

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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