

by the disponer ;—whether to the behoof of the said person, in whose favours it was made, or not ; or upon any other account,—for keeping the same, so that the disponer might call for and alter it :

It was found, 1. That the disponer might have revoked the same ; in respect it did not appear, that it was delivered to the behoof of the person to whom it was made.

This decision seems to be hard ; in respect the disposition was now in the hands of the receiver ; so that it was to be presumed that it was delivered, either to him, or to the said other person to his behoof : and the delivery ought to be construed, and presumed to have been, *ut operetur* : and the nature of the act itself imports that it should be to the behoof foresaid : It not being to be imagined, that the disponer had intended to have retained the power in his hands, either to make the said right effectual, or not, he would have given it out his hands.

2. The Lords found, upon the testimony foresaid, That the disponer having revoked the said disposition not simply, but to the effect foresaid, that the said two dispositions should be granted : the pursuer therefore had not right to the whole lands contained in the said first disposition ; but that the same should divide, conform to the said two dispositions.

Mr Thomas Hay, *Clerk.*—*In presentia.*

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1677. February 1. MASTER of RAE *against* SINCLAIR of DUMBAITH and OTHERS.

SINCLAIR of Dumbaith, Sandside, and others, having, in a hostile manner, invaded the Lord Rae's country : There was a criminal pursuit intented against them, for the crimes committed upon the occasion foresaid ; but the said pursuit being taken away by a remission, there was thereafter a spuilie pursued at the instance of the Master of Rae, having assignation from his father, and by his tenants whose goods had been robbed and taken :—And it being ALLEGED against the said pursuit, that it was prescribed ;—The Lords sustained the reply,—That the prescription was interrupted by the foresaid process before the justices.

And again, this day, a summons of spuilie, which had been formerly intented, being produced ;—And it being ALLEGED, That, by the said summons and execution upon the same, the prescription was interrupted ;—

The Lords found, That the same did not interrupt ; in regard it appeared, that the names of the defenders have been blank in the said summons, and since filled up with another ink. And it appeared by the executions, that the same were at the instance of Gray of Arbo, and others, mentioned in the summons, without specifying the said other persons : And the defenders had settled with, and satisfied Arbo ; so that it appeared, that the names of the said other persons had been filled up in the body of the summons, of purpose to be a ground for the said reply. But though the Lords did not sustain the process, as to the effect of giving the pursuer *juramentum in litem* ; in regard the goods libelled, were libelled to extend as to the number of goods, and the damage sustained by

the pursuer's cedent, to vast sums; exceeding the value of that whole country: yet the Lords did adhere to their former interlocutor,—That they would consider, the time of the advising, the profits of the goods as in a spuilzie.

It occurred to some of the Lords, and was moved,—whether *juramentum in litem*, being given to the party wronged; and upon that account,—that the quantities and the kinds of goods, taken from him, could not be so well known to others and proven,—if the same be a personal favour; or if it may be extended to an assignee?

Newbyth, *Reporter*.

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1677. June 26. MR JOHN KINCAID *against* GORDON of ABERGELDIE.

MR John Kincaid having pursued Gordon of Abergeldie, as representing his father by behaving: His defence was,—That he had right by an expired comprising, whereby his father was denuded; so that he could not be heir to him. But in the same process, in respect a reduction and declarator was intended at the said Mr Kincaid's instance, within ten years after the apparent heir had purchased a right to the said comprising;—

The Lords, though there were no order used, did, *simul et semel*, sustain the said processes; and appointed count and reckoning, and auditors.

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