

1671, *July 4.*—IN the foregoing case about the executor creditor's diligence, taken to interlocutor at No. 191; the Lords, because it was a general leading case, ordained both parties to produce practiques anent it *hinc inde*.

*Advocates' MS. No. 197, folio 101.*

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1671. *July 5.*

PROCESS.

A CERTAIN person pursuing on a bond for payment-making to him of the sum therein contained, and the annualrent thereof from the date. Against which it was ALLEGED, No process for the annualrent, because the bond bears none. REPLIED, Though it bears no annualrent, yet shortly after its date, the debtor being charged, he was denounced and registrate at the horn; from which time he must be liable to the creditor, now pursuer, in annualrent. DUPLIED, This is noway receivable by way of reply; but in all form and justice he should have libelled thereupon, and given out the horning with the process as one of its instructions, and *in modum tituli*. Craigie inclined to sustain it by way of reply; but I observed Sir G. Lockhart and the most learned in the house, to differ from him therein.

*Advocates' MS. No. 200, folio 102.*

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1671. *July 5.* HEW DALLAS KENNEDIE, Sheriff-Clerk of Aberdeen, &c. *against* SIR GEORGE MACKENZIE of Tarbet.

HEW DALLAS KENNEDIE, sheriff-clerk of Aberdeen, &c. having charged Sir George Mackenzie of Tarbet, to make payment of 20,000 merks conform to his bond. He suspends upon this reason, that the bond was conditional, *viz.* if the gift of Innerallochie's ward and marriage, (the right whereof he had acquired from this pursuer,) should prove effectual and profitable to him; but *ita est*, this condition was never purified; but to the contrary, a second donatar to the said ward and marriage *in foro contentioso*, was preferred.

ANSWERED,—They confess the condition; but Tarbet *in quantum lucratus est* by that gift must be liable to the pursuer: but so it is, by that decret of preference, there is 5000 merks appointed to be paid to him out of the said ward by the second donatar, and that in consideration of his gift: *ergo*, his bond must stand good against him as to that 5000 merks, and the pursuer is content to restrict it thereto.

REPLIED,—The bond can never subsist *quoad* that 5000 merks; because expressly by the decret it appears to have been granted by the Lords, in respect of the vast expenses Tarbet was at in defending the plea against the said second donatar; and so in effect he had no benefit by that gift.

DUPLIED,—He can never be heard to impute the said 5000 merks as the re-