

*bente potestatem* ; seeing this sum was not confirmed by Mr Archibald, but by his sister, Rachael Wilkie, wife to the said Charles Jackson, and executrix-dative *ad omissa* ; and any eik that was made by the said Mr Archibald was afterwards improven as false. The Lords also repelled that defence, That he had paid Sir Harry upon a *probabilis ignorantia juris*, thinking that, because Mr Archibald, his cedent, was confirmed executor, therefore he had right, seeing it was not given up in the inventory. But it occurred to the Lords that he might be not only executor-nominate, but likewise universal legator, which would give him right to this balance without a specific confirmation. But they considered that the ground of Rachael Wilkie's confirmation was as creditor to her father in a bond of 4000 merks of tocher ; and she had proven that her father had continued in a solvent and responsal case to his death, so she would be preferable to the universal legacy ; but restricted Charles Jackson and his children's claim, to the said ground of debt, and the annualrent of it. *Vol. I. Page 581.*

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1698. *December 21.* The EARL of NITHSDALE *against* The DUCHESS of BUCCLEUGH.

[See the two prior parts of this Report, Dict. p. 545, 546.]

THE Earl of Nithsdale, against the Duchess of Buccleugh, on the £5000 minute. The first defence was against Nithsdale's title, That it was not *in bonis* of Earl Robert, the philosopher, and so cannot fall to his executor ;—that the sum was heritable, as *surrogatum* in place of lands, and so fell not under confirmation and executry ;—and that the Duchess was not bound to pay till the Earl of Nithsdale fulfilled his part of the minute ; it being a *synallagma*, consisting of mutual prestations, and the Duchess is not yet secured in the barony of Langholm. ANSWERED.—This sum was moveable, it neither excluding executors nor bearing a destination of infestment ; and so belonged to him as executor confirmed to the Earl, who entered into the minute ; and as to the disburdening the lands of incumbrances, the Duchess was sufficiently secured by an adjudication she had led, and a certification she had obtained in an improbation.

The next point was as to the annualrents.

ALLEGED.—The minute bore none, and they were only due *ex lege et pacto*.

ANSWERED.—Here it is due by law, being the price of lands. REPLIED.—It is but a consideration and gratuity given for the Earls of Nithsdale their good-will and kindness ; seeing they had irredeemable right, and paid the price before ; and so could bear no annualrent.

The Lords thought fit to hear this case in their own presence.

*Vol. I. Page 582.*

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1698. *December 22.* RORY DINGWALL *against* MURRAY of POLROSSIE.

SOME of the Lords were clear that the reason of suspension was just and relevant, *viz.* You have discharged one of the co-cautioners, and so cannot exact