and therefore, as the sheriff, who has an ordinary jurisdiction, might have continued the Court, having once fenced it, so might the messenger, as in effect but his depute: and therefore they found his prorogating the day no nullity, unless they would condescend on some pregnant and considerable damage they sustained thereby.

Yet one who will but consider the reason of the 6th act of the Parliament held in *June* 1649, (though rescinded,) will think thir diets peremptory, else there was no need for that act. *Vide* this at more length, [*December* 1674, the same parties,] *infra No.* 452. *Vide supra* 67, [*July* 8, 1670.]

The last ALLEGED nullity was, that it was neither deduced within the bounds *illius districtus et jurisdictionis* where the lands apprised lay, nor within the tolbooth or Session House of Edinburgh, which is *communis patria* to all Scotland, but at Coupar. ANSWERED, That what the messenger did in this was by warrant and express dispensation from the Lords: this past also to interlocutor.

The Lords found that their warrant ought not to be a snare to any of the lieges; and therefore sustained the apprising, notwithstanding it was led neither *infra illum vicecomitatum* within which the lands lay, nor at Edinburgh; yet, in regard of the singularity of this, and the preceding point, about adjourning the diet, the Lords declared they would make an act to be a *caveat pro futuro* how far a messenger's power shall reach in these cases.

There were four great interlocutors. [*See December* 1674.]

Advocates' MS. folio 104.

1670, and 1671. LERMONT *against* the Earl of LAUDERDAILL.

1670. *June* 29.—THE Earl was pursued as donatar to the forefaulture of the Laird of Swinton, at the least, as intromitter with the mails and duties of his lands, to pay this debt, which was contained in the disposition of the estate to that laird of Swinton, in whose place the Earl is come; and so is *debitum fundi et reale*, and must affect the lands.

This pursuit was not sustained unless they would say the estate was burdened with that debt in the procuratory of resignation, and in the infeftment following thereupon.

Act. Spotswood. *Alt.* Sinclair. *Advocates' MS. No.* 45, *folio* 77.

1671. *July* 5.—THE action whereof we have mentioned *supra* at the 45th No. *Lermont* against *the Earl of Lauderdale*, being again called, because they controverted about the scroll of the act: it was ALLEGED that my Lord Lauderdale was liable to satisfy the said debt *super hoc medio*, that he being the King's donatar to the forfaulture of John Swinton of that ilk, he and the King must get the right *prout optimum maximum erat*, and as it stood in the said John's person: but *ita est* in the disposition made by Sir Alexander, (who was John's father,) in favours of John his son, he reserves *in gremio juris* a power to affect and burden the lands disponed with 52,000 merks in what manner he pleased; and thereafter having borrowed from the laird of Smeton, (in whose right Lermont is now come,) 14,000 merks, he declared it was his intention to exercise his power he had

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 haill 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