

# DECISIONS

OF THE

## LORDS OF COUNCIL AND SESSION,

REPORTED BY

SIR PETER WEDDERBURN, LORD GOSFORD.

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1668. June 19. SHEIRSWOOD *against* SHEIRSWOOD.

THOMAS Sheirswood did grant an assignation of a bond of 5000 merks, made to him by Douglass of Bowieburgh, bearing for love and favour, and reserving his own liferent, with a power to dispose otherwise thereof during his lifetime; which bond remained in his own custody till his death. The assignees having pursued the nearest of kin for delivery of the bond and assignation, the action was sustained, notwithstanding that it was alleged that the assignation was never a delivered evident; because the Lords found, That, albeit the not-delivery of an evident by the granter was a relevant exception where dispositions were made of heritable rights, or assignations were made *inter vivos*: yet the assignation being of the tenor foresaid, it was *donatio mortis causa, quæ æquiparatur legato*: and so, in delivery thereof, could be no defence.

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1668. June 20. The MINISTER of FERGUNDENNY *against* PARISHIONERS.

THE minister of Fergundenny having charged the heritors of the parish for

payment of the sum of £2000, expended for reparation of his manse, there was suspension raised upon this reason,—That, by the 20th Act of the 3d session of the late Parliament, it is ordained that ministers' manses should be repaired during the vacancy of the kirk out of the vacant stipend wherewith the charged had intromitted before his admission.

The letters were found orderly proceeded, notwithstanding of this reason : because the minister being presented to the whole stipend due thereafter, and having actually served the cure at the said kirk until he was admitted, the Lords did find, That his admission ought to be drawn back to the date of his presentation.

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1668. *June 26.* LADY BALCARRAS *against* SEAFORTH and OTHERS.

THE Earl of Seaforth's estate being comprised by the Earl of Balcarras for the lady's tocher ; by a posterior contract he did allocate some lands to be possessed by a factor, who should uplift the maills and duties until he should be satisfied of the whole sums, by certain proportions agreed on to be paid yearly. Likeas, in the same contract, Seaforth, with consent of the lady, did grant a factory to one Mackenzie of Duchmalluch, for whom Sir George Mackenzie of Tarbet and Cromarty were cautioners, that he should do exact diligence, and make count, reckoning, and payment yearly, conform to the contract : whereupon both the factor and cautioners were charged. The letters were suspended by the cautioners, upon this reason,—That the Earl of Seaforth did never suffer the factor to enter to the possession ; and that he had done diligence against the tenants, by obtaining decreets and letters of poinding ; which he offered to execute, but was deforced by Seaforth, who had appointed his own chamberlains to intromit : which the factor did intimate to the lady by a missive letter.

Notwithstanding of this reason, the letters were found orderly proceeded ; because the factor having made payment of the first year's proportion, and having sufficient power from Seaforth to intromit by the factory, the Lords found, That the writing of a missive letter was not exact diligence, unless he had instructed, by instruments taken, that he had done diligence *debito tempore*, by offering to poind, and sending the executions, bearing a deforcement, and had thereupon offered to give over his factory, or sent sufficient instructions to the lady for pursuing a deforcement.

And it being likewise ALLEGED, That the cautioners were only obliged for a factor, and so were only *subsidiarie* liable after the principal was discussed, as had been decided in the case of cautioners for factors in Camphire, and for tutors and curators ; the Lords found, That this factory was of a different nature, the factor being bound to do exact diligence, or pay a liquid sum yearly ; and that he was sufficiently discussed, by being denounced for not-payment.

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