

death or marriage was declared;—Answered, The comprising was not led till after elapsing of the term subsequent to the mother's death, and there was no necessity for a previous declarator thereof. The Lords assoilyied from the reduction, and would not so much as find the legal current upon that defect. *Vide* No. 297, [M'Braire of Netherwood against Thomas Rome, December, 1683.]

Page 81, No. 333.

---

1688. *January 26.* LAIRD of DRUM and THOMAS SOMERVEL *against* CAPTAIN TENENT.

JAMES Tenent, laird of Cairns, having, in anno 1679, disponed his lands to a blank person, containing a dispensation with the not-delivery, and a power to alter, *in articulo mortis*; in the year 1683, he gave a written commission to one Johnston, the writer, or any other person, impersonally, to fill up Captain Tenent's name in the disposition, either before or after his death, and to deliver it. The Captain's name was accordingly filled up, and the disposition remained with the writer, from whom Cairns, in the year 1685, called for it on his deathbed; and, upon the reading, finding it conceived in favours of the Captain's heirs whatsoever, and so disconform to his intention of making a tailyie, was so offended, that he offered to tear it; but was prevailed with to let it continue uncanceled, to be used as a scroll for drawing a bond of tailyie to Captain Tenent, and other heirs-male: but Cairns died before that was done; after whose death, the disposition being delivered to the Captain, a creditor of the defunct's appearand heir of line, raised reduction of it, upon this ground, That as the actual destroying of the disposition would have been *judicium mutatae voluntatis*, so the recalling of it, in order to an alteration, must annul it; [and] the new right was never perfected. Answered, It were dangerous to quarrel such a right upon the depositions of writer and witnesses; and the recalling on't from the writer, to make some alteration, was not a simple, but a qualified altering; for the instrumentary witnesses will depone, that it was to be in favours of the Captain and his heirs-male, and so no alteration *quoad* him. And, in Brown of Ingleston's case, where the first disposition only contained a dispensation with the not-delivery, and the second and third to the same person differed in some things from the first, the Lords found these posterior rights, though not dispensing with delivery, but accessory, and only alterations and qualifications of the first; and by the § *Inst. quibus modis testamenta infirmantur*, a testator, who began to alter his will, being prevented by death, the first complete testament is invalidated by the imperfect one. The Lords, before answer, ordained witnesses insert, and others present, to be examined; who having deponed that Cairns, on deathbed, resolved to make a tailyie, but gave direction to preserve the first disposition for Captain Tenent's security, in case he, Cairns, should die before the second was subscribed;—the Lords assoilyied from the reason of reduction.

Page 33, No. 152.

---