

1671. July 13. DOUGALL M'PHERSON *against* The RELICT and CHILDREN of  
MR THOMAS LUNDIE.

IN a pursuit of maills and duties, of the lands appraised from Sir James Keith, at the said Dougall's instance, compearance was made for the relict and children of the said Mr Thomas ;—who ALLEGED that they ought to be preferred ; because they had right by a comprising led by their father prior to the pursuer's comprising.

It was ALLEGED by the said Dougall, That he ought to be preferred ; because the said appraising led by Lundie was intrinsically null :—*1mo.* Because it was not led upon the day to which the lands were denounced to be appraised ; —*2do.* The appraising was led at the Beech-hill of Couper, a place neither within the shire nor the regality where the lands did lie.

It was REPLIED to the *first*, That the letters of appraising being directed to the sheriffs in that part, with power to hold courts, one or more, he had sufficient warrant, after holding of court the same day to which the lands were denounced, to continue the diet until the next day. And, as to the *second*, it was ANSWERED, That it was done by a dispensation from the Lords ; which was a sufficient warrant to the messenger.

To this last it was DUPLIED, That, by a late decision, Lady Lucy Hamilton against the Laird of Kelburn, an appraising was found null, because it was led at Glasgow ; whereas the lands appraised lay not within that shire, notwithstanding of a dispensation granted by the Lords.

The Lords did sustain Lundie's comprising, notwithstanding of these nullities alleged ; in respect that the messenger not only is a sheriff in that part, but, by the letters, hath power to hold courts ; unless the said Dougall could allege, that, by the continuation of the court until the next day, the common debtor had sustained prejudice : As, likewise, they did find, That, there being a dispensation granted by the Lords, albeit it was a private warrant, *et periculo petentis*, yet that could not make the comprising null ; and that the chief reason of the decision, in Lady Lucy Hamilton's case, was, that the denunciations were not at the head burgh of the regality within which the lands lay ; whereas, here, the denunciations were at the head burgh of the shire of Forfar, within which shire the lands were. But yet the Lords did declare, and ordained it to be inserted in the books of sederunt, and to see intimated, That no comprising should proceed upon dispensations privately impetrated ; but that the reasons thereof should be considered, or reported to the whole Lords : and that it should not be in the power of messengers to continue their courts and diets, but upon just and reasonable causes. Which shows, at least, that the interlocutor as to the appraising, at the place without the sheriffdom, where the lands lay, was hard,—dispensations not being granted in course for comprising at any other head burgh but at Edinburgh, which is *communis patria*.

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1671. July 18. JAMES MURDOCH *against* SIR ANDREW DICK.

SIR Andrew, as tutor and administrator to his son, who was minor, having

disponed a tenement of land, whereof his son was fiar, and obliged himself to cause him ratify at majority ; whereupon Murdoch, having charged Sir Andrew, he did SUSPEND, upon this reason,—That it was *factum imprestable* ; and therefore he was only liable *ad damnum et interesse*.

It was ANSWERED, That the father taking burden for his own son, and the fact being *prestable* of its own nature, he behoved to fulfil *in terminis* ; these deeds being only accounted in law imprestable, which, *ex natura rei*, are become impossible.

The Lords, finding that there was here no collusion betwixt the father and the son, and that the son had intented a reduction of this disposition upon minority, did ordain the charger to give in his condescendence of damage, and decerned the suspender to grant sufficient surety in case of eviction.

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1671. July 18. COUNTESS of CASSILS *against* The EARL of ROXBURGH.

THE Countess pursuing the Earl for payment of the sum of 10,000 merks, provided to her by the Lord Ker, her deceased husband, as an additional jointure :—

It was ALLEGED for the Earl, That the said provision, being *donatio inter vi- rum et uxorem*, was revocable, and, *de facto*, revoked ; in so far as the Lord Ker, by his latter will and testament, did declare, that the said Countess should only have such an additional jointure to her provision in her contract of marriage, as, in all, should make up the sum of £10,000 ; and, therefore, she could not crave the benefit of that bond, granted for her additional jointure, but behoved to pursue upon the Lord Ker's testament ; which was a revocation of the bond.

It was ANSWERED, That the said testament making no mention of the former bond, nor revoking the same expressly, and being only done and made when my Lord Ker was on death-bed, it could not be interpreted a revocation thereof. *2do*. The said testament was only conditional, bearing, that it was only made because the Earl of Roxburgh, his father, was out of the country ; but that in case he should return, that the same should be void and null ; and a prior testament made by him, whereby he did give full power to the said Earl his father, to appoint provisions both for his lady and his children, should stand good and valid. But so it is, that the condition was purified by the return of the said Earl, who did ratify the provision made to the Countess, and granted infeftment for security thereof ; likeas she had been in constant possession thereof since the Earl's decease.

The Lords did find, that the said testament being conditional, as said is, and the condition purified, was no revocation of the said bond of provision, albeit it was alleged that the Earl, when he ratified, knew nothing of this testament ; and would not burden the Countess to prove the Earl's knowledge thereof, or examine the friends of the family anent the same, who were present at the ratification ; in respect of her long and peaceable possession, and that her right was never quarrelled upon that ground ; and that the testament was written by Sir Alexander Don, then servant to the Earl, which was a strong presumption that he knew thereof.

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