payment of 2000 merks, it was ALLEGED for the defender, That he ought to have compensation for the like sum, in so far as he had right to a bond, wherein the pursuer's goodsire was cautioner; for instructing whereof, he produced a decreet of registration, obtained before the Sheriff of Edinburgh.

It was REPLIED, That the decreet being given against the principal, who was only called in that process, it cannot verify the debt against the pursuer, as representing his goodsire, who was not called, unless the principal bond were produced; seeing, as to the alleged cautioner, it was *res inter alios acta;* and the decreet being but the assertion of the clerk, cannot verify a debt more than an extract of a registrate bond after the death of the granter, or of a transumpt to make faith against a party not cited to compear.

It was DUPLIED, The decreet of registration of a bond, whereof the principal was given in to be the warrant of the decreet, must be sufficient to verify the debt against the cautioner, unless there were an improbation of the principal bond depending.

The Lords did repel the defence of compensation, founded as said is; and found, That, unless the cautioner or his representatives had been called in the action of registration, as well as the heirs of the principal, the decreet of registration could be no ground of a pursuit against them; especially seeing there had never been any action intented against the cautioner or his representatives for the space of fifty years.

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1673. *January* 2. DAVID HAY *against* MR JOHN BELSHES.

IN an exhibition at the said David Hay's instance, as apparent heir to Sir Alexander Belshes of Tofts, for inspection of the said writs *ad deliberandum*,— it was ALLEGED for the defender, That he had right to the said lands by adjudication, which had proceeded upon the renunciation of the pursuer's mother, who was the next apparent heir, whereof the legal was long since expired; so that his right, being a legal diligence, he was not obliged to exhibit the same; unless the pursuer would serve himself heir, and thereby be liable to the debt for which diligence was done.

The Lords sustained the defence, and found, That creditors, such as comprisers and adjudgers, who had acquired real rights by legal diligence, were not obliged to exhibit the same to the apparent heir of the debtor.

Thereafter it was ALLEGED, by way of reply for the pursuer, That he offered to prove, by the defender's own oath, that the debt which was the ground of the adjudication was satisfied and discharged, and so could be no ground of the defence.

It was ANSWERED, That the allegeance of payment could not be proponed by an apparent heir in an exhibition *ad deliberandum*, against a singular successor; but the pursuer ought to be served heir, and pursue a declarator of reduction of the adjudication upon that ground.

The Lords, considering that exhibitions *ad deliberandum* were most favourable, and it being referred to the defender's oath that there was a discharge of the debt for which the land was adjudged, they did sustain the pursuit, in re-

spect of the answer made to the reply; and ordained the defender to depone upon his having a discharge of the debt, and to exhibit the same, if it was in his possession, that the pursuer might advise if he would enter heir or not.

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1673. *January* 14. CAPTAIN ROSS *against* The EARL of NIDSDALE.

CAPTAIN Ross being infeft in the Castle of Dumfriece *in anno* 1654, and in possession till the year 1657, did pursue the Earl of Nidsdale for intrusion, and to repossess him, and for the violent profits.

It was ALLEGED for the Earl, That the said house being garrisoned, by order of the Council, with a party of the king's forces, upon their removal, he did enter to the possession, which was *vacua possessio;* and he, standing infeft in the house, was not obliged to repossess the pursuer, seeing he had a full and perfect right thereto, and was content instantly to debate his right with the pursuer, whose right did only flow from the deceased Earl of Nidsdale, who was denuded by comprising.

It was REPLIED, That the pursuer, not having voluntarily quit his possession, but only in obedience of a public order, he did retain the same until that impediment should be removed; which was in law sufficient against any allegeance of *vacua possessio.*

The Lords did sustain the action for repossession; and ordained, that, *ante omnia,* he should be restored to the possession, reserving to both parties to debate their rights as accords.

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1673. *January* 15. The LAIRD of ROWALLAN *against* The LORD BARGENIE.

IN a pursuit at Rowallan's instance, as assignee constituted by the Laird Pinkell, in and to a bond granted by the Lord Bargenie, for implement thereof:—

It was ALLEGED, That it was offered to be proven, by the pursuer's oath, that he was only intrusted to the behoof of Pinkell, who was denounced the king's rebel, and so had not *personam standi in judicio.*

It was REPLIED, That that allegeance was only personal; and the right of the bond being standing in the person of the pursuer, the defence could not militate against him, unless they could allege that he was at the horn.

The Lords did repel the defence, in respect of the assignation standing: which may seem hard, seeing that the trust was offered to be proven by Rowallan's oath; which being granted, he could only be looked upon as a procurator; in which case the defence was relevant: otherways, it were easy to rebels to evite the punishment of the law, which chiefly consists in that they cannot have *personam standi in judicio.*

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