

tress of this party, who was a mean gentleman, and heavily prejudged by sundry occasions, which had made his estate weak, they found that they would sustain this charge as a pursuit, for trying of the contravention ; for the party offered, in this place, to prove that the Earl possessed the lands continually since the caution was found ; and therefore they assigned to the Earl's procurators a competent day to answer to this contravention ; which they found they would try and discuss in this place, without any further pursuit to be intended thereanent.

*Act.* Nicolson and Scot. *Alt.* Mowat and Hart. Gibson, *Clerk.*

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1637. *March 9.* ROBERT BROUN *against* GILBERT ATCHISON.

ONE Gilbert Atchison being made assignee, by Isobel Marshel, to some heritable bonds made in her favours ; one Mr Robert Broun, being made assignee by George Marshel, who was retoured heir to the said Isobel, pursues reduction of the said assignation made by the said Isobel to Gilbert Atchison, as done *in lecto ægritudinis* : And the defender alleging, that the pursuer's assignation made to him by the said heir was also made *in lecto ægritudinis*, and who died immediately after making thereof ; and therefore, seeing *laborat eodem vitio*, it ought not to be found a title to pursue this action ;—the Lords repelled the allegiance ; for, as it was competent to the excipient to quarrel the same *super hoc medio*, so they found it could not be taken away *ope exceptionis* so summarily, but the same ought to abide reduction.

*Act.* Gilmor.

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1637. *March 22.* ANDERSON *against* HENRY GIBSON.

In a double poinding betwixt one Anderson and Mr Henry Gibson ; umquhile George Reid in Glasgow, having acquired from Marion Dorroch her liferent of some lands in Glasgow, whereof himself was heritor, for which, by that security, he was obliged to do certain deeds to the said Marion ; after which contract the said George Reid being deceased, and the said Marion Dorroch being married upon John Anderson, burgess of Glasgow, the said Marion and her said spouse dispone her said liferent right to the said Mr Henry Gibson, and oblige them to warrant the same from all preceding deeds : and the prior disposition being comprised by Gabriel Cunninghame for a debt owing him by the said George Reid : Whereupon it being questioned, if the said John Anderson should be holden to warrant the alienation thereafter made to Mr Henry of that same liferent, from that prior disposition ; and sicklike, because there was an action of double poinding against Gabriel and Mr Henry, as both claiming the right of the mails and duties of that liferent, by virtue of their said rights ;—in which action the Lords found that Mr Henry had best right to be answered ; and preferred him to Gabriel Cunninghame, because the right made to umquhile George Reid, by the said Marion, and which was comprised, was found not effectual to

denude her of her liferent, or to make it vailable to the said George, to be comprised by his creditor; seeing the said umquhile George was obliged to do some deeds to the said Marion, for the said disposition, which was never yet fulfilled to her, but the said George died before the fulfilling thereof; likeas, the same was consigned to remain in the hands of a third person condescended upon, while it were fulfilled: And albeit the compriser alleged, that that ought not to stay the effect of his comprising, seeing now he has the right, and she has action to seek performing of the deeds obliged by George Reid to her, against his heirs or executors;—yet the Lords found, that she was not prejudged by that disposition, it not being fulfilled to her reciprocally, and consequently that the compriser had no right: And albeit the compriser offered now to perform the same things to her which George Reid was obliged to, yet the Lords respected not the same, in respect it was not fulfilled to her by himself in his own lifetime; seeing she, *bona fide*, thereafter dispoed it to Mr Henry Gibson, thinking the same to be extinct by his decease, and by the consignation thereof, while it had been fulfilled; neither was it respected that the disposition was now in the compriser's hands; seeing the relict and her spouse offered to prove that, after George Reid's decease, Mr Henry Gibson broke up the coffer where the writs were consigned, and took out the same; and, by what condition he knows not, the said Gabriel Cunninghame has comprised it. Which the Lords found relevant to prefer Mr Henry to Gabriel, and to make his comprising to cease, as of a null right, for the foresaid reason received against the comprising and disposition, *hoc ordine*, as said is.

*Act. Cunninghame. Alt. Maxwel. Scot, Clerk. Vid. 22d February 1627, L. Aitkin, and the cases there.*

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1637. *June 16. SIR JOHN SCOT against ARCHIBALD DRUMMOND.*

SIR John Scot pursuing Archibald Drummond of Giblistoun, for payment of the back-tack duties of the lands of Giblistoun, which were wadset to him, and set back again for payment of the said duties yearly; and, for that effect, to find caution for payment of the said duties bygone, and in time coming: And it being alleged that this summons could not be sustained, it not being executed upon 21 days' warning, and not being tabled in the common table; seeing the nature of this action, and the like, (*viz.* for paying of duties of lands,) ought to abide the common table, and ought to be executed upon 21 days' warning, especially where the summons contains no privilege;—the Lords repelled the allegation, and sustained the order and summons which was executed upon the citation of six days, the same being continued, and the party of new summoned by the continuation; and found no necessity of table or citation upon 21 days' warning.

*Act. Præsens. Alt. Gilmor. Scot, Clerk.*

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