1671. *July* 6. BOWARS *against* The LADY COUPER and THOMAS BANNATINE, Donatar.

IN the foresaid action, at Bowars' instance, against the Lady Couper; compearance being made for Thomas Bannatine, who produced his gift to the Lord Couper's escheat, with a summons of general declarator, he thereupon ALLEGED,—That he ought to be preferred to the Bowars; because the Lord Couper died at the horn, and his escheat belonging to the King, he, as donatar, had right to the whole moveables disponed to the lady.

It was ANSWERED for the said Bowars, That, their father having obtained decreet against the Lord Couper, in his own time, for payment of his bygone stipend, and having pursued the lady as intromitter,—the Lords, by their interlocutor, had found her liable, and debtor, notwithstanding of her disposition; whereupon litiscontestation was made, and, by an act extracted, her intromission admitted to their probation; in respect whereof a donatar, who had but lately obtained a gift, and whereupon no diligence was done, and not so much as general declarator obtained, could not compete with them.

The Lords did prefer the donatar, and admitted him for his interest. Which was very hard.

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1671. *July* 7. WALLACE *against* CORSANE.

CORSANE, and several other heritors of the shire of Dumfries, having given bond to Wallace for 300 merks; whereupon being charged, did suspend upon this reason,—That the bond, bearing that the granters did oblige themselves, and their heirs, and not conjunctly and severally, they were only liable *pro rata*, and none of them for the whole debt.

It was ANSWERED, That it was clear, by the bond, they were all bound, conjunctly and severally, in so far as, in the obligatory part for payment of the annualrents, it is expressly made, that the granters obliged themselves, conjunctly and severally, as said is; which words show that their meaning was, that they were so obliged for the principal sum; and evince that these words, conjunctly and severally, were only omitted and left out by the negligence of the notary, who was writer of the bond; which likewise appears by the clause of relief of the bond, which bears, that every one of the granters are obliged to relieve others of their proportional part; which was to no purpose, if they were not bound conjunctly and severally.

It was ANSWERED, That the bond was opponed; which being conceived, as to the principal sum, that the granters were only obliged, and their heirs, without mentioning conjunctly and severally, in law none of them was liable but for their own part; and, albeit it might appear to have been an omission of the notary, yet that cannot be supplied to their prejudice, against the express terms of the bond, by any posterior clauses, and the meaning thereof.

The Lords did find the letters orderly proceeded against the suspender, who was but one of the subscribers; and found, That the whole bond, being considered as it was subscribed, it was thereby clear that the debtors did acknow-

ledge they were bound, conjunctly and severally, both for principal and annualrents, in respect of the clause of mutual relief: and that, they being so bound for the first term's annualrent, as said is, did suppose that they were so bound for the principal sum; which did supply the omission of the notary.

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1671. *July* 8. GEORGE IRVING *against* The DUCHESS and DUKE of BUCCLEUCH, and PATRICK SCOTT of LANGSHAW.

IN a suspension of double poinding, raised at the instance of Jean Scott, relict of John Maxwell of Broomholm, against Langshaw, as donatar to her husband's escheat, and the said George Irving, as executor-creditor to her husband, and who had obtained decreet against her as intromittrix;—it was ALLEGED for Langshaw, That he had right as donatar, because Broomholm was within the regality of Langholm, belonging the Duke and Duchess of Buccleuch, from whom he had right, and to whom Broomholm's escheat did fall, as lord of the regality.

It was ALLEGED for the said Irving, That he ought to be preferred, being executor-creditor, and thereupon having obtained decreet; because the barony of Langholm was not erected in a regality long after Broomholm was rebel; and his escheat fell, and so could not belong to the lord of regality, who could have no right but from the date of the erection.

The Lords preferred the executor-creditor; and found, That the donatar to a single escheat, by a gift from the lord of regality, had no right but from the date of the erection: and that the escheat, before that time, did belong to the King or his donatar, who could only pretend right and enter in competition; whereas no such gift was produced.

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1671. *July* 8. ANDREW and ADAM STEVEN *against* CORNELIUS NEILSON.

IN a reduction of a disposition, made by Andrew Steven to the said Cornelius, at the instance of Adam Steven, brother to the said Andrew, upon the Act of Parliament 1621, That it was done in defraud of the pursuer, who was a lawful creditor to his brother by a bond of 1000 merks; and that the disposition of the lands to Cornelius, being worth £10,000, was only made for 1000 merks, the said Cornelius being a conjunct person to his brother:—It was ANSWERED to the reason, That this reduction could not be sustained at the pursuer's instance, because the said Adam's bond was a mere donation; and the defender having charged Andrew for warrandice of his right, the said Adam had become cautioner in the suspension for his brother, who was granter thereof; *et quem de evictione tenet actio, eundem agentem repellit exceptio.*

It was REPLIED, That his being caution in a suspension could not hinder the reduction; because, if he prevailed therein, the warrandice would be taken away with the disposition, and the bond of caution did fall *in consequentiam.*

The Lords did find the answer relevant, founded upon the bond of cautionary; and that he, being cautioner for warrandice of their right, could not reduce the same upon the Act of Parliament 1621, anent divours; but prejudice to him to insist upon the reason of fraud and circumvention. *Page* 183.