allows, all conjunct fees or provisions in favour of the wife would be elusory without her fault. And married persons having lived long after the contracts, it hath been found, by several practicks, that wives are not obliged to instruct payment of their tocher.

The Lords found, That the husband, being assigned to a bond, with that provision,—"In case of no children, the half to return to the wife,"—that he was bound to do diligence for recovering payment; which not having obtained, his heirs were only obliged to retrocess, but not to make payment: being moved upon these reasons, that there was no obligement in the provision, after dissolution of the marriage, to make payment. 2*d*. That it was irrational to conceive that it was *mens contrahentium*, that, albeit the husband should do diligence, and the tocher prove desperate, that, notwithstanding the husband should pay back again what he did not receive, having sustained *onera matrimonii*.

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1676. *July* 25. Captain Alison and James M'Lurg *against* Bailie Carmichael and Andrew Aickman.

In a poinding of the ground, pursued at the instance of James Alison and James M'Lurg, as being infeft in an annualrent out of the lands of Thurstoun, compearance was made for Bailie Carmichael, who alleged, That he ought to be preferred; because he stood infeft, by virtue of a disposition, in the said lands, made by the common debtor in November 1672, whereupon he was infeft, and immediately entered in possession, by labouring and sowing the lands, and granting tacks to tenants, before the annualrenter's right was either made public by confirmation or clad with possession.

It was answered and alleged for Captain Alison and James M'Lurg, That they ought to be preferred notwithstanding; because they were infeft in the annualrent in June, which was long prior to Carmichael's infeftment, and was made public, by confirmation in the Exchequer, that same day that Bailie Carmichael's disposition was confirmed: and, as to any possession by labouring of the lands and granting tacks, it can be no ground of preference; because, not only the disposition was granted by the common debtor after he was denounced rebel and under caption; but his right, and entering Bailie Carmichael to the possession, was voluntary, and in favours of his own good-brother; which makes it most suspected; and is never sustained against a prior infeftment of annualrent; whereupon no diligence could be done, for apprehending possession, until after the first term of payment, which was posterior to Carmichael's voluntary infeftment: and the preference of posterior rights being only founded upon that point of law, that those who had prior rights did no diligence, whereby the condition of the common debtor might be made known, that reason ceaseth in this case, where the annualrenters were incapacitated to do diligence.

It was replied for Carmichael, That the bond for infefting the annualrenters were two years before they took any infeftment, so that they were *in supina negligentia:* and, albeit their infeftment was prior to his, yet they, being both base, and his clad with possession before any of them was made public by

confirmation, in law he is preferable; his right being first made public by possession. It was replied to the second, That his disposition was for most true and onerous causes, as it bears; and, there being no reduction *ex capite fraudis*, he is not obliged to answer these grounds.

The Lords did find, That nothing was to be decided but as to the preference of their rights in question; and did prefer the annualrenters to Carmichael upon these grounds, That they had the first infeftment, and that any possession Carmichael had was by the voluntary deed of the common debtor, who ceased to labour as formerly, and had suffered the tenants to take new tacks from Carmichael, being freed from their old tacks; as likewise, that, before Carmichael's infeftment or possession, the annualrenters had given in their signatures to be confirmed in Exchequer, and had raised and executed summonses against the tenants, and could not proceed farther until after the term of payment, and so were not *in supina negligentia*. But I was of that opinion, that they ought all to come in *pari passu*, without preference; being moved upon this reason, That both their rights being private, and made public at one and the same time by confirmation, the law did make none of them preferable to others who had obtained no possession by legal diligence, which could only make them public; and so their confirmations being of one date, and the only deed which did make them first public, they ought to come in *pari passu*.

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1676. *July* 25. WILLIAM BAXTER, and MR PATRICK FALCONER, his Assignee, *against* JAMES MAXWELL of Kirkonnell.

UMQUHILE Halbert Maxwell of Kirkonnell, being debtor, by bond, in the sum of £1400, to the deceased Patrick Baxter,—William Baxter, his son, did pursue John Maxwell of Kirkonnell, as representing the said Halbert, for payment; in which action, there being a defence of prescription proponed, and a reply of interruption, before decreet the defender died: Whereupon the pursuer intented a transferring, and got a decreet for payment against James Maxwell, as heir to John, and, by progress, to the said Halbert: Whereupon, being charged, he did give in a bill of suspension; and the reasons being remitted to the Ordinary:—

It was ALLEGED for Kirkonnell, That the decreet of transferring was under reduction, upon the reason of minority and lesion, he being out of the country the time of the decreet; and, if he had compeared, he would have renounced to be heir to Halbert, which would have freed him from personal execution: Likeas, he is yet content to renounce, that Halbert's estate may be adjudged. 2*d*. The bond, which was the ground of the pursuit, being an heritable bond, by a charge of horning, became moveable, and so did fall to Patrick Baxter's executors, and not to his heir William, who had obtained a decreet.

It was ANSWERED, That the decreet, being *in foro contradictorio* against Kirkonnell, who compeared by his advocate, who proponed a peremptory defence of prescription, he can never be heard to suspend and reduce; and as