

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:

## No 65.

an active title in a reduction of deeds that might affect the defunct's estate, the pursuer completing his title by adjudication upon a special charge before he could insist.

good right to remove all debts or deeds that might affect the means or estate of the deceased Lord Whitelaw, her last husband; and that the Lady having vitiously intromitted with her deceased husband's goods and gear, all obligations granted by him to her ought to be declared extinct by confusion; and that she ought, as vitious intromitter, to make payment to the pursuer of the sum contained in his bond, and to pay all the debts, and relieve the heir thereof.

*Answered* for the defenders; No process at the pursuer's instance; because he produces nothing but a simple bond, granted by the deceased Bangour, apparent heir to the Lord Whitelaw, his uncle, which could never be the title of such a reduction and declarator, till an adjudication be led thereon against the granter, as lawfully charged to enter heir to his uncle: For Bangour himself could not have insisted in such a pursuit without being served, and *multo minus* is it competent to his personal creditor.

*Replied* for the pursuer; Bangour the debtor might pursue *declaratorie* for removing any debt whereby his uncle's heritage might be affected, especially at the instance of a party *aliunde* liable to debts of the same kind. And any personal creditor may, by way of declarator, prevent a feared danger, and save the needless expenses of adjudication, charters, infestments, &c. May not a creditor, who has only used inhibition, reduce rights that may affect his debtor's estate? Yea, a conditional creditor may, before the condition is purified, assert his right; so, 25th November 1669, Creditors of Balmerino *contra* Lord Coupar, No 25. p. 3203. it was found, that creditors, even of an apparent heir, might, upon personal bonds, insist *ex capite lecti*. In a case since the Revolution, betwixt Sir John Hall of Dunglass and Sir William Sharp, (*see* APPENDIX.) process of warrandice *declaratorie* was sustained before eviction and distress. Was not process sustained at the instance of an apparent heir, not served, for declaring the lands he was to succeed to free of the predecessor's debts? July 1680, Lady Margaret Cunningham *contra* Lord and Lady Cardross, *see* TITLE TO PURSUE. And such reductions are always sustained at the instance of personal creditors upon the act of Parliament 1621.

*Duplied* for the defenders; Law and form require, that people be not put to unnecessary trouble of exposing their writs to any that have not a right equally good in form at least; therefore, even an adjudication is no sufficient title to force production of rights whereon infestