have burdened his heir, or disponed and provided any part of his estate, in favours of his wife for her liferent use, yet it not being done *debito modo et tempore*, it ought not to be respected.

The Lords found the mediate heir had interest; and sustained the antedating relevant to be proven. And witnesses having been adduced thereon, and the same advised, the Lords found the same false in the date.

Then the pursuer's procurators ALLEGED, The same being false in the date, was false in all, and therefore craved it be wholly reduced. The Lords declared they would hear both parties' procurators thereon.

Then the pursuer produced two practicques out of Dury, the one on the 29*th of March*, 1626, between *Keith* and *Robertson*, and the other at the 10*th of February*, 1636, between *Edmiston* and *Syme*. Likeas the defender's procurators contended, It ought not to be null *in totum;* and produced a practicque out of the same Dury at the 4*th December*, *Winraham* contra the *relict of Mr. Robert Winrahame*. See them all in Dury.

The Lords having considered them, FOUND the disposition false in the date, and therefore reduce and improve *in totum* the said disposition; and repone and restore the pursuer *in integrum* against the same, as if it had never been *in rerum natura:* reserving always to the said defender any right of terce, or other right she may have to the said lands, *prout de jure.*

Sinclar and Lermonth were for the pursuers, and Lockhart for the defender.

Vide infra, Number 375, in *November* 1672, between *George Home* and one *Brown.*

Vide infra, November, 1673, *Oliphant* and *Lady Grange*, Number 431.

It may be questioned What, if they had offered to prove that even after the true date that ought to have been inserted, he went to kirk and market, and so by the change of the date the pursuers had no prejudice; seeing it would have debarred them from quarrelling it, though it had been of that one date which they contend for? They say the Lords found such a falsehood so punishable, that the writ should make no faith at all, though there were no other ground whereby the same could lawfully be impugned. And this seems just. See *Craig de Feudis*, page 156. *Advocates' MS. folio* 62.

1669. *January* 20, and *February* 9. The BISHOP of GALLOWAY, the BAILIE of ARRAN, the DUKE of HAMILTON, and his Donatar, *against* DAVID FRENCH, and the TENANTS of MILNEBURNE.

January 20.—In this case, it came to be debated, if a charge given to the superior to enter a vassal who had comprised, did prejudge him of his casualties of ward and non-entries, which befell him thereafter, by the vassal's decease from whom the lands were comprised. The Lords, in P. D. found such a charge not equivalent to an infeftment, which denudes the prior vassal, and stops ward; and that the superior thereby is not prejudged of these casualties; which was never

heretofore decided; and the Lords declared they would keep this decision in all time coming.

Yet I think the Lords would yet decide otherwise, if, on such a charge, all diligence allowable in law were done, viz. to charge his superior to enter a compriser, and so from hand to hand *donec ventum ad regem, qui neminem recusat;* and to raise summons against the disobeying superior, to hear and see him decerned to tyne his superiority, &c.

Act. Lockhart. *Alt.* Cunyghame.

Advocates' MS. folio 60.

February 9.—*Decreet pronounced Dec.* 1668.—David French, as having comprised the estate of umquhil Robert Hamilton of Milnburne, *in anno* 1667, and thereupon charged the Duke and Dutchess of Hamilton, superiors of the said lands, to infeft and sease him therein,—intents a summons for mails and duties against the tenants of Milneburne. At the calling of the action compears Mr. William Hamilton, advocate, and craves to be admitted for my Lord Belheaven, and his cautioners, who stand infeft in a part of the lands of Milnburne, ay and while the payment to them of the sum of 10,000 merks. He declared likewise that he compears for John Hamilton, bailie of Arran, and craved that he might be preferred to the lands wherein he stood infeft. In like manner compeared Sir George Lockhart, Mr. John Cuninghame, and Mr. John Harper, advocates, as procurators for the Duke and Dutchess of Hamilton, as superiors of the said lands, and for Mr. Robert Black of Silvertounhill, the donatar to the ward and non-entries of the said lands; and for clearing of the dispute underwritten, they produced the charge of horning given at the instance of the said David French, pursuer, together with an instrument upon the back of the same, bearing the said Duke to have offered to have obeyed the charge, upon such satisfaction of composition as is usual in such cases, if not, protested that any useless procedure therein might be void and null.

