

ANSWERED, The act of Parliament 1621, by confident persons, means only fathers, brothers, and sons, and not brother and sister-in-law, and such remote degrees; neither does the civil law æquiparat them in this case.

(Yet the Lords have found brothers-in-law confident persons, which is just our case here; See *Dury*, 23d March, 1624, *Duff* and *Kelly*: but did not find an uncle and nephew so; 28th January, 1625, *Levinston*.)

REPLIED, That this were to open a door to all fraud and collusion; and that, by the common law, the prohibition that is in consanguinity, either for marriage, diction of testimony, &c. is extended to all the same degrees of affinity, the affection being oftimes the same.

The Lords ordained the defender to condescend upon the onerous causes of her disposition; notwithstanding that it bore to be granted for onerous causes, in which cases strangers are never burdened with any farther probation: so that upon the matter the Lords inclined to find her a conjunct person.

See M'Kenzie's observes on the act of Parliament 1621, page 66, where they found her a conjunct person.

*Advocates' MS. No. 402, folio 218.*

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1673. June.

ANENT NON-ENTRY DUTIES.

IT is reported the Lords have found in an infeftment of annualrent, where the destination runs thus, the granterto pay annualrent as well not infeft as infeft; in that case the non-entry mails are only the blench or feu-duties. The reason whereof appears to be, because the creditor can ascribe what he has got to the said personal obligement, and not to the real right; but if it want that clause, then the annualrent, according to the received practique, being in non-entry, *valebit seipsum*. But our custom may deserve correction, where, upon a nicety of law, an annualrent falling in non-entry is entirely due to the superior, whereas equity seems to ordain that the superior's interest here should be no other than in other non-entries; all of them being unfavourable, and to be restricted. See more of this *alibi*.

*Advocates' MS. No. 403, folio 218.*

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1673. June. DR ARCHIBALD STEVINSONE *against* The EARL OF TWE-DALE.

DOCTOR ARCHIBALD STEVINSONE, pursuing (as executor to his father Mr A. Stevinson, minister at Dunbar) the Earl of Twedale, as representing the deceased Earl, his father, upon one or other of the passive titles, for payment of his proportion of the stipend due for the lands of Beltane, for the year 1630: ALLEGED, He nor his father could never have been liable for that year, because the teind, yea, the stock itself, was wasted by the calamity of war, and the English their incoming that year, and lying about Dunbar.

ANSWERED, That he having pursued the Earl of Roxburgh for some stipend

owing by him for the same year, he had proponed the very same allegiance; and it was repelled by the Lords, who found where the minister was only a stipendiary, and no beneficed person, though the teind be wasted by calamity of war, or other accident, that did not liberate him who had right to the said teinds, because that loss might be compensated and supplied by the uberty of preceding or subsequent years; and which is the reason assigned by the law, wherefore tenants can plead no abatement upon the head of sterility or vastation. *L. 15, p. 4, D. Locati; L. 8. et 18, C. eodem.*

The Lords adhered to their interlocutor given in Roxburgh's case.

*Advocates' MS. No. 404, folio 219.*

1673. *June.*

ANENT COMPRISINGS.

IN an action for maills and duties at the instance of a compriser, it fell to be contended, that a first compriser having arrested, and by virtue thereof obtained payment of his annualrents, he was bound by the act of Parliament 1661 (declaring second apprisers within year and day to come *pari passu*, and to be reputed a part of the first comprising, as if but one apprising had been led for all their sums,) to communicate proportionally what he had so got to the said apprisers within year and day. (And yet the intent of the act of Parliament 1661 may be eluded easily, if their diligences were proper.)

It was not decided. Only it seems he ought to communicate nothing, save what directly and immediately flows from his comprising. What if he has attained payment, in whole or in part, by virtue of some other right he was necessitated to acquire, or by an inhibition he had served on his bond, or by confirming executor creditor? Sure posterior creditors apprisers should claim no share in that as common; *nam sibi vigilavit; meliorem suam conditionem fecit; jus civile vigilantibus scriptum est; non revocatur id quod precepit; L. 24, p. 1, D. Quæ in fraudem creditorum facta sunt, ut restituantur.*

*Advocates' MS. No. 405, folio 219.*

1673. *June.*

STREET and JACKSON *against* MASON.

IN the action pursued by the English merchants, Street and Jackson against Mason, the case was, James Mason, elder, merchant in Edinburgh, having, in 1665, granted heritable bonds to thir two Londoners for L.1000 sterling, whereon they were infest in his lands of Howboot and Gayside; they pursued a pointing of the ground. In which action compareance was first made for my Lord Torphichen, superior, his donator to Mason's liferent escheat, who craved to be preferred.

ANSWERED, That Torphichen having received the said Mason's son vassal in the said lands, and he being publicly infest before his father's rebellion, he could not thereafter, as superior, gift his liferent escheat of these lands, whereof the father, who became afterwards rebel, was denuded by a resignation, accepted by the said superior, in favours of his son, and whereon infestment was taken by the son.