

1693. *November 14.* THOMAS LAURY *against* The MARQUIS of ATHOLE.

ONE Thomas Laury, merchant, his bill against the Marquis of Athole, seeking out his decret, in regard the Marquis had been in town and had not deponed,—the Lords, *ante omnia*, ordained the Marquis to pay the £40 formerly modified for his expenses; and then allowed him to extract a new commission, on his own charges, to depone at Perth; to be reported against the 8th of December next, Thomas naming the commissioner; and with this quality, That, if the Marquis did not take out the commission, the former decret should be extracted against him, without Thomas being put to circumduce the term against him on this act.

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1693. *November 14.* The EARL of SUTHERLAND *against* The EARLS of ARGYLE, CRAWFORD, ERROL, and MARISHALL.

THE Earl of Sutherland, upon a remit of Parliament, craves, that the Earls of Argyle, Crawford, Errol, and Marishall, competing with him for precedency, may presently answer. They ALLEGED, That the bill was not remitted, but only the action and cause; which necessarily presupposed the raising a summons and citation in common form.

The Lords having considered the remit, they found the Parliament had only dispensed with the order of the roll, but not with the preliminaries and formalities of process; and therefore, that the defenders behoved to be cited. But some thought their answering on this bill a material compearance.

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1693. *November 8, 9, 11, and 14.* WALLWOOD, COLVIL, and DUNCAN, *against* BARBARA SETON, and WILLIAM HALY her Husband.

*November 8.*—THE reduction pursued by Wallwood, Colvil, and Duncan, against Barbara Seton, and William Haly her husband, was debated *in presentia*; and the following points were this day determined with open doors, in presence of the parties and their lawyers:—

*Imo.* The Lords found, That the defence of competent and omitted did not exclude thir pursuers from insisting in their reduction, seeing the reasons now repeated were not competent then by way of exception: though some alleged, that, in form, they ought at least to be proponed, though they be repelled as incompetent *hoc ordine*, to the effect they may be reserved; especially seeing that competent and omitted is not an exception *juris communis*, but introduced only by our statute *ad abbreviandas lites*. And the President thought, one might raise a reduction upon one reason, as *supra lecto aegritudinis*, or the like, and, if he succumbed in that, he might raise a new one *super capite inhibitionis*, &c. seeing he only delayed himself. Yet by these he vexes others.

The *second* point was, You cannot insist in the reduction of this decret; be-

cause I exclude your base infestment by a public one, yours not having attained the first possession.

ANSWERED, That cannot hinder me once to remove this decret out of the way, as a middle impediment; and then, it being reduced, I will debate the validity and competition between the two infestments.

The Lords thought, if the party against whom the decret was obtained, was now reducing, then he would have a sufficient interest to have insisted, *primo loco*, to free himself of that decret personally obtained against him; but here, being his singular successor, he ought to debate that point that would determine the whole cause; and, if they succumbed, then he might recur to the decret; and that the proponing it either *dilatoriè* or *peremptoriè*, did not exclude them to return to the other allegances.

The *third* point decided, was, the pursuer of the reduction ALLEGED, That the defender's apprising was extinct; in so far as the right of reversion and the apprising were both come into one person, and so the property absorbed the collateral right of the apprising.

The Lords found, If the debtor, from whom the lands were apprising, and to whom the right of redemption and reversion belonged, had acquired in the apprising, then there would have been ground to plead a consolidation and extinction; because he being both debtor and creditor, *confusione tollebatur*.

But here it was not the debtor, but a stranger, to whom he had dispoed the right of the reversion, in whose person both the rights might very well subsist, without extinction; especially seeing, the reversion was not the first right in his person, but the comprising. But if the reversion had been first, and if the comprising had been afterwards not dispoed, but renounced to him as proprietor, it would have altered the case. Though it was pleaded here, that they declared they made no other use of their disposition but as a renunciation: Which the Lords would not allow of; seeing *hoc non agebatur ab initio inter partes*. This was the first considerable cause that was decided with open doors, conform to the new Act of Parliament, made in June 1693. *Vol. I. Page 567.*

November 9.—Colvil insisted on this reason of reduction of the comprising, That the term of payment of the bond on which it was led, was not come: in so far as it was not payable till after his mother's decease; and it was not proven that she was dead.

ANSWERED.—The decret was not null for lack of probation of this point; because it was competent to have been proponed, and was not; and so, being omitted, it needed not be proven.

The Lords found this not competent, seeing it was not then produced, and so could not be objected against.

Then Haly ALLEGED, This was not a nullity, seeing it was notour she was then dead; and so the term of payment of the bond was truly come; and there was a declaration lying in the process, under her son's hand, bearing her death; and they were content to sustain it, if Colvil would prove she was then alive.

The Lords found it a nullity, and such as ought to have been proven; six being against five.

Then the next vote was, If it was such an informality as annulled the comprising *in totum*, or if it did only operate to restrict the comprising to stand as a security for the sums therein contained, but to cut off the benefit of the legal, and the exorbitances of sheriff-fees, &c.

The Lords generally sustained the nullity only *ad hunc effectum*, to stop the legal; and declared it redeemable for year and day after this interlocutor.