All which being at length well considered by the said Lords, they have preferred the said Lord Belheaven and his cautioners, and also the said bailie of Arran to the pursuer, and to the duke and his donatar for the maills and duties of the lands wherein they stand infeft, and that for all years preceding the decease of the said Robert Hamilton of Milnburne; reserving them to debate with the donatar in reference to the mails of the lands foresaid, for all years since the said Milneburne's decease, and in time coming. And also prefer the said Duke and his donatar to the mails of the lands not contained in the said Lord Belheaven and his cautioners and the bailie of Arran their infeftments; and that for all years since Milneburne's decease, and in time coming during the ward; reserving always to the pursuer the right of his apprising after the expiring of the ward. Because the time of the dispute in the said matter, all parties having compeared by their respective procurators above written; and having produced their several interests above mentioned, the said Lords (of consent of the pursuers procurators, and of the said Sir George Lockhart, Mr. John Harper, and Mr. John Cuninghame,) preferred the said Lord Belheaven and his cautioners, and thereafter the said John Hamilton, bailie of Arran, *quoad* the mails and duties of the lands whereunto they have right for all years preceding the decease of the said Robert Hamilton: reserving to them to debate with the donatar for years subsequent, as is above mentioned.

Likeas thereafter, the said Sir George Mackenzie and Mr. William Weir ALLEGED that the pursuer ought to be preferred to the duke and dutchess of Hamilton and the said donatar: in regard he having apprised Milneburne's hail estate, and having charged the superior before Milneburne's decease, this charge did so denude Milneburne, the immediate vassal, that no casualty of ward by his decease could fall to the superior; and, therefore, by consequence, he must be preferred to the donatar.

To the which it was ANSWERED by the donatar's procurators,—That the reason of preference ought to be repelled, because, albeit a compriser by charging the superior to infeft him, will by the said charge, be preferred to another appriser who hath not done the like diligence, yet the charge doth not so operate as to make the compriser the superior's immediate vassal; in regard, the compriser could not be liable in payment of the feu-duties to the superior, except he had meddled with the mails and duties of the lands, and that he had completed his right by infeftment.

To the which it was REPLIED by the pursuer's procurators, that the answer ought to be repelled, because the charge, by our law and constant practique observed in such cases, forceth the superior to enter the compriser, and denudeth the vassal from whom the lands are apprised; so that the first charge doth not only give the appriser preference to another compriser, but also denudeth the debtor, so as he is no more vassal; and not being vassal, no casualty can fall in the superior's hands by reason of his decease or rebellion; in which last case, the Lords have been still in use to prefer a compriser who has charged the superior to a donatar of the liferent escheat of the debtor, whose escheat fell after the charge. And whereas, it is answered, that the charge is not sufficient to make the appriser vassal except likeways infeftment had followed; it was replied, that the same ought to be repelled, because by the charge, the pursuer was so constituted vassal, that by his decease the ward had fallen in the superior's hands, seeing the ward falls by the decease of one who is in fee, (See Balmanno, *Lockhart of Bar* against *Tenants of Monzie;)* in which condition this pursuer (after the charge) must be reputed, considering that thereupon he would have gotten removing and decreet for mails and duties against the tenants, though not infeft.

Whereunto it was DUPLIED by the said Sir George Lockhart, Mr. John Cuninghame, and Mr. John Harper, procurators for the donatar—That 1*mo*, they opponed their former answer, viz. that the charge against the superior is only introduced to prefer the first compriser to another posterior charger, but it doth not denude the debtor; so that he is no more vassal, and that the pursuer could never be liable in payment of the feu-duty, except he had been infeft. But 2*do*, this charge could never militate against the superior to prejudge him of his casualty and benefit of ward, except it could be made appear that the superior had been *in mora:* which cannot be alleged in this case, because the superior was willing to have obeyed the pursuer's charge, upon his payment and satisfaction of what was due to him as superior; and thereupon took instruments, and protested that any procedure upon the apprising might be ineffectual; and for proving thereof, produced the instrument above written; so that the pursuer not having at that time offered a charter to the superior, with an year's interest, according to the act of Parliament, no charge against the superior could so operate as to prejudge him of any casualty, or benefit that might accresce to him by the decease of his vassal. And as to that part of the

reply, taking the case to be the same with the vassal's rebellion, wherein the compriser would be preferred; it was duplied, that there was *dispar ratio* betwixt a casualty falling by the reddendo of a charter, viz. service of ward, and that which falls by the delinquency of the vassal; in which last case the Lords are in use to prefer the compriser to the donatar of the liferent escheat, because *medio tempore*, the vassal might have suffered himself to be put to the horn, of purpose, that his escheat might fall in the superior's hands to the prejudice of the compriser, his creditor, which cannot be alleged in this case of a ward; and therefore, &c.

To the which it was TRIPLIED by the pursuers' procurators above written, —That the act of Parliament has allowed a charge against the superior to be a sufficient diligence for the creditor to obtain his just debt; wherein the advantage of the superior is not at all considered, likeas the appriser is not obliged for any farther diligence than allenarly to charge, seeing thereupon he may have the benefit of any action: so that the law having introduced no more, the compriser, by his charge, is a full proprietor, and who must be preferred to the donatar; because a prior compriser, though infeft after the charge given by the posterior appriser, will be preferred to the donator because infeft; and the posterior appriser, upon his prior charge, being preferred to him who was first infeft, must by consequence be likewise preferred to the donatar, this charge being equivalent to an infeftment: so that thereby the debtor being totally denuded, there can no casualty fall to the superior by his decease, he being no more vassal; for if he were a vassal, the compriser also, by this charge, being a vassal, the superior should at one and the self same time have two vassals, which were most absurd. And seeing the pursuer is, beyond all question, vassal, and so would incur all the disadvantages arising thereupon, as the falling of the escheat in the superior's hands, in case of rebellion, and the lands falling ward and in nonentry by his decease, so also he ought to have all advantages that may attend his being vassal. And as to that part of the duply, bearing it to have been the pursuer's own fault that he was not entered, and that the superior was not *in mora;* it was triplied, that it was not the custom that comprisers went along with messengers, when they charged superiors, and offered the year's rent with a charter; so that the superior was *in mora* notwithstanding of his pretended willingness to have obeyed the charge, because he ought to have suspended the same, and at the discussing, the compriser would have been admitted to pay an year's duty. So that the not offering the same at the time of the giving of the charge cannot prejudge him of the benefit of his diligence: especially considering that there is a mutual obligement in law betwixt the superior and the compriser; *viz.* the superior is obliged to enter the vassal, and he to pay an year's duty; so that, from the date of the charge, the compriser turneth vassal, and the not payment of the year's duty taketh not away the obligation, but allenarly delayeth it; for if the superior had suspended upon that reason, that an year's duty had not been paid upon the discussing of the suspension, the pursuer's right would have been drawn back to the date of his charge. Likeas the compriser is not tied by act of Parliament to go along with the messenger, the time of the giving of the charge; so that it were most unreasonable to disappoint him of his diligence upon that account, because being a singular successor, he is not holden to know the reddendo of the debtor's charter, nor know the true extent of the year's duty, and so he may bring less or more, which were alike as if he came not at all. NOTE, Likewise an year's rent of the lands apprised, might much exceed the sums for which the

same are apprised; in which case, it were most unjust to exact the haill rent for the sums contained in the apprising: as also if there were a tie upon the compriser, to offer and pay *ut supra*, it were of most dangerous consequence, because the debtor might prefer one appriser to another, by showing his writs to one for drawing of a charter, and concealing the same to another, who might have been prior in diligence. And therefore the pursuer having done all that in law or reason he was obliged to do, and being yet willing to pay such a composition as the Lords shall find equitable, he ought to be preferred.

The which reason of preference, answer, reply, duply and triply, being considered by the said Lords, they repelled the foresaid reason of preference proponed for the pursuer, and his reply and triply, in respect of the foresaid answer and duply; and found that the Duke and Dutchess of Hamilton, as superiors of the lands above written, and the donatar, had right to the ward thereof by the decease of the said Robert Hamilton, notwithstanding of the pursuer's apprising and charge proceeding thereupon before the death of the vassal; and found that it is the duty of the compriser to offer a charter, and an year's duty of the lands to the superior, and if the duty offered be less than an year's duty of the lands, that the compriser is to find caution for the overplus; and found by the instrument produced upon the back of the charge, that the superior was not *in mora*. And therefore the said Lords preferred the said Duke and Dutchess of Hamilton, and their said donatar, to the pursuer, since the decease of the vassal, and in time coming during the ward; reserving to him his right after the expiring of the ward, as is above mentioned, and ordain letters in form as effeirs.

This was thought a very hard decision, and the like of it cannot be shown before. See farther my thoughts, in the summary of this same decision, *supra* [page 450,] 20*th January* 1669, *Duke Hamilton and French. Vide* 23*d March* 1622, *Mr. Simeon Ramsay*, and the cases there. *Vide infra No.* 652, 13*th November* 1677, *Sir William Purves* against *Strauchan of Kinaldy*.

Advocates' MS. No. 1, *folio* 65.

1669. *February.* MURRAY *against* LYLLE.

THE suspension, Lylle *contra* Murray, being called before my Lord Stair, in December, 1668, Mr. Alexander Oswald, procurator for the suspender, repeated the first reason of suspension: also offered him to prove that the ship was broken *vi majore*, and that no *mora vel culpa* on his side proceeded the *vis major*; and so was made incapable to ply the said voyage. (See P. Peckius *ad Leges Nauticas, pagin.* 285, *et seq.)*

To the which it was ANSWERED for the charger, by Mr. John Colvill and myself,—That albeit the ship had been broken *vi majore*, which he denied; yet the foresaid reason ought to be repelled, in respect of the contract charged upon; whereby the suspender did input the charger, master of the said ship, and took him obliged to attend the same, and to cause repair the same in all the defects thereof upon the said suspender his charges, also to hire a company of skilful mariners for plying the said voyage. And it is offered to be proven that the charg-