

No 114.

ped the process of aliment till the marriage betwixt them be proved before the Commissaries of Edinburgh: Albeit it was *alleged* for the pursuer, That where a consequent of marriage is concluded in a summons, and the marriage denied, the Lords are in use to allow such a proof of the marriage as the nature of the things admit of, without any previous constitution or prejudicial process before the Commissaries of Edinburgh; as in declarators of bastardy, or *ultimus hæres*, or in a pursuit for a terce; and consequently in this action of aliment, where the pursuer's marriage is denied by the defender, the Lords should allow it to be proved even *in prima instantia*, though the question was never tabled before the Commissaries: For albeit a direct declarator of marriage or adherence is more proper before the Commissaries, the Lords are most competent to judge in this pursuit, whereof the conclusion is a civil interest or effect arising from marriage, and to determine the proof of marriage, in so far as necessary to support either defence or reply: In respect it was *answered* for the defender, That the Commissaries of Edinburgh being established judges competent to cognosce marriage in the first instance, though liable in subordination, to be regulated by instructions from the Lords; the pursuer's libel which imports marriage to be proved or inferred from qualifications, must be remitted to the Commissaries, proper judges in the first instance of marriage, which is the foundation of the libel, and all the consequences thereof: *2do, Non sequitur*, that because the pursuer of a bastardy, or *ultimus hæres*, (who needs not to libel marriage) is not put to prove it in a prejudicial process before the Commissaries, therefore such a previous trial is not necessary to the pursuer of the present aliment: For bastardy, &c. is not (as aliment) the effect or consequence of the marriage; but on the contrary, marriage excludes the libel of bastardy, &c.: And when marriage is admitted to be proved before the Lords, by way of defence for excluding bastardy, that defence respects only held and reputed married *de præterito*, which proof would not infer an obligation upon the parties to adhere, in order to which an *individua vitæ consuetudo* must be tried by the *judices Christianitatis*: Nor is there any contingency betwixt this, and the process of a relict for her terce, whose cohabitation with the defunct till his death without being questioned, entitles her to a terce, act 77. Parl. 6. James IV. without further proof of marriage; whereas, the pursuer's marriage is here denied by the defender in his own lifetime, and requires to be positively proved before the Commissaries, in order to aliment her.

Forbes, p. 487.

No 115.

The Lords
are not judges
of perambulations
and
molestations

1711. December 4.

The MARQUIS of Annandale *against* Sir PATRICK MAXWELL.

THE Marquis of Annandale having some lands lying contiguous to Sir Patrick Maxwell of Springkell's lands, the marches whereof were debateable and

unclear, the Marquis takes forth of the chancery a brieve of perambulation, directed to the steward-depute of Annandale, for settling the controverted marches betwixt them. Of this brieve, Sir Patrick Maxwell raised an advoca- tion to the Lords, on these reasons, *1mo*, The judge to whom it is directed is most incompetent and suspected, being the Marquis's own depute, he being principal steward: *2do*, Some of the lands lie within the Duke of Queens- berry's regality of new Dalgarno, and who will be a more fit and impartial judge: *3tio*, Sir Patrick has a declarator of property of these lands, craved to be perambulated, depending, which is a prejudicial action, and must be first discussed. *Answered*, The cause must necessarily be remitted, seeing the Lords are not judges to perambulations and molestations in the first instance, as appears by the 79th act 1579, and act 42d 1587, these causes being best discussed on the ground of the lands by a sworn inquest of neighbouring gentlemen, where the judge, witnesses, and inquest, can visit and perambulate the marches, which the Lords cannot possibly do at Edinburgh, but behoved to remit it *ad probos et fideles homines patriæ*; and therefore Stair, B. 4. tit. 3. § 14. & B. 4. tit. 27. says, it must be remitted to be tried in the country, there being no remeid to clear marches, but to red them on the ground controverted. And to the first reason of advoca- tion, it was *answered*, There is nothing more usual than for principals to pursue actions before their own de- puties. But here it is the concern of Graham of Mosknow, Irvine of Cove, and other neutral gentlemen, as well as the Marquis's. To the 2d, *Non con- stat* any of them lie in a regality, it is *gratis dictum*; but though it were, the the regality is situated within the stewardry, and so has no privilege. To the 3d, *Esto* he had a declarator of property, the same is most compatible with this perambulation, which is *actio finium regundorum*; they are not quarrelling his right of property: The only quarrel here is about the marches, which his property cannot hinder. THE LORDS repellèd the reasons of advoca- tion, in re- spect of the answers, and remitted the cause back to the steward-depute.

Fol. Dic. v. 1. p. 496. Fountainhall, v. 2. p. 682.

SECT. III.

Actions peculiar to the Court of Session.

1618. November.

A. against B.

No 116.

FOUND, That a declarator of nullity of a right cannot be pursued in an in- ferior court, albeit the party so oblige himself by contract.

Fol. Dic. v. 1. p. 497. Kerse, MS. fol. 46.

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in the first instance; and they refused to advocate a brief of perambulation, though it was raised at the instance of the steward of a stewardry, and directed to his own deputy.