

1675. DOUGALL M'PHERSON *against* MURRAY ; or rather, THOMAS LUNDY *against* SIR JAMES KEITH of Caddom.

IN the action mentioned *supra*, at No. 216, between Murray and M'Pherson, [12th July 1671,] or rather Mr Thomas Lundy and Sir James Keith of Caddom, we will find a comprising was there quarrelled as null, on the following grounds:—*Primo*, That the creditor who was to lead the apprising had, upon a bill given in by him to the Lords, obtained a dispensation to hold his court of apprising at a place in the open fields called the Beechhill in Angus, (which I conceive was craved as nearest to him, to save charges;) and which place was neither on the ground of the lands to be appraised, nor at the chief burgh of the shire where the lands were situated, nor was it within the shire where they lay, nor at Edinburgh, which is the *communis patria* of all Scotsmen, and, where lands in sundry shires are to be appraised, is ever made the place, but was in the open fields and in another shire; at which rate, one may apprise lands situated in Leith or Edinburgh, in Lochaber or Orkney, by which they may be both clandestine and remote. *2do*, The comprising was questioned, in so far as it was not led and adduced on the day prefixed by the messenger, but he had prorogued and continued the diet at his own hand; which being peremptory, and he only as *judex pedaneus*, seemed unwarrantable for him to do: yet the macers in service of heirs, *ex justis causis*, will continue; and the style containing a messenger's warrant, empowers him to affix diets, one or more. The Lords went over them both, and sustained the comprising, yet looked upon them as enormities and irregularities they would not sustain for the future; and ordained the appriser to condescend in special on some reasonable causes why the messenger deserted the first diet he set. In obedience whereto they condescended, *1mo*, That the messenger was so drunk he was not capable to officiate. *2do*, Being in the open air, there was a great rain that would have spoiled all their papers if they had offered to proceed. Which excuses the Lords accepted of; but they found it absurd that a messenger should have power at his pleasure to prolong the comprising, which, at that rate, he might dwang and delay for a year or more, and defraud persons of their just diligences.

*Advocates' MS. No. 452, folio 237.*

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1675. *December 2.* HEW KELLO and WILLIAM HALLY *against* AGNES KELLO and JAMES MAR, her Husband.

IN an action pursued by Hew Kello and William Hally, his assignee, against Agnes Kello, daughter of umquhile John Kello, and James Mar, her spouse, for payment to him of 1000 merks, owing by her father, and whom she represented on the passive titles; and particularly insisting against her as lawfully charged to enter heir, she offered to renounce.

IT WAS ALLEGED she could not be heard, because *res non erat integra*, in so far as she had granted bonds, whereupon, by collusion and subjecting herself to the jurisdiction of the Bailie Court of Edinburgh, whereunto she (dwelling in the Water of Leith,) was not answerable, decreets were recovered against her; and upon her