Then Colvil repeated another reason of reduction, That the registration of the bond which was the warrant of the apprising, bore only, that executorials of horning and pointing should pass thereon, and did not mention comprising.

But the Lords found this no nullity; seeing pointing comprehended apprising.

Then he offered to prove, The sums of the comprising were paid within the legal, by intromission; and what they wanted, he would consign: and that the legal was open many years; in respect it being led in 1646, the seven years run out in 1653; and the act 1661 prorogated the legal to 1664; at which time, the debtor's heir being minor, it was an open and current legal for ten or twelve years thereafter.

ANSWERED for Haly and his wife.—That any intromission they had was not by virtue of the apprising, but of the disposition they had from the reverser.

REPLIED.—That the apprising, being the sovereign right, and *sors durior debitori*, his possession must be *primo loco* ascribed to extinguish that. See Stair, the 10th February 1674, Blyth.—But there the rights were not of divers kinds, but *ejusdem speciei*, both being comprising.

DUPLIED.—That the preferable right was indeed a presumption that one bruik-ed, and possessed by virtue thereof; yet, if one offered to prove that he entered to the possession by another right, then *præsumptio cedit veritati*, and the *initium possessionis* must be considered. And here, though the apprising be the first right in his person, yet, by it, she did not attain the possession till the reverser, who was in the natural possession, assigned her to his right, and to the maills and duties; and by that she got his possession. For a party, having several rights in their persons, may ascribe their possession to any of them they please; but, if they make no definite application, by pursuing for the maills and duties upon one of the rights more than the other, then the *durior sors* takes place; but when it is clear how they attained the possession, *non est amplius locus conjecturis*.

When this point was going to be voted, some of the Lords moved it might be delayed till next day, to have their thoughts on it:—Which was granted.

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November 11.—In the foresaid cause of Haly and Colvil, mentioned 9th current, the Lords decided another point, *viz.* Whether it was a nullity in Haly's decret, that not only Wallwood, who was indeed convened as defender, but also Colvil, who only compeared for his interest, were decerned to denude; seeing Colvil was neither libelled against, nor was it craved.

The Lords found it no nullity, in regard he compeared and produced his interest, and Haly's wife was preferred to Colvil; and so it was but a genuine and natural consequence to decern him to denude; which the Lords could adject and supply, without the parties demanding it, seeing it might only be a defect and omission in the clerk's minutes; and decreets are not to be annulled on every minute informality.

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November 14.—In the foresaid cause of Haly and Colvil, mentioned 11th current, it was of new ALLEGED, That his interest was then repelled, because it was *jus tertii* to him to object against Wallwood's comprising; but that he had since acquired a supervenient right, *viz.* an adjudication against Duncan, the apparent heir.

ANSWERED.—That, in a posterior decret of declarator, that was competent and omitted by Colvil.

REPLIED.—It was not competent ; because he knew it would be repelled *illo ordine*, till he had first reduced that decret against him for denuding, and their adjudication.

DUPLIED.—Their adjudication was neither libelled on, nor founded upon in the debate ; and so could not hinder them from proponing it.

Several of the Lords thought, competent and omitted being a penal exception, introduced to repress dole and fraud in protracting pleas, that it ought to be understood, where the exception was relevant and competent *cum effectu* ; therefore, that it did not take place in this case so circumstantiate. Yet the plurality repelled it now ; because they found it was competent then, and should have been proponed, and was omitted.

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1693. *November 15.* The EARL of KINTORE and MR JAMES KEITH *against* HOME of NINEWELLS, AUCHTERLONY, and COUTTS.

MERSINTON reported the cause of the Earl of Kintore and Mr James Keith, against Home of Ninewells, Auchterlony, and Coutts, conform to the new Act of Parliament in summer last, by reading the minutes, signed by both parties' advocates.

The defence was a declinator of the Lords as incompetent ; it being a question about a part of the King's revenue, (the retoured and non-entry duties of Falconer of Newton's lands,) which was only proper for the Exchequer, by the Act of Parliament 1633 ; seeing there was no competition between parties in point of right here, and that the precept bore *capiendo securitatem*.

ANSWERED.—The nature of the debt was here innovated by taking a bond of corroboration ; and it was not taken in Sir Thomas Moncreiff the cash-keeper's name, but in the Sheriff-depute's ; and it was no more the King's, being gifted to Kintore for his salary as Knight-marshal ; and, by this rule, all wards, non-entries, and marriages, and such like casualties of the Crown, might all be claimed to be judged *privativè* by the Exchequer.

The Lords, by plurality, found this case more proper to be judged by the Exchequer, and remitted it thither ; but, in regard the charge of horning proceeded upon letters raised before them,—lest they should go on to denounce upon that charge, they declared that diligence null, for securing the suspenders *medio tempore*.

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1693. *November 15.* ————— *against* SIR ANDREW MURRAY.

IN a declarator of recognition pursued by —————, against Sir Andrew Murray, upon this ground,—That, though his charter bore a blench-holding, yet it had this adjection, “and the other services contained in the old infestments ;” and, by the tenor of the prior infestments, it appeared that the lands held clearly ward : and therefore, *primo loco*, the pursuer insisted to have it declared it was a ward-holding.