

adjudging, arresting, or the like, and heaping the same upon him : which method had proved very successful in *Edzell and Thomas Robertson's case*, and sundry others where it was tried ; and that Colvil is one of the consenters who agreed to it, and, having accepted, cannot resile now, unless the trustees first repon him to his own estate ; and, except a small competency to himself, the rents go to his creditors ; and Mr Colvil may have his proportion effeiring to his sum. And the very design of the disposition was to be free of adjudging and overwhelming him with the expense of diligence. Neither will an adjudication advance your payment ; for it has the course of ten years, and in this way now laid down you may get payment much sooner ; so the compulsitor you build on will not operate your design. And by Mr Colvil's resiling now, were to impose a trick upon Woolmet, and hound out all his creditors on him, though he is denuded of his estate in their favours : *et malitiis non est indulgendum* ; contrary to Mr Colvil's express consent and paction.

ANSWERED,—Denying he agreed either to the disposition or nomination of the trustees ; *esto* he had, the condition was only conditional that he was paid of his annualrents, and the lands roused to pay the principal sums ; none of which is done : but he and the trustees collude together ; and, at this rate, a debtor might easily ensnare his creditors, by giving them a disposition in a trustee's name, and gratify such as he pleased, neglecting the rest, and so bind up their hands from either pursuing him or affecting his lands. But law is more just and equal than so. Suppose I have accepted a wadset, and am in possession, will that hinder me in farther security to adjudge ? In the Roman law, neither a legal nor a conventional hypothec could stop the creditor from seeking a *missio in possessionem bonorum debitoris*, which was the *pignus prætorium* ; and if they were not satisfied *intra annum*, then followed the *venditio bonorum auctoritate judicis*. And seeing no course is taken for paying my sum, what can hinder the free current of law to take place ? especially seeing the disposition bears a clause, that, if any of the creditors disagree, the rest shall be at liberty to proceed in diligence ; from which I can never be precluded, unless I had accepted the right in satisfaction, and discharged or renounced my debt. And seeing I have no benefit by the disposition, I am willing to repudiate it.

The Lords thought the minister too hard on his debtor ; and therefore found he could not adjudge, it being proven that he accepted the disposition, and consented to the nominees ; but thought, in a reduction, he might be liberated of it, but not in this process. This was only carried by the President's vote, and was designed as a spur to get the man his annualrents. *Vol. II. Page 714.*

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1712. February 2. NICOLAS MARJORIBANKS *against* DOUGLASS and DUNDASS of BREISTMILN.

MARJORIBANKS *against* Douglass. James Murray of Skirling having sold his lands foresaid to Lieutenant-general Douglass ; but there being some incumbrances, particularly one by Dundass of Breistmiln, unpurged, there was 27,000 merks of the price retained for clearing thereof, the annualrent whereof was paid to the said James, by way of aliment, for several years. And he being now dead, Nicolas Marjoribanks, his widow, raises a new summons of aliment, on this

ground, that she was provided to the liferent of that sum ; and craves 1200 merks yearly. Compearance is made for Breistmiln, who alleged, he had a process depending to affect that remainder of the price, and he would suffer none to touch it till his claim was paid. *2do*, Whatever pretence James Murray had, she is not *in pari casu* ; for, being remarried to a second husband, he is, *jure naturæ*, bound to aliment his wife, and not burden her first husband's creditors therewith.

ANSWERED,—That it were against all equity for the General's heirs to bruik the estate, retain a great part of the price, and not pay its interest to the seller's relict provided thereto, who, albeit married, yet has no other fund to support herself and bairns but this annualrent. And though the General, conform to the custom of purchasers, used the precaution of retaining a part of the price to obviate any latent incumbrances that might emerge, and though Breistmiln's be marked amongst others, yet it has not so much as the shadow of a right ; and has lingered these many years ; and is prescribed *non utendo* ; and never was clothed with infestment ; and can never prevail, much less stop so favourable an aliment.

REPLIED,—They'll find themselves mightily mistaken about the quality of his right ; for he not only has an apprising, but likewise an inhibition long prior to the General's purchase ; and his process is so far advanced that there is an act pronounced in it, and her aliment must attend the event of his cause. And it is singular confidence to assert he can never prevail ; the rights by which they would exclude him not being yet produced, and which are really paid by the price, or extinguished by the apparent heir's intromissions ; and, because of thir defects, are wilfully kept up.

The Lords finding the probability of a claim in Breistmiln's person, they thought it hard to exhaust his fund of payment by aliments. But, in regard it was suggested, that his claim would fall much short of the 27,000 merks retained, and would not come to the half of it, though he prevailed, so that there might be room for a modification of some part of the annualrents to the poor woman ; therefore they remitted to my Lord Minto, Ordinary in the cause, to try the extent of Breistmiln's debt, and how far it might subsist ; and, if it were within the sum retained, to calculate what superplus might be left behind, out of which the pursuer might get an aliment modified to her.

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1711 and 1712. THE LADY ORMISTON OF WHITLAW, and COCKBURN of ORMISTON, Lord Justice Clerk, now her husband, *against* J. HAMILTON of BANGOUR and his TUTORS.

1711. *July 3.*—THE Lady Ormiston gave in an appeal and protest for re-meid of law to the British Parliament, against J. Hamilton of Bangour and his Tutors, complaining of several interlocutors pronounced against her, in her process for payment of the £7000 sterling bond, granted to her by the deceased Lord Whitlaw, her former husband : and particularly one given on the 29th of June last, finding she could not insist for her claim of the funeral charges in