

foresaid quality of the bond laid no obligation to prove it, but only afforded the competitors an exception and defence, that he could not be liable, because he has not intromitted at all, or not to the value; and that being omitted, it is no nullity in Libberton's adjudication, seeing he offers yet to prove, that before he pursued, the condition was pursued by his uplifting more than the sum in the bond extends to, which is more than sufficient to support the diligence; 24th December 1703, Lockhart, No 83. p. 3886; and in a parallel case, 11th February 1680, Gordon *contra* Hunter, No 3. p. 170, an adjudication on a bond bearing requisition was sustained, though it did not mention previous requisition was used, seeing it was produced *ex post facto*, when the want of it was quarrelled; and the Lords have sustained adjudications on clauses of relief and warrandice, though the same were not incurred by distress, as is marked by President Falconer in November 1685, Burnet, No 12. p. 140. *Replied*, This way of arguing confounds pure and conditional obligations, taking away the difference betwixt them, and making them to have the same effect as to producing of actions; and indeed these topics from parallel cases are very inconclusive and fallacious. By an apparent resemblance of cases, men are led insensibly from things evidently reasonable to others as obvious absurdities. THE LORDS thought there was no reason to annul adjudications on such informalities as these; but being restricted to principal and annualrent, they might subsist as a security, though accumulations, penalties, and termly failzies might be cut off by such omissions; and therefore they sustained this adjudication so restricted; Libberton yet proving these actual intromission, prior to his decret of cognition, with as much of the funds as the debt pursued for amounts to; and in case the probation shall fall short of that extent, then reserved to themselves to consider what should be the effect thereof.

Fol. Dic. v. 2. p. 307. Fountainhall, v. 2. p. 241.

1706. January 9.

The LORD BALMERINO *against* The EARL of STRATHMORE.

THE deceased Lord Balmerino as apparent heir to the Lord Couper, having commenced a pursuit against the Earl of Strathmore, upon a clause of warrandice in a contract of alienation in the year 1638, betwixt the Earl Kinghorn the defender's predecessor, and the Lord Couper; the LORDS found that the present Lord Balmerino being served heir to the raiser of the process who died in the simple state of apparenacy, and also to the Lord Cowper, might insist in the said process without necessity to raise a new one.

Fol. Dic. v. 2. p. 303. Forbes, p. 66.

No 62.

No 63.

No 63.

* * * Fountainhall reports the same case :

THE Earl of Strathmore's grandfather, in anno 1638, disposes to the Lord Couper the lands of Ingliston and Castleton, with the teinds, and gives warrandice against all farther impositions, augmentation of ministers' stipends, or other burdens whatsoever, that should happen to be imposed on these teinds. In 1649, the commission grants an augmentation to the minister of L. 143 more than what these teinds formerly paid ; whereupon the Lord Balmerino, as come in Couper's right, did raise a process in 1698 against Lord Strathmore, as representing his grandfather, to refund all the bygones, and to relieve him of the said augmentation and eviction in all time coming. *Alleged* for Strathmore, there was no valid active title in his person, neither did he connect his right to the contract of alienation whereon the distress and eviction is pretended ; seeing all he produced was a charter of recognition from King Charles II. in 1669, and a sasine thereon, as having recognosced by the Lord Couper's taking a base infestment on Strathmore's contract of alienation to him, the lands holding ward ; which is so far from giving Balmerino right to the said contract of alienation, that it rather voids and annuls the same ; *2do*, As to the bygones preceding Couper's death, there is no right produced for conveying of them, but only an attested double of a testament and disposition made by the Lord Couper, in favour of Dame Mary Ogilvie his Lady ; and she being afterwards married to the Lord Lindores, he, for any right he had *jure mariti*, and his son as apparent heir to his mother, assign and dispone the bygones to Lord Balmerino ; whereas an attested double is no more but a copy, unless either the principal or an extract, or at least a judicial transumpt, were produced. And the Lord Lindores and the Master his son have no right, unless they had been established by a sentence in the Lady Couper's lifetime during her marriage with Lindores ; which not being done, they remained still *in bonis* of the Lord Couper, and without a confirmation to him no right to these bygones could be transmitted. *Answered* for the Lord Balmerino ; That, besides all his former titles, he has now served heir to the Lord Couper his uncle, which gave him right to all the evictions since his death in 1668 ; and as for what preceded, Sir James Elphinston had confirmed executor-creditor to the Lord Couper, which would carry all preceding his decease. *Replied*, This is an evident acknowledgment that his title was defective, and so forced to supply it by a service, which cannot now be received, being several years posterior to the raising and executing the summons, which was preposterous, and *filius ante patrem*, to make up a title after the summons is called and insisted in ; and therefore he must, on this new title and service, intent a new process in regular form. *Duplied*, That where there is an antecedent natural title, the Lords have ever allowed the legal perfecting of it to be done *cum processu* ; as an apparent heir, having the *jus sanguinis*, may serve at any time before extract ; and was sus-

tained to the Lord Pitmedden against the Countess of Dumfermline, within these few years. If it were a single title, by assignation or the like, there indeed it must precede the summons, and cannot be retrotracted; but it is otherwise in services of heirs; and Sir James Elphinston's right as executor-creditor can never support Balmerino's title to the bygones preceding Couper's death; but that the attested double could give no title for preceding years without the principal were produced; and that Balmerino could not found on Sir James Elphinston's right; and seeing the retour was but lately produced, therefore they found my Lord Strathmore not bound presently to answer thereto, until he were allowed some days to see it in the clerk's hands, but that it ought to be received *incidenter* in this same process, without obliging Balmerino to raise a new one.

No 63.

Fountainhall, v. 2. p. 309.

1707. February 22.

JOHN JOLLY Merchant in Edinburgh *against* THOMAS BETHUNE of Tarvit, Mr ALEXANDER BRUCE, and Others.

No 64.

JOHN JOLLY merchant in Edinburgh, having by virtue of a general disposition from James Reid merchant there, not intimated in the granter's lifetime, raised horning upon a bond granted to the said James Reid by Sir William Preston of Valleyfield as principal, and the Earl of Kincardine as cautioner, without confirming the debt; and arrested in the hands of Thomas Bethune of Tarvit, Mr Alexander Bruce, and other debtors to the Earl, and pursued a furthcoming; the LORDS found the horning null and unwarrantable, and that the arrestments thereon could not subsist to have the effect of an arrestment upon a depending action, albeit the arrester should now confirm the debt. Though the general assignation would have been a good foundation for a summons, whereupon Mr Jolly might have used arrestment.

Fol. Dic. v. 2. p. 306. Forbes, p. 136.

1707. March 13.

GEORGE ROBERTSON, Writer in Edinburgh, *against* Dame ANNA HOUSTON, and the LORD JUSTICE CLERK, her Husband.

No 65.

GEORGE ROBERTSON, writer in Edinburgh, as creditor to the deceased Mr James Hamilton of Bangour, and now to John Hamilton, his son and heir, raised a reduction and declarator against Dame Anna Houstoun, and the Lord Justice Clerk, her husband, for his interest; concluding, that the pursuer had

A personal bond, granted by an apparent heir, sustained as: