

1671. *July 14.* LADY CASSILS *against* The EARL of ROXBURGH.

MY Lady Cassils pursuing the Earl of Roxburgh for payment making to her of the sum of 10,000 merks per annum, of additional jointure, over and above the 10,000 merks which was provided to her in her contract of marriage with my Lord Ker, her first husband.

ALLEGED for the Earl, That it was *donatio inter virum et uxorem*, and so was null of the law. ANSWERED, Ought to be repelled, because it was *morte confirmata*. REPLIED, That her husband revoked it in his own lifetime, in so far as by his latter will and testament, he entreated his father would be pleased to instate his wife in a jointure of L.10,000; which must be interpreted an evident revocation of the additional jointure of 10,000 merks, which with her provision by the contract matrimonial made up 20,000 merks. DUPLIED, *Imo*, The conception of the words will never import a revocation, which ought ever to be clear and expressed. But *2do*, *Esto*, they did, the Earl can never be heard to found any thing thereon; because it is offered to be proven, that the old Earl, father to her husband, chose rather to ratify the additional jointure, and to secure her therein, than to follow his son's desire in his latter will; and that because he found the first much more easy for him than the last: in regard her additional jointure was not payable till after the old Earl's decease. But for the L. 10,000 spoke of in the testament, it would have been due immediately after my Lord Ker, her husband, his decease: which homologation and election made by the said Earl, *funditus* takes away all revocation if there any was. But to show how square the lady is, she is content to restrict herself to what jointure is contained in the testament, for by that means she will have right to 5000 merks yearly, (which she never got,) for all years intervening between the decease of her husband and her goodfather. Which claim will come little short of what she is now seeking.

The Lords found no revocation.

Then they ALLEGED she had promised never to exact it. Which being referred to her oath, she deponed *negative*.

Then ALLEGED she was paid; this she also denied upon oath.

The Lords repelled all the defences proponed for the Earl, and decerned conform to the desire of the summons.

*Advocates' MS. No. 223, folio 105.*

1671. *July 27.* Lord RUTHERFORD *against* Captain RUTHERFORD.

IN the foresaid improbation mentioned at No. 101, betwixt my Lord Rutherford and Captain Rutherford, the Advocates in their reasoning entering upon the matter, the Lords ordered Robert Hamilton, macer, to go and bring the defender out of the tolbooth, where he had lain of a long time before, to their presence, in case there should any thing occur whereon he might be interrogated by them. While he is coming over, he pretends there were some papers in Colliston's chamber in Besse Wind which would be of great use to him if he took them with

him, and therefore begged leave to fetch them, and paroled he should presently return. The macer trusting him simply, Rutherford makes his escape; the rumour whereof running up and down the town, Towie Barclay, who was lately but released from his confinement at Glasgow, comes in to the Lords in the Inner House, and proffered to find him out and fetch him again within an hour; which accordingly he did with a great deal of zeal, expressing that he could not abide cheatry by any thing in the world. Such persons know one another's lurking places so well.

*Advocates' MS. No. 224, folio 105.*

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1671. *July.*

Anent the sale of the BASS.

IN Andrew Ramsay's business about the sale of the Bass to his Majesty, the King's Advocate was induced to attest the disposition made by the Provost to his Majesty of that Isle, to be a sufficient security, and that the Provost had a valid and good right thereto under his hand; though he alleged it was a thing no King's Advocate ever before him had been in use to do, yet he would say nothing verbally save what he would also give under his hand.

*Advocates' MS. No. 226, folio 105.*

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1671. *July 27.* LADY FINGASK *against* Her CHILDREN and their TUTORS.

IN the Lady Fingask her action against her children and their tutors, she craving the annualrent of the 3000 merks left her by way of additional jointure in her husband's testament:

It was ALLEGED,—The heir behoved to be assoilyed therefrom, because being a deed *in lecto*, and so could not prejudge him.

To this we ANSWERED,—That albeit it was done on deathbed, yet the heir must be liable therefore, because it depends upon an act *inter vivos*, viz. her contract of marriage, by which, acknowledging the provision he had put her in to be mean, he reserves to himself a power at any time in his lifetime, *etiam in ipso articulo mortis*, to burden and affect his heir with what farther provision and additional jointure he shall judge fit; so that what he has done in his testament is only in prosecution and the exercise of this power.

To this it was REPLIED,—That that provision and reservation could never salve it, because it was contrary to a fundamental law, with which none can dispense.

We were to have the Lords' answer on this.

They altogether declined to tell their sentiment thereon: but found if we would still insist to burden the heir with the 3000 merks contraverted, because of the reservation made *inter vivos*, they would hear us in their own presence press that point from reasons *in jure*; but if the lady would insist for it as a legacy to affect the free gear, then they would ordain her to be answered *secundum vires*