

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.*

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.*

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-

imbursement of his expenses; because by his bond charged upon, he is bound and obliged to perfect the said gift on his own charges.

The Lord Craigie inclined to find, if Tarbet had uplifted the said 5000 merks, then to decern him in repayment thereof to this pursuer; but if it was yet in the debtor, *viz.* the second donatar's hands, then reserved action to the pursuer against him as accords.

*Advocates' MS. No. 202, folio 102.*

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1671. *July 5.* LAURENCE PARK *against* ELIZABETH BINNIE, Relict of MR. LAURENCE SCOT.

ONE Laurence Park, pursues Elizabeth Binnie, relict of Mr. Laurence Scot of Bavillaw, one of the clerks of Session, by way of declarator, to hear and see it found and declared that it was Mr. Laurence his mind and intention to settle the fee of a sum contained in a bond granted to him by ——— on the said pursuer as his godson. The acts out of which he elicited his intention, were these, *1mo*, That in his lifetime, before famous witnesses, he declared the right of that sum belonged to Laurence Park's father; *2do*, He ordered a writer to draw an assignation to the said bond, to be given by him to the said Laurence; which, though it was never subscribed, yet having died suddenly, it was found amongst his papers, and it was a thing he was minded to do. *3tio*, They referred it to the relict's own oath, that it consists in her knowledge, that it was her husband's firm resolution that this sum should belong to this pursuer, with sundry others.

My Lord Craigie was content to give them the Lords' answer thereupon; who, before answer, ordained all writs that might anyways clear the trust and Bavillaw's intention, especially the said unsubscribed assignation, to be produced.

*Advocates MS. No. 205, folio 102.*

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1671. *July 7.* MURDOCK *against* SIR ANDREW DICK.

SIR Andrew as administrator of the law to his son William Dick, sells a tenement of land to one Forester, and he to Murdoch. Sir A. is obliged to warrant this right at all hands, and to procure his son's ratification at his majority. Sir A. and his son altogether disagreeing, he was so far from procuring his son's consent, that his said son has intented action of reduction of this alienation made by his father in his nonage to his prejudice. Murdoch finding his right thus drawn under question, intents a summons against Sir A. for warranting him, and for obtaining his son's ratification.

Against which it was ALLEGED,—That Sir A. could never be decerned to warrant till there were a distress; but *ita est* there is no distress condescended upon, save only a naked citation given by Sir A.'s own son to this pursuer for reduction of his right; which, till decret follow thereon, can never be the ground of an action