

reserved to himself in the disposition he had made, and therefore willed the said sum should affect the lands, and burden his son, conform to the said disposition : and as the said John, if he had not been forfaulted, would never have been able to evade this debt, so neither can the King or his donatar, it being *onus reale inhærens* before the forfaulture, and therefore it must pass *cum onere*. And as to the *facultas* reserved by the father, it is real, and might have been comprised from him at a creditor's instance.

ANSWERED,—That however the laird of Swinton might have been reached upon the said debt, yet my Lord, who is donatar to the forfaulture, and so a singular successor, can never be, unless infeftment had followed upon that bond of Smeton's, and it had become a real right.

They were to have the Lords' answer upon this.

*Advocates' MS. No. 203, folio 102.*

1671. *July 12.*—THE case at No. 203, *supra*, being reported, the Lords found that in the disposition made by Sir Alexander Swinton to his son John, he reserved a faculty for burdening the estate by wadsets, or other infeftments, with the sum of 52,000 merks ; and that this declaration, in a personal creditor's bond, That he willed this sum should be a part of the said sum reserved him, was not *habilis modus* of exercising his said power ; and therefore assoilyied the King and the Earl of Lauderdale his donatar therefrom, as noways affecting them.

*Advocates' MS. No. 217, folio 104.*

1671. *July 12.* Consent by a WOMAN clad with a HUSBAND.

THIS case being taken to interlocutor, Whether or no a woman clad with a husband the time of the consent, may not reduce a consent, given by her then, to an alienation of her conjunct-fee lands, upon thir common grounds of law, That what she did was through marital reverence *et ex timore*, and that her subscription was *fide implicita*, in so far as they assured her and made her believe that what she was doing redounded noways to her prejudice. This the Lords declared they would hear both parties debate upon in their hail presence, out of the common law, in regard there was nothing yet in our law to be a rule therefore.

*Advocates' MS. No. 218, folio 104.*

1671. *July 14.* Anent EXHIBITION ad deliberandum.

THE Lords found an exhibition *ad deliberandum*, sought by an apparent heir, ought to be sustained only for all writs granted to the apparent heir's predecessor, by whatsoever person ; as also for all writs granted by him containing clauses of reversions or other clauses conceived in his favours ; and siclike for all writs

granted by him of whatsoever tenor they be, *conjunctis personis*, or to such as were the time of his decease *in familia*; and that farther it could not be sustained.

*Advocates' MS. No. 221, folio 105.*

1671. *July 13 and 14.* MR. THOMAS BAIRD, Advocate, *against* JOHN INGLIS, Advocate.

*July 13.*—IN the ejection pursued by Mr. Thomas Baird, advocate, against John Inglis, likewise advocate, for ejecting the said John furth of a dwelling-house pertaining to the pursuer, and possessed these several years by the said John; he having alleged many things, and all being repelled, viz. that he was never warned to remove, but allenarly a woman who sits there by his tolerance; that the decret of removing was given by the bailies of Edinburgh, who were not Judges competent to any member of the College of Justice; that the pursuer set him a verbal tack, and promised not to bid him flit: which assurances and promises imported at least a tack for a year; and after that, he bruiking by tacit relocation, he behoved to be warned ere he could remove.

Thir were repelled, because it was answered that the pursuer never set his house to the said John, but only to that woman, so John was only her sub-tenant, so that he had no necessity to warn him but only her; neither made it ought that he paid only the mail and not she.

He at last ALLEGED he had waired sundry considerable reparations upon the house, which were both necessary and profitable, which behoved to be allowed to him ere he could remove. ANSWERED,—What he did of this kind was upon his hazard, unless the landlord had approven thereof, or had promised to refund to him the same: and the most he can seek is, to take the same with him; seeing *qui in rem alienam sciens et sic mala fide impendit, impensas non deducit*. Next, though ye have made it of a newer fashion, yet I like the old way better and will have it so.

REPLIED,—The landlord consented in so far as *scivit, tacuit, et non contradixit*.

The Lords found, if the reparations were necessary, or such as thereby the house might set for more mail, that then he should have *retentionem rei* till the same were repaid to him; and that he was not obliged to remove till that were done.

*Advocates' MS. No. 220, folio 104.*

*July 14.*—IN the foresaid case, at No. 220, the Lords ordained the deacon of the wrights, with two other tradesmen, to go in the afternoon with my Lord Colinton and view the house and reparations made thereon, and to report how far they judge the house meliorated thereby.

*Advocates' MS. No. 222, folio 105.*