

was, Ye cannot have right to this provision till ye be served heirs ; and, *qua* heirs to your father, you are obliged to relieve me, who was only cautioner for your father ; and so *confusione tollitur obligatio : et quem de evictione tenet actio eundem agentem repellit exceptio ; et frustra petis quod mox es restitutus.*

This allegiance the Lords sustained, that ere they could seek implement, they behoved to be served heirs, and then they would be obliged to relieve : and therefore assoilyied from the pursuit.

This evacuates all cautionaries for provisions to heirs in contracts matrimonial ; but it is only done to discourage such inept conceptions of these clauses. The title *Codice, Ne fidejussores dotium dentur*, aims elsewhere. Mr David Dinmuire, advocate, was just engaged in the parallel case to this. *Vide* this case argued *supra*, No. 555, § 6, [*February, 1677.*] *Advocates' MS. No. 661, folio 308.*

1677. *January 10, June 16, and November 27.* STEWART of Castlemilk against THE DUKE OF HAMILTON and SIR JOHN WHYTFORD of Milneton.

*January 10.*—DUKE HAMILTON and Sir John Whytford of Milneton's defences against Stewart of Castlemilk's reduction *ex capite metus* being this day advised, the Lords allowed a conjunct probation as to the spontaniety of the deed ; yet upon the matter they rendered Duke Hamilton's probation ineffectual, by declaring they would not admit those same witnesses whom the pursuer should make use of to prove the compulsion, fear, and force, to prove his being at liberty, but the Duke behoved to use others ; whereas there was no others that knew ought of it save whom the pursuer intended to make use of. They took Castlemilk ere the caption came ; they carried him not to a prison, but two or three days, one after another, to private houses, which was *carcer privatus* ; and instead of taking from him an obligation to fulfil the will of the horning and caption, they presented him a disposition of his estate, and undertook to pay debts for him, and constrained him to sign it. In this cause it was, that the Lords debated if the Duke should be permitted to come within the bar, and sit with his hat on ; *item, de alienatione litis in potentiolem* ; which see in the observes anent Session emergents, on the 19th of December, 1676. *Vide supra*, No. 278 and 279, in December, 1671, *Spalding and M'Intosh.*

On the 16th of *June, 1677*, the Lords advising the probation led, found the reason of force clearly proven, and therefore reduced the disposition ; for it is the interest of every private man to be compelled to do nothing but according to law. Yet if a man be owing me money, and I by threats compel him to pay me, as was in this case, there will be no *repetitio* or *condictio* of what is paid. Yet *vide* l. 7. *C. Unde vi.* *Advocates' MS. No. 532, folio 272.*

1677, *November 27.*—Duke Hamilton's action and Castlemilk's was this day advised. The Lords decerned Duke Hamilton to cede the possession to Castlemilk : albeit the commencement and entry of his possession was not by that disposition they had reduced, but by a gift of liferent escheat, and by an assignation to a lady's liferent, which was now extinct by her death ; *et resolutio jure dantis, re-*

*solvitur et jus accipientis*; and the escheat was not declared, and so he had no title whereto he could ascribe his possession, but only that disposition now reduced *ex capite vis et metus*: But reserved to the Duke all his other pretensions on the land. Some cried out on this interlocutor.

*Advocates' MS. No. 662, folio 309.*

1677. November 27. CARSAN *against* MAXWELL.

CARSAN obtains a decret for making arrested goods forthcoming, before the Stewart of Kirkeubright, against Maxwell; who suspends,

*Imo*, It bears no dispensation. ANSWERED, The defender was compearing in the decret, and so had acknowledged, founded, and prorogated the jurisdiction, without proponing that dilator; *et primus actus judicii est judicis approbatorius*. And it was within ten days of a head-court, at which time inferior judges need no dispensation. REPLIED, The compearance is disclaimed as officious, simulate, and patched up; and the decret bears not that the procurator compearing for him had a mandate. DUPLIED, A mandate was presumed, and the decret needed not bear it. Yet see *supra*, No. 576, *M'Min* and *Newlands*, [19th June, 1677.]

Their second and third reasons of suspension were, that the decret was intrinsically null, because it bears defences were repelled, and docs not tell what they were, only because the judge knew them to be frivolous and dilatory. *Item*, that compensation was proponed and repelled.

But the reason of this was because it was proponed generally, without a special condescendence whereon the compensation was founded. I offered to admit any relevant exception of compensation, or otherwise, providing it were instantly verified. Which they failyeing to do, after several side-bar callings, the letters were found, by my Lord Strathuird, orderly proceeded.

*Advocates' MS. No. 663, folio 309.*

1676 and 1677: JOHN HADDOWAY *against* ——— INGLIS and WILLIAM SOMERVELL.

1676, December 12.—IN an action for maills and duties, pursued by John Haddoway, of some lands beside Douglas, compeared one Inglis and Mr William Somervell, and competed upon another infestment; wherein possession being admitted to Haddoway's probation, he, for proving his infestment was clad with possession before their right, produced, *Imo*, A discharge of the feu-duty from the Marquis of Douglas, superior. The Lords found, at the advising, this alone was not a sufficient proof of possession. *2do*, He produced a holograph discharge, granted by him to the tenant possessor of the land of his year's rent.

The Lords found such discharges were not probative of any man's possession, because it did not prove *quoad datam*, and might have been recently granted after