

1671. *February 22.* COUNTESS of CASSILIS *against* The EARL of ROXBURGH.

THE Countess of Cassilis, besides the provision of her contract of marriage, having gotten a bond from her first husband, the Lord Ker, for infesting her in an annualrent of 10,000 merks out of the lands of Broxmouth, with an obligation to warrant the same free of all burdens whatsoever; and having gotten a charter from my Lord Ker's father, the Earl of Roxburgh, whereupon she was infest,—did pursue a pointing of the ground against the Earl of Roxburgh; as likewise did conclude against him personally, to make payment of the said annualrent for several years bygone.

It was ALLEGED, That the annualrent could not be decerned to be paid but with deduction of the public burdens, conform to the Act of Parliament anent liferenters.

It was ANSWERED, That the bond of provision and infestment did bear an obligation to be free of all burdens; and that the granter's heirs should be liable to the pursuer, as well infest as not infest.

The Lords, notwithstanding, did find the said annualrent liable to public burdens; and that they ought to be deduced yearly: seeing it did not relate to any principal sum; and that it was an additional jointure, without any onerous cause.

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1671. *February 23.* MR STANFIELD, Englishman, *against* WILLIAM HAMILTON of WISHAW and JAMES HAMILTON, Merchant.

IN a declarator, pursued at Stanfield's instance, against Wishaw, to hear and see it found that a ticket, subscribed by him and the said James Hamilton, for the sum of £400 sterling, in July 1667, was truly paid to James Hamilton, who received the money, and for whose use it was borrowed; and therefore the pursuer should be declared free: Which declarator was founded upon many strong presumptions, *viz.* That it wanted witnesses, and all solemnities, and did bear no annualrent, but was made payable upon demand. *2d.* Never any diligence had been done thereupon near by the space of 40 years, until some differences had fallen out betwixt Stanfield and James Hamilton, albeit, these two years bygone, the said James's estate and condition was known to be weak; nor was there any farther surety demanded of them; albeit Stanfield was a stranger, and going several times to England: And that it was offered to be proven, that the ticket was seen retired in James Hamilton's hands; and that Wishaw and he thereafter had made several accounts for great sums of money, and that they had paid in to Stanfield several sums of money, without craving retention, or making mention of this ticket; and that they did of late raise an inhibition against Stanfield, and, by indirect means and contrivances, did study to conceal the same, by giving orders to the messengers, and inserting, in the minute book and register, only Hamilton against Hamilton, without mentioning of Stanfield; whereupon he craved witnesses to be examined *ex officio*.

It was ALLEGED for the defender, That the said ticket, being in his possession,

and made to him for so considerable a sum of money, could not be taken away but *scripto vel juramento* ; and that presumptions could not prove payment, or take away his bond, he being willing to depone and give his oath.

The Lords, notwithstanding, ordained witnesses to be examined, *ex officio*, upon the presumptions and grounds alleged on ; which they found to be as strong as in other cases, where the like was done before.

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1671. June 21. The APPARENT HEIRS of LESLY *against* JAFFRAY.

JAFFRAY having comprised Lesly's estate, and the legal being expired, there was a pursuit raised, at the instance of his three daughters, apparent heirs, for count and reckoning, against the comprisers, *ad deliberandum*, only that they might know if they might safely enter heirs to their father :—It was ALLEGED, That apparent heirs could only pursue exhibition of writs *ad deliberandum* ; but no other action, which might put comprisers, and others having right, to trouble and expenses, of counts and reckonings ; who might sustain great prejudice thereby ; and yet, if they were not satisfied by their intromissions, the apparent heirs were not liable to them. It was REPLIED, That the case of apparent heirs was most favourable ; and, having *annum deliberandi* allowed to them by the law, they might take all lawful ways to know the condition of the estate of the defunct, as was found by two practiques, one *in anno* 1637, betwixt the apparent heirs of Home of Eccles against Home of Blackater ; and another by an interlocutor in a process depending betwixt the Earl of Traquair and the Laird of Kirkhill.

The Lords did sustain the defence, notwithstanding of the reply, and found, That no action was competent to apparent heirs, *ad deliberandum*, but for exhibition of writs ; and having considered the practiques, they found, that the last was upon consent, and did not quadrate ; and for the first, that it was sustained against the factor and trustee of the apparent heir's father, which made the case something different ; but yet declared, that they would not sustain the like in time coming.

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1671. June 24. MR ARTHUR GORDON *against* The LAIRD of DRUM.

MR Arthur Gordon, as assignee constitute by the executor of \_\_\_\_\_ Gordon, who had obtained decret, against the Laird of Drum, for payment of the sum of 7000 merks, contained in his bond, granted to the defunct, to whom Mr Arthur's cedent and another brother were confirmed executors, and had obtained decret against Drum, as conjunct executors ; but, in respect that the other executor was dead, Mr Arthur, as having right from the surviving executor, pursued for the whole.

It was ALLEGED, That the surviving executor had only right to the half of the sums confirmed ; because, the testament being executed, by the decret ob-