

and of the £80,000 bond, and to carry on the count and reckoning against him; and that he should, out of the first end of the rent, furnish money for determining these processes, and bringing them to a period. And ordained him to find caution to pay the Laird's annuity of 6000 merks yearly; and not to suffer the adjudications on the estate to expire, but to redeem them within two years before the legal, that the Lady may not be cut off from a terce.

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1693 and 1694. MRS PURDIE and JOHN DALGARDNO *against* MR WILLIAM and SIR PATRICK MAXWELL of SPRINGKELL.

1693. *January 4.*—THE Lords found,—Though Springkell produced more ancient rights, yet, they being only general, and not of thir roums in particular, and only offered to be proven to be part and pertinent; *2do*, not being connected by a progress, nor he showing any conveyance of these rights;—that therefore Purdie ought to have certification *contra non producta*; seeing the Lords refused to suffer them to debate the reasons till the production was closed, and a certification extracted. But, as was done in Biggar of Wolmet and Lauderdale's case, *7th December 1668*, though all the terms be now run, yet they gave him the 1st of February next, as a farther diet, to produce all the other writs; with certification, that what should not then be produced should never be admitted thereafter; and gave him a diligence for recovery thereof, to be concluded in that time.

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1693. *December 22.*—The Lords advised the debate between Mrs Purdy and Dalgardno, against Sir Patrick and Mr William Maxwells of Sprinkell. The Lords having weighed the presumptions and evidences on both hands, whether the lands of Smelholme and Chapel of Logan be Temple-lands, or temporal lands, and a part and pertinent of the barony of Logan, formerly belonging to the Earls of Nithsdale, and now to Sprinkell;—they found the express infestment of Sommervel, Purdy's author in thir lands, preferable to the probation adduced by Sprinkell, that they were only part and pertinent; and that, by the tract of presumptions and probabilities adduced, there was as much evidence as could be got, *in re tam antiqua*, that they were truly Temple-lands, though it was not instructed that Mr Robert Williamson, who gave a charter of them, in 1611, to Sommervel, was infest therein himself; seeing he was known to have stood in the title of many of these lands for Torphichen's and the Earl of Haddington's behoof, and that they were in the old lists and rentals of the Temple-lands, and produced in the Templar-courts, though not marked as produced in the King's Exchequer; and that it was no adminicle against their being Temple-lands that they lay environed and in the midst of another barony; which was very customary in the pieces given off to the Knights-Templars. Neither did the Lords regard that the decret against the Master of Maxwell was in absence, seeing he never sought to be reponed in his own lifetime, and it is now fifty years ago; and, though it was not proven that Sommervel's base infestment from Williamson was clad with possession, seeing the libel he raised at the Privy Council against the Master of Maxwell bore he was dispossessed. Then the Lords found Sommervel's seasine had a sufficient warrant, albeit the

precept seemed to be razed and vitiated; and that it had been [*nuncupat,*] and in place thereof the word *Smellholme* had been superinduced; seeing, in the charter where the said precept was engrossed, the word *Smellholme* was fully and distinctly in the dispositive clause, and in the *tenendas* and *reddendo*, and seemed only to have been an inadvertency and omission of the writer, and to be no late amendment, but done with the same ink and *ab initio*. *Vol. I. Page 582.*

1694. *January 19.*—The Lords advised that great cause, which had long depended, between Mrs Purdy and John Dalgardno, and Sir Patrick Maxwell of Sprinkell, mentioned 22d December 1693; and, having gone through the five nullities objected by Sir Patrick against the decret obtained by Sommervel against the Master of Maxwell, on which followed his comprising of the lands of Sprinkell,—the first vote was, Whether they were such as ought in law to annul and reduce the said decret *in totum*, or were only sufficient to restrict its excessive exorbitancies. And the plurality carried only to restrict it. Then, descending to the particulars, they found, seeing he was out of the country the time the decret was obtained, and that he was held as confessed on high quantities libelled, *viz.* 500 merks a-year, as the rent of Smellhome and Chapel of Logan; whereas it was offered to be proven that it was not worth £4 or £5 sterling of yearly rent; therefore they restricted it to the true rent.

Next, it was questioned who should prove the rental, and if there should be a conjunct probation granted. But the Lords preferred her. And, in regard it would be difficult to prove what rent the lands paid the time of the decret, being sixty years ago and more, they allowed her to prove what it had paid for seven years together at any time since the decret: but would not admit her to prove what it might pay in time coming; because tenants might be dealt with to take tacks for a great duty, on a back-bond or assurance that it should not be exacted; so that might be a false rule. As the Lords restricted the decret *quoad* the rent, so also as to the time; for, though it was extracted for eight years' violent possession libelled against him, and referred to his oath in absence, and the term circumduced against him, yet it appeared from the production that he stood only four years of that time infest in the lands; and they would not presume he had any possession before he had a colourable right or title in his person; and therefore restricted it to four years: but sustained the decret for the 400 merks libelled against him for demolishing the houses; seeing it was libelled against him that the said damage was done either by himself or others in his name.

Then the Lords entered on the consideration, which of the two rights were preferable;—whether Somervel's apprising in 1645, or Mr Maxwell's voluntary right in 1648. For whom it was ALLEGED, That he had the first complete right, being infest under the Great Seal before any charge given to the superior on the apprising.

ANSWERED.—That, after the denunciation of the lands to be appraised, and much more after the decret of appraising itself, the lands were rendered litigious; so that the debtor could not dispoise them by a voluntary right in prejudice of the prior compriser.

But the Lords thought, if an appriser was negligent to complete his right, and neither infest himself nor charge the superior to enter him within the legal, that the denunciation or appraising could not be equivalent, in that case, to an inhibition, to incapacitate the debtor from all voluntary deeds. But, on the

other hand, considering that our law had prefixed no precise time betwixt and which a compriser was obliged to perfect and consummate his diligence, therefore they forbore to decide this important point for a creditor apprising for a small sum a great estate of his debtor :—shall he, for obtaining himself infest in that great barony, pay the superior a full year's rent for that small debt? But they answer, *1mo.* You may apprise less than the whole ; *2do.* you may charge the superior to stop there.

This point being waved, the Lords proceeded to another ground of preference craved by Sprinkell against Purdy, *viz.* that the charge you gave the superior in 1652, a year after the legal, is null ; because you had not charged Hay of Mains, who was then the true superior, standing publicly infest, but only the Earl of Nithsdale, who was denuded.

ANSWERED,—The Earl was superior when I led the apprising, and named in the allowance ; and creditors cannot be put to such expiscations as to search out the true superiors ; and there was a probable ground here.

Yet the Lords, by plurality, found the charge null ; seeing it was not against the Earl, but only against his apparent heir, who was not in possession ; and that they had not at any time since rectified the mistake, by charging the right superior ; and therefore preferred Sprinkell, and assoilyied from Purdy's reduction.

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1694. *January 19.* The EARL of ABERDEEN *against* SIR ROBERT BAIRD.

PHILIPHAUGH reported the Earl of Aberdeen against Sir Robert Baird ; and the Lords adhered to their former interlocutor, finding that Sir Robert Baird's adjudication of Arthur Udney's *jus mariti* of these fishings was null ; because Arthur had then no right thereto in his person ;—Isobel Jack, the proprietor, having disposed these salmon-fishings to Isobel Douglas, her daughter, in life-rent, and to ——— Udney, her grand-child, in fee, with the express seclusion of Arthur and his creditors ; and she might qualify her donation in what terms she thought fit. And whereas Sir Robert alleged that the right of Arthur, his debtor, reconvalesced ; because the Earl of Aberdeen, for his security, and to take away the grand-child's right, raised a reduction of Jack's disposition to her grand-child *ex capite lecti* ; and actually reduced it, whereby the fee came in Isobel Douglas the mother's person ; and consequently the *jus mariti* recurred to Arthur Udney, her husband, his debtor : for they found there was no right of accrescing in legal diligences, but only in voluntary rights, and that it was *actus meræ facultatis* in Isobel Douglas to quarrel her mother's disposition, to which neither her husband nor his creditors could compel her ; and that, having disposed to Aberdeen, she could not hinder him to secure himself as he pleased, and wherein she had not concurred ; and that this was so decided, *supra*, betwixt them and George Lawson, merchant in Edinburgh.

Sir Robert insisted on a third reason of reduction, *viz.* That, before Udney's disposition to him, he was lying at the horn, at his instance ; and so, by the Act of Parliament 1621, he could not dispose to Aberdeen in prejudice of his diligence. But the Lords repelled this, in regard the said Act of Parliament only relates to creditors where a bankrupt gratifies and prefers one to another ; but