July 11.—In the foresaid action of Macraw against Macdonald, at No. 199, there was a third point then taken to interlocutor, (which then I omitted,) viz. if the messenger's execution on the first summons should not be sustained, because it wanted these words of a copy left; whether the execution upon the act and letters would be effectual, at least for this, that it would stop prescription, seeing it was given within some very few days of prescription. The Lords found, *esto* the first execution were null, and so that no process could be sustained on the second, yet that the second would have stood good, *ad hunc effectum*, to interrupt the forty years' prescription, and that *qualisqualis insinuatio sufficit in isto casu. Vide* A. Fabrum *in Cod. Lib.* 3. *Tit.* 8. *De Litiscontestatione defin. secunda. Vide l.* 13. *D. de Regulis Juris, in secundo sensu prout id exposuit* Bronchorstius. *Vide infra, No.* 285; [*5th December*, 1671,] *et supra, No.* 17, [*Riddocks* against *Sorleys*, 16*th June*, 1670.] *Vide l.* 15. *D. de inofficioso test.*

Advocates' MS. No. 215, *folio* 104.

1671. *July* 12. DOUGALL MACPHERSON *against* MURRAY.

THIS being a competition betwixt two comprisers, it was ALLEGED by Macpherson, that Murray's comprising was null upon four several heads. The first was, that it was led and deduced upon an heritable bond, which was never made moveable; at least, if it was made moveable, it was allenarly by a requisition made to the cautioner; which could never be a ground for a comprising against the principal; and that the comprising behoved yet to be null, because it bore nothing of the requisition at all.

(This apprising was led by one Mr. Thomas Lundie against Sir James Keith's estate of Caddom.)

This being taken to avizandum, the Lords found requisition being made sixty days before a term to the cautioner, (they being all bound conjunctly and severally in the bond,) was a ground good enough whereon the principal's lands might be comprised; as also that the comprising needed not narrate the said requisition; but find they may produce it now; and ordain the other party to see it.

The second nullity was, that it was a comprising led against the heir male, the heir of line not being called and discussed. To this it was ANSWERED, that he was discussed in so far as, he compearing by his procurator in a process intented by the said Murray, a day was taken for condescending and proving what estate belonged to the heir of line, to the effect he might discuss the same; and he failyeing, the term was circumduced against him.

This being also taken to interlocutor, the Lords found this sufficient discussion; and therefore, notwithstanding of the said second pretended nullity, sustained the comprising.

The third was, that the messenger, who was judge to the comprising, had prorogated diet from one day to another; whereas their said diet is ever most peremptory.

The Lords' answer being also sought on this, they found a messenger sitting judge to a comprising was not only sheriff in that part, but also supplied the room of the sheriff of the shire, before whom, of old, all comprisings were led;

and therefore, as the sheriff, who has an ordinary jurisdiction, might have continued the Court, having once fenced it, so might the messenger, as in effect but his depute: and therefore they found his prorogating the day no nullity, unless they would condescend on some pregnant and considerable damage they sustained thereby.

Yet one who will but consider the reason of the 6th act of the Parliament held in *June* 1649, (though rescinded,) will think thir diets peremptory, else there was no need for that act. *Vide* this at more length, [*December* 1674, the same parties,] *infra No.* 452. *Vide supra* 67, [*July* 8, 1670.]

The last ALLEGED nullity was, that it was neither deduced within the bounds *illius districtus et jurisdictionis* where the lands apprised lay, nor within the tolbooth or Session House of Edinburgh, which is *communis patria* to all Scotland, but at Coupar. ANSWERED, That what the messenger did in this was by warrant and express dispensation from the Lords: this past also to interlocutor.

The Lords found that their warrant ought not to be a snare to any of the lieges; and therefore sustained the apprising, notwithstanding it was led neither *infra illum vicecomitatum* within which the lands lay, nor at Edinburgh; yet, in regard of the singularity of this, and the preceding point, about adjourning the diet, the Lords declared they would make an act to be a *caveat pro futuro* how far a messenger's power shall reach in these cases.

There were four great interlocutors. [*See December* 1674.]

Advocates' MS. folio 104.

1670, and 1671. LERMONT *against* the Earl of LAUDERDAILL.

1670. *June* 29.—THE Earl was pursued as donatar to the forefaulture of the Laird of Swinton, at the least, as intromitter with the mails and duties of his lands, to pay this debt, which was contained in the disposition of the estate to that laird of Swinton, in whose place the Earl is come; and so is *debitum fundi et reale*, and must affect the lands.

This pursuit was not sustained unless they would say the estate was burdened with that debt in the procuratory of resignation, and in the infeftment following thereupon.

Act. Spotswood. *Alt.* Sinclair. *Advocates' MS. No.* 45, *folio* 77.

1671. *July* 5.—THE action whereof we have mentioned *supra* at the 45th No. *Lermont* against *the Earl of Lauderdale*, being again called, because they controverted about the scroll of the act: it was ALLEGED that my Lord Lauderdale was liable to satisfy the said debt *super hoc medio*, that he being the King's donatar to the forfaulture of John Swinton of that ilk, he and the King must get the right *prout optimum maximum erat*, and as it stood in the said John's person: but *ita est* in the disposition made by Sir Alexander, (who was John's father,) in favours of John his son, he reserves *in gremio juris* a power to affect and burden the lands disponed with 52,000 merks in what manner he pleased; and thereafter having borrowed from the laird of Smeton, (in whose right Lermont is now come,) 14,000 merks, he declared it was his intention to exercise his power he had