process for restitution of it sustained here; seeing, by the rescissory Act of Parliament 1690, that case is expressly referred to the Commission. But, as to his conclusion that the 2000 merks bond should be redelivered to him, if he insisted on that ground of the common law that it was for the discharge of his fine, which he never got, and so was *causa data et non secuta;* that he could have the privilege of summary discussing, that being indulged to those within the compass of the act: but, if he insisted on the claim of right and Act of Parliament 1690, it behoved first to be instructed that he was in one of the cases there mentioned; though he argued, the case being as favourable, was the same. And here the decreet, not being recorded in the Privy Council books, (which should make the clerks liable on their omission,) the question occurred how it shall be proven what was the cause of his fining. Some proposed to take his own oath upon it; but the Lords ordained James Hay, upon oath, to produce the bond; and if it did not bear its cause, also to depone anent his knowledge of the cause of it, and for what the fine was imposed. *Vol. I. Page* 627.

1694. *July* 5. JOHN KINNAIRD *against* PATRICK M'DOUGAL.

THIS was a charge on a bond for £8 sterling. The reason of suspension was, —I offer to prove, by your oath, though the bond bore borrowed money, yet the true cause of granting thereof was for the price of a horse; and that being confessed, then I offer to prove, by the witnesses present at the bargain, that I having questioned the horse as having the cold, you in express terms promised to uphold it. ANSWERED,—That cannot be proven by witnesses, being a promise *et nuda verborum emissio;* and the debt being constituted by writ, the debtor's oath must be taken on the whole; and the manner of probation cannot be divided.

The Lords, *first,* found the allegeance not relevant, of his undertaking to uphold it, unless the suspender also joined this with it, that, how soon he discovered the distemper, he offered him back again, as the *edictum ædilitium* requires. *2do.* Found, if he, upon oath, acknowledged that the cause of the bond was for the horse's price, then it reduced it to this point, as if there had been no bond at all, or as if the bond had borne that express cause in its narrative; in which or either of these cases the terms and conditions of the bargain might be proven by witnesses; and therefore allowed it to be so proven here.

Vol. I. Page 627.

1694. *July* 5. JOHN HAMILTON in HALSIDE *against* GEORGE GORDON of EDINGLASSIE.

THIS was a summons on the passive titles, as lawfully charged to enter heir to his father and goodsire. The DEFENCES were,—No process, because he was designed *John,* whereas his name was *George;* and having now discovered their mistake, they mended it; but it was clearly vitiated. The Lords thought this was only *error in nomine,* seeing *constabat de persona;* and *esto* his first

name had been blank, yet his surname and designation were such as could be applied to no other but him.

2do. ALLEGED,—They had interlined the summons, and inserted his grandfather's name, as being lawfully charged to enter heir to him. The Lords found they might cut and mend their summons, any time before calling, on a new sight of the process in the clerk's hands. They also repelled this dilator, That he was charged to enter heir to his father; and *non constat* but he is yet alive, having gone some years ago to the Venetian service against the Turks, and was presumed *vivus;* for they considered he was habit and repute dead, and the party would take his diligence on his peril. *Vol. I. Page* 627.

1694. *July* 6. MARGARET CATHCART *against* BOYL of KELLBURN.

THE Lords found, seeing the term was circumduced against him for not proving his allegeance that he had arrested the rents by the baron officer's execution before her diligence, that it was not receivable now, on his offering to produce the same *in secunda instantia,* in a suspension, and purging his former failyie, to have been no design nor contumacy, because his agent's letter acquainting him therewith miscarried, or that the ranking of the creditors of Corshill is not yet closed: for the Lords considered that the term was circumduced against him in February, and yet it was not extracted till July thereafter; so he had four months' time; and, though the ranking be yet depending, yet it was determined she had the preference to him: which would wrong no other. *Vol. I. Page* 628.

1694. *July* 6. OGILVIES of KINALTIE and TARQUACHIE *against* LINDSAY of GLENQUHISH.

OGILVIES of Kinaltie and Tarquachie against Lindsay of Glenquhish, about a head roum, wherein neither of the parties were *expressum* infeft, but both of them pled it to be part and pertinent of their properties. The Lords allowed a conjunct probation as to their deeds of property and possession in the lands controverted these forty years bygone. But Lindsay, craving deduction of fifteen or twenty years' minority from Ogilvies' prescription, they reclaimed; because this would put them to prove sixty years' possession; which was impossible to do by witnesses under eighty years of age, who could not be got.

The Lords found they could not help them in this point; for the act anent prescription, in 1617, was clear that prescription ran against minors; but these years behoved to be deduced: and it altered not the case whether the prescription began before the minority existed or in the time when it was running.

On a bill, the Lords forbore that point of the minority till the conclusion of the cause; in regard neither of the parties had a special infeftment: which may alter the case. *Vol. I. Page* 628.