found; to be extracted with this quality, that, if the liferent shall be restricted to the annualrent of the 20,000 merks, this decreet shall cease from thenceforth.

*Act.* Horn. *Alt.* Jo. Ogilvie. Roberton *Clerk.*

*Vol. II. No.* 9. *p.* 13.

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1716. *July* 12. KATHARINE MAXWELL and her Husband *against* GORDON of Carleton.

THE deceased Major Maxwell of Glenlair, being debtor in considerable sums of money to Carleton, he, for payment thereof, and some other debts, dispones to him the lands of Glenlair, with special provision that the disposition should be burdened, and the lands stand affected with an heritable bond of 1000 merks of annual-rent, &c. of provision granted by the Major to Katharine Maxwell, his daughter, the disposition containing absolute warrandice. After which, nevertheless, an old adjudication appeared, led at the instance of one Mr. John Fraser, which Carleton thought fit to transact; the ground of which adjudication was a bond, wherein the Laird of Kilwhannadie was principal, and the Major cautioner, and on which Fraser was infeft in Kilwhannadie's lands. There being also a debt owing by the Laird of Earlston to the Major, he assigns the same to his said daughter, (at the same time he granted the above disposition,) for the further security anent payment of her said bond of provision.

Carleton being convened by Katharine Maxwell upon the clause of the disposition aforesaid, it was answered for him, 1*mo*, That, in so far as she had recovered payment of Earlston's debt, he could not be liable; her assignation thereto having been expressly granted for further security of her bond of provision: 2*do*, *Esto* she had got no payment of that debt; yet, by the said adjudication at Fraser's instance, now in the defender's person, he was preferable to the bond of provision, notwithstanding his accepting the above disposition, clogged as said is; and that because of the warrandice which was now incurred by the superveniency of the said incumbrance, and to which she was liable by accepting of the said assignation to Earlston's debt.

REPLIED for the pursuer,—1*mo*, That it was *jus tertii* to Carleton what effects of the Major's she had intromitted with, or what assignations she had accepted from him, since, by the terms of the disposition, the bond of provision was made a burden upon the estate disponed, and nothing could hinder the Major to dispose upon his other effects as he thought fit; and, upon the matter, Carleton, by accepting the disposition, had made the bond his own debt. 2*do*, That she was not concerned with supervenient incumbrances on the estate, she not representing her father: and Carleton having accepted of the disposition with the burden foresaid, can never, upon any ground, quarrel it; for, by the whole tract of the affair, it was evidently designed, that the children's portions should be secure, and Carleton was to follow the Major's faith in the warrandice.

The Lords sustained the above two defences, viz. that the pursuer had a corroborative security from Major Maxwell, her father, to a debt due by Earlston to

him, of which she got payment; as also, that there was a preferable debt due to Mr. John Fraser affecting the lands disponed to the defender by the said Major Maxwell, to which he acquired right: relevant to assoilyie from the pursuers' process, in so far as she received from Earlston.

*Act.* Ferguson. *Alt.* Boswall. Sir James Justice, *Clerk.*

*Vol. II. No.* 16. *Page* 19.

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1716. *July* 17. MAXWELL of Orchardtown and MAXWELL of Cuil, *against* M'LELAND of Barklay.

THERE having been a complaint given in to the Lords by Sir George Maxwell and Cuil his factor, against Barklay, as having unwarrantably ejected them from some lands whereof they were tacksmen; in so far as, notwithstanding of a protestation scored on production of a suspension, a second was put up and extracted, and Cuil ejected; and concluding damages, &c.—the defender urged the constant form, viz. That, when there is a protestation put up in the minute-book, calling for production of a suspension or advocation, and that the same is thereafter produced and scored; the practice is, that the suspender, or his doers, cause the keeper of the minute-book score the said second protestation, because the suspension was formerly produced.

ANSWERED for the plaintiff,—That, if the suspension was in the charger or his doer's hands, (as here it must be presumed it was,) he can have no pretence to justify his putting up and extracting a second protestation, and using execution upon a decreet, whereof the suspension was presumed to be in his own hand undiscussed.

The Lords found the charger liable in damages and expenses.

*Act.* Ja. Ferguson, jun. *Alt.* Erskine, jun. Roberton, *Clerk.*

*Vol. II. No.* 19. *page* 23.

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1716. *July* 26. PITCAIRN of Dreghorn *against* COCHRAN of Ferguslie.

MR. DAVID PITCAIRN of Dreghorn, being appointed to take up a list of the pollable persons in the parish of Collington, he himself was contained in the list, and classed at nine pounds Scots; and the said list having been given in to Ferguslie, the general tacksman of the poll, Dreghorn accordingly made offer of the said sum, which Ferguslie refused, alleging he was not given up in the list. After some reasoning, Dreghorn asserting, and Ferguslie denying, that he was in the list: at last Dreghorn wagered the whole poll in Collington parish that he was contained in it, and Ferguslie did wager the quadruple of the said poll that Dreghorn was not in the list. There having occurred several points to be discussed in the