1672. *February* 18. The EARL of NITHSDALE *against* The FEUARS of DUNCOW.

THE Earl of Nithsdale pursues removing against the tenants of Duncow, who alleged Absolvitor; because, they being the ancient farmers to the king in this barony, the Earl of Nithsdale having gotten some pretence of right thereto, did pursue this removing to put them from their ancient feudal tenements, which, by their industry, they had improven above their old rent; and they having raised improbation and reduction against the Earl, and having commissioned some of their number to go with the messenger for using of the citation, the Earl's servants did, by his command and direction, invade and wound them, to the effusion of their blood; and having brought them back to the Earl's house, in their blood, he did approve his servants' deed, and put them in his pit, in prison, three days: so that, by express Act of Parliament, of the date 1594, cap. 219, the Earl hath amitted his cause; for it is thereby declared, That if the pursuer be invaded, he shall have decreet without further probation; and if the defender be invaded, he shall be assoilyied. So that this necessary Act of Parliament for securing of parties in processes, and for the honour of the king's authority, both instructs these poor men's reduction against the Earl, and affords them a perpetual defence in the removing. The defender alleged Absolvitor; because this being a statute exceedingly penal, is not to be extended above the express tenor thereof: and so can only reach to the actual invaders; but no way the Earl, who was absent, and coming home, and finding that there had been some contest and blows betwixt some of those tenants, who came rudely up into his house to summon him, he did put some of them into prison upon the Saturday, and caused his bailie of regality hold court upon Monday; and having tried the fact, he liberated the tenants, and fined the servants; so that the Earl had done nothing but what he might have lawfully done; and it can neither import warrant nor approbation of his servants' illegal deed done in his absence, before it was tried and found by the judge. *2do*. The Earl cannot be liable for command, warrant, or ratihabition by any probation by witnesses; which, in these cases, are not admittable, but only by writ or oath of party. *3tio*. Whatever the invasion may import as to the right of these tenants that were invaded, it cannot be extended to the rest, though they were commissioned by them; there being no such thing contained in the Act, as that the factors or commissioners of parties being invaded. It was replied, That the Act bears expressly, "the invaders, or those that are art and part in the invasion;" which must necessarily be proven by witnesses; because it cannot be imagined that invaders will give writ to instruct it; and it is to be presumed, that those who will so invade, resolve not to confess it, though it were put to their oath: and albeit command or ratihabition in contracts is not probable but by oath or writ, yet, in delinquency, where no writ can be expected, it is. It was duplied, That, albeit the Act bears "that the invasion may be tried criminally, or by recognition," in which case witnesses may be used; but that order not being used in this civil process, witnesses are not receivable in matters of this importance, to lose inheritance; for, in the criminal trial, exculpation would be competent to the other party, who would have witnesses thereupon. The Lords found, That they would not prefer either party to the probation by witnesses, but gave a joint probation; and

superseded to give answer whether the invasion would extend to any more than the persons who were actually invaded, till the probation were closed.

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1672. *February* 28. DAME MARGARET FOWLIS *against* GILMOURS.

UMQUHILE Sir Andrew Gilmour, advocate, not having any children for a considerable time after his marriage, disponed his whole means and estate to Dame Margaret Fowlis, his spouse, and her heirs; and, having thereafter one daughter, he disponed of new his estate to his daughter, reserving her mother's liferent, and providing, that, if his daughter died unmarried, and without lawful children, before her mother, she remaining unmarried, that the fee thereof should belong to her mother; and made a testament to the same effect: And some years thereafter his daughter died. Sir Andrew's means being due by bond, which, having no clause of infeftment, belonged to his nearest of kin, and to the nearest of kin of his daughter; and at the time of the daughter's decease, the late President, and the relict of William Baillie, being father-brother and father-sister to the daughter, were nearest of kin. There was no testament confirmed of Sir Andrew's daughter in the President's life;—and now the said Dame Margaret Fowlis pursues a declarator, that Sir Andrew his whole means and estate belongs to her by the disposition and testament; and called Alexander Gilmour of Craigmiller, the President's son, and Margaret Gilmour, relict of the said William Baillie: who alleged Absolvitor; because the terms of the disposition and legacy, in favours of the pursuer, bears expressly—"she remaining unmarried;"—whereby the same is a conditional provision, and cannot be claimed by the pursuer during her life, because she is still capable of marriage; so that it must be understood to be a suspensive condition: And though it should but import a resolutive condition, that the pursuer should be fiar after her daughter, yet so as if she happened to marry, her right ceaseth, she ought to find caution, that in case she marry, to restore. The pursuer answered, That the clause in the disposition and testament did not import a condition, that the pursuer should remain unmarried all her lifetime,—for it is not put as a provision or clause by itself, but is annexed to the daughter's dying without issue before her mother, and she remaining unmarried: so that remaining unmarried can only be understood the time that her daughter deceased without issue or marriage; which is evident to have been the defunct's mind; because he does not provide to whom the means should belong, if she happened to marry thereafter; which certainly he would have done, being so knowing a man. *2do.* By his former disposition, when he had no child, there is no such limitation, but it is absolute. *3tio. In dubio matrimonia non sunt restringenda:* though such a provision might have been valid, if it had been clearly the defunct's mind, yet being at most doubtful, it should be interpret with the greatest freedom to marriage. The Lords found the meaning of the clause to be,—The pursuer's remaining unmarried the time of her daughter's decease, and that it did not import a resolutive or suspensive clause, if she happened to marry thereafter.

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