

The Lords found Marjorybanks obliged to make a sufficient right, and that the posterior clause was not restrictive, but cumulative; and found the offers made, did not oblige the buyer to accept thereof: but, seeing there was no clause irritant, they did not declare the minute presently void, but gave the first day of February to produce the assignation, or prove the tenor thereof; but gave no answer to the other point, till the apprising was produced.

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1679. *December 2.* CHIRNSIDE *against* His TENANTS.

CHIRNSIDE pursues his tenants to remove; who alleged Absolvitor; because the warning is anterior to the pursuer's infestment, being a singular successor, and the execution does not bear a warning at the kirk door in time of divine service; and whereas the pursuer produces now a new execution, it cannot be received, as being most suspected of forgery.

Yet the Lords suffered the pursuers to mend the warning, they bidding by the same to be true; and sustained the same, unless the defenders would improve it.

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1679. *December 3.* MARGARET WISEHEART *against* HUME of LINTHILL.

THERE being a decret *in foro* obtained at the instance of Mr Andrew Monro against Linthill, for payment of a bond granted by Linthill's father to Major-General Monro, *in anno* 1641; whereby Linthill, being then a public collector, having gotten a discharge from the Major-General for the payment of the quarterings of his regiment, he, by his bond, acknowledged that there was £1455 due to the Major-General; and obliged him, that, so soon as he should obtain payment from the public of these quarterings, he should pay the said sum to the Major-General. Whereupon Mr Andrew Monro, as having right from his father, intended a pursuit against this Linthill, as representing his father, *in anno* 1662. And at last there was a decret obtained *in foro* at the instance of Margaret Wiseheart, who had right thereto, by progress, for a part of the sum, with the annualrents of it, Linthill having been necessitated to produce his father's count-books with the public, with a fitted account betwixt the public and his father; whereby he charges them with the whole sum due for the Major-General's pay and quarterings, and discharges the public with intromission of the public money; and, with his own hand, sets down the balance, that there was resting to him, by the public, 9000 pounds: he did also produce a discharge by the Major-General for a term's annualrent of the said sum of £1455, bearing this clause,—That he should not be thereafter obliged for the annualrent, unless he got payment from the public. Whereupon Monro insisted for the said sum and annualrent.

It being ANSWERED for Linthill, That the bond founded on wanted witnesses, and that there being a rest due to him of £9000, and he having allowed

to the public a precept drawn by them for £10,000; he could not be liable to the Major-General further than to assign a part of the rest due to him, because it was reasonable he should have preferred his own payment to the Major-General's. Neither could he be liable for annualrent, albeit the common rule be, that once payment of annualrent infers it always thereafter; because the ticket, instructing that he did pay a term's annual, bears,—That it shall not pay annualrent thereafter, unless it be paid to him by the public.

To which it being REPLIED, That Linthill's bond was acknowledged by the discharge of the annualrent accepted by Linthill, and now produced by his son; so that Linthill could not prefer his own payment to the Major-General's, because his ticket bears,—That he should satisfy the same out of the first and readiest of the public money he should receive thereafter. And, by his own count-books, it is evident that he charges the public with Monro's discharge of the dues of his regiment, whereof this is a part. And, by the dates of his said receipts in the said account, it is clear that he received most considerable sums of money from the public after his bond to Monro; and, as to the restriction in his receipt of the annualrent, it alters not the common rule, annualrent being only demanded since Linthill received public money after the ticket.

Whereupon the Lords found, That Monro's bond, being a part of the debt in Linthill's account, the whole articles whereof were near £100,000; and by his intromission on the credit-side all was satisfied, except £9000 in balance: that, therefore, Monro should suffer a proportional abatement of his £1400, effeiring to the balance, which was wanting to Linthill of his whole account, whereby Monro's sum was restricted to £1200; and annualrent was sustained therefor. And, as to the precept of £10,000, which Linthill allowed to the public, the Lords would not put Monro to prove that it was paid; but, seeing Linthill accepted it, and did no diligence, nor produced no protest for not acceptance or not payment against the collector, they held the same as paid.

This decret and process being assigned to Commissary Aikenhead, and by him to his wife Margaret Wiseheart, she obtained a second decret of suspension, finding the letters orderly proceeded, the reasons being the same that were in the first decret. And Linthill, having raised reduction, and given in a bill of suspension upon the same grounds, the Lords ordained both to be discussed upon the bill. Which being heard *in præsentia*, the Lords adhered to the decreets *in foro*, and repelled the whole reasons of reduction, there being nothing new, but that this was a public debt; which was not found, seeing, by the count, Linthill was paid: and the Lords would not descend to consider the points proponed and repelled in the former decreets, but sustained the allegiance against them all, that they were proponed and repelled.

In this process it was also ALLEGED for Linthill, That, *in anno* 1665, there was an interlocutor by which Monro was admitted to prove Linthill's other intromissions. This bill was abstracted by Monro, and therefore the decret was unwarrantably extracted, without inserting that interlocutor; which was referred to the knowledge of some of the Lords. Whereunto the Lords had no respect; seeing that decret cannot be quarrelled by no other mean but by the minutes of process, except *de recenti*.