanto*; and therefore ordained a count and reckoning.