

It was REPLIED for Lothian, That the bond being blank in the creditor's name, and in Sir Thomas Nicolson's custody, not owned or disposed of by him, nor amongst his other writs, but in another box, in his closet; no man could claim right to it, unless Sir Thomas, the depositary, had declared the terms of the depositions. And no schedule by Cockpen's hand could be equivalent; and, if it could have any effect, his oath could not be refused, to declare upon what terms the bond was granted. And, as to Balmerino's oath, if litiscontestation had been made on any peremptor referred to his oath, and sworn, it had been something; but there is no such thing here, but only an oath *ex officio*, whereupon Balmerino was interrogated how he came to this bond, and if he delivered money at the subscribing of it.

The Lords having, *ex officio*, examined the Lord and Master of Balmerino, James Chalmers, and Cockpen; Balmerino's oath did bear,—That, at the subscribing of this bond in question, he being then absent, his friends who transacted for him, did declare to him, that there being many bonds due to him, by Lothian, for the price of Fairnieherst lands, containing 32,000 merks, or thereby, which were delivered up to Lothian, in place whereof the bond in question was granted. James Chalmers depones, That he found this bond, after Sir Thomas Nicolson's death, in a box, in his closet, with some papers of Balmerino concerning Fairnieherst; and this schedule of Cockpen's about it; which he delivered to the Master of Balmerino, as belonging to his father. Cockpen deponed, That bonds about 30,000 merks were given up to Lothian, by Balmerino's friends, about the time of this bond; and that this bond was trusted to Sir Thomas Nicolson: but the cause of the bonds of 30,000 merks was, that some part of the lands of Fairnieherst, disposed by Balmerino to Lothian, to which Balmerino had not sufficient rights; and that this bond, in question, was intrusted to Sir Thomas for relieving Balmerino of the public debt,—for which he was conjunct with Lothian,—and for Lothian's concurrence with Balmerino against Bedford.

The Lords found, by the evidences adduced, That the bond in question was not delivered to Balmerino, but deposited in the hands of Sir Thomas Nicolson; and that no terms of depositions were proven, warranting the giving of the bond to Balmerino: and, therefore, suspended the letters *simpliciter*; and declared the bond null and void.

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1680. *December 15.* The LADY KINGLASSIE *against* MR JAMES ALEXANDER.

THE Lady Kinglassie pursues a declarator against Mr James Alexander, for reducing his right of Kinglassie's estate, upon a contravention of a clause in it, upon which he is obliged to call his children Ayton: he did propone a defence, which was sustained upon the 26th day of November last,—That the executions were null, not designing the defender.

The cause being again insisted in, and a new execution produced, bearing his designation, which he was allowed to see in the clerk's hands; he did now ALLEGE, That, having excepted against a summons with the first execution, and his dilator defence sustained thereupon, he was not obliged to answer upon any new execution; but was, in effect, assoilyed *ab hac instantia*, till he were sum-

moned of new, and a new process raised : for albeit the Lords, before interlocutor, will, *ex gratia*, suffer pursuers to mend their executions, and abide by the verity thereof, yet that is but *ex gratia*. And the ancient custom was, when the defender excepted against the executions, if they were defective, he was ever free, *ab instantia*, and not obliged to answer till a new process were raised : much more in this case, where, by interlocutor, the defence was sustained, upon the defect of the execution then produced.

It was ANSWERED, That defects in executions, albeit they may be strictly adhered to by the Lords, yet, *ex nobili officio*, they may allow some alterations ; and there can be none more favourable than this,—the addition of the defender's designation, *ubi constat de persona*. And the Lords' interlocutor finds only no process upon the execution produced ; but doth not assoilyie *ab instantia* ; and, though it did, there is nothing extracted.

The Lords sustained process upon this execution.

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1681. *January 7.* OGILVIE of LOGIE *against* JAMES HAMILTON.

OGILVIE of Logie having, by contract, disposed a quantity of victual to James Hamilton, he charges for the price.

JAMES SUSPENDS, upon this reason,—That his receipts of the victual bear expressly, that every boll wanted eleven pounds of weight ; whereof he must have abatement, conform to the Act of Council, ordering all bargains between merchants to be by weight.

It was answered, That this bargain was before the Act of Council, although the delivery was after ; and, therefore, the delivery behoved to be regulated according to measure, as the bargain was made, and not according to weight.

Which the Lords found relevant.

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1681. *January 11.* MR ROBERT LUNDIE *against* The MARQUIS of DOWGLASS.

MR Robert Lundie, as assignee, by Janet Jack, to a bond of 50,000 merks, granted to her by the Marquis of Dowglass, charges the Marquis for payment ; who SUSPENDS, and raises reduction upon these reasons, *1mo.* That albeit the bond bear borrowed money, yet it is notour that Janet Jack was a person of no fortune, but in the Marquis's family ; and was never able to lend any sum : and, therefore, unless she can instruct a just cause, the bond must be declared null, and *sine causa*. *2do.* If need be, it is offered to be proven that the bond was granted *ob turpem causam, scilicet stuprum* ; which is reprobated in law. *Stio.* This bond is discharged ; and the discharge is produced long before the assignation.

The pursuer ANSWERED, That all promises and obligations are, with us, effectual ; and, if there be no cause onerous, it is always interpreted gratuitous and donative. To the second, the law says, *l. 4, § 3, ff. De Conditione ob tur-*