

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

renunciation to Jo. Nasmith, who had right to these bounds by progress, he had adjudged her father's estate from her: by all which she had incurred gestion.

ANSWERED,—*1mo*, That Nasmith's adjudication was led, not only upon a bond granted by her who was now apparent heir, but also upon a bond of her father's. Neither can the granting of that bond be interpreted a behaviour, seeing it was in her father's lifetime, and then she was not apparent heir. And as to the qualifications of collusion drawn from her appearing before the bailies of Edinburgh, to whose jurisdiction she was not liable, and that *actor regulariter sequi debet forum rei* ;\* it is ANSWERED,—The Bailie Court of Edinburgh was *forum competens* to her upon all those grounds of law by which *quis forum sortitur*. For, *1mo*, She was subject to it, *ratione domicilii et originis* ; for as she was born in it, so she dwelt in the Water of Leith, within the town's territories. Though it may be answered to this, that the Water of Leith answers *in civilibus et criminalibus* to the shire; and though, as being a part of the town's common good, it makes them answerable to the head courts of the barony and regality of the Cannogate, whereof the town of Edinburgh are superiors, yet it made not the inhabitants within that bounds liable to the Bailie Court. *2do*, It was *forum competens* to her, *ratione contractus*, the debt being contracted in Edinburgh. *3tio*, *Ratione situs rei controversæ* ; for the tenements of lands craved to be adjudged lie within the town of Edinburgh. *4to*, The tribunal was competent, *ratione consensus et prorogationis judicis* ; *nam primus actus judicii est judicis approbatorius, et magistratibus Edinburgenis jurisdictionem conferbat in eos consentiendo*.

See thir at large in *Gudelinus de Jure novissimo*, p. 155, 156, et seq. *Vide Durie, 28th November 1635, Williamsons*. See *28th November, 1679, Straiton and Bell*. See the informations of this cause beside me. See the informations in the action Sir Robert Murray *alias* Crichton *contra* Richard Murray of Brughton, *apud me*. *Vide infra, December, 1676, No. 522, Haliburton and Balmerinock*.

The Lords, upon the report of the debate by the Ordinary, FOUND, on the foresaid day, that the collusion insisted upon by the pursuers was not a sufficient ground to fix a passive title upon the defender; but prejudice to the pursuer, upon that ground to reduce any decree of preference obtained by Nasmith, upon the foresaid collusion; and find the defender's giving bonds does not put her in the case of the act of sederunt made in the action Glendynning *contra* the Earl of Nithsdale, unless the pursuer will allege that she, or some other person for her behoof, has possessed her father's lands, and intromitted with the maills and duties thereof.

In this cause it was CONTENTED, she had behaved, in so far as she had meddled with the writs of her father's lands, and other his evidents. ANSWERED, *Non relevat*, unless you say, she had made use of them, by assigning them, or uplifting farms or sums by them, or pursuing or defending upon them; for the Lords have found a naked meddling with writs no *gestio pro herede*, Dury, *8th July, 1628, Dumbar*. Yet, *vide supra, 29th June, 1670, Casse and Eleis, No. 40*, where intromitting with a charter-kist was found sufficient to import behaviour; only that was *immixtio per universitatem*.

In this same cause, in February, 1676, William Hally, having raised reduction of Jo. Nasmith's adjudication, on the ground of collusion, mentioned in the Lords' interlocutor aforesaid, and taking a decret *cognitionis causa*, and thereafter a decret of adjudication upon the apparent heir's renunciation of the same tenement already

\* *Locus situs rei controversæ is forum competens apud Gallos. Joannes Imbertus Institutionum forensium, libro 1, cap. 22.*

adjudged by Jo. Nasmith; and compearance being made by Jo. Nasmith to stop his diligence, on the allegiance of payment of part of the sum for which he was taking out his adjudication: the Lords refused to revoke the same *hoc loco*, either against the decret *cognitionis causa*, or the decret of adjudication; (see this marked in other papers *alibi*;)\*) upon this reason, that they judged it calumnious, and designed merely to postpone, stop, and delay the pursuer's inchoate diligence, which they would not allow; and, therefore, resolved and enacted, that both the old adjudications upon decreets *cognitionis causa*, and the form of adjudications introduced in place of comprisings by the act in 1672, shall be summarily decerned without inrolling, (though this seems contrary to the regulations,) or receiving any defences that formerly were competent against the adjudication itself; reserving all defences and objections, competent to be proponed against the debt, to the action for maills and duties, or to a competition in a suspension of multiplepointing; so that they now pass of course, *absque ullâ causæ cognitione*.† And as they have made an act of sederunt upon this, so they follow and practise it in judging.

In June, 1676, when Jo. Nasmith's process for maills and duties, upon his infetment and decret of adjudication, was called before the Lords, Hally compeared, and repeated his reasons of reduction against Nasmith's adjudication by way of defence.

ANSWERED,—They could not come in in this action for maills and duties, his reduction being only seen, and returned, and inrolled, and not yet called, nor a term taken; much less the production satisfied, or a warrant *in præsentia* to the Ordinary in the Outer-House, to hear and discuss the reasons, without which they were not receivable, else reductions should prove vain and elusory points of form. *Vide infra*, No. 467, (24th February, 1676.)

This being taken to interlocutor, the Lords ordained Jo. Nasmith to be answered of the maills and duties; he finding caution to make them forthcoming to any the Lords shall afterwards find to have best right; and particularly to Hally, who competes, if he prevail in his reduction; unless the said Hally will hold the production, as it is in the pursuer's process for maills and duties, as fully satisfied: in which case, ordains Nasmith to answer to the reasons of reduction *etiam hoc loco*, even by way of defence. But Hally finding only the seasine produced for the active title to instruct his interest to the maills and duties, and that neither the decreets *cognitionis*, nor of adjudication, nor the bonds whereon it proceeded, were *in campo*, against which mainly his reasons of reduction upon collusion and nullity militated; he would not accept of the condition of the Lords' interlocutor: whereupon Nasmith got forth his decree for maills and duties; though, in effect, they are but consigned, deposited, and sequestrated in his hands, till the event of the reduction: concerning which, see *infra*.

*Advocates' MS. No. 453, folio 237.*

\* *Infra*, Harperfield and Bannatyne of Corehouse, (1st January 1678, No. 700.) See 13th February, 1680.

† Adjudications on a decret *cognitionis causa* must have two diets for citation, and pass upon a bill, else they will be casten as unformal. *Infra*, 1st August, 1677, Cathcart, No. 634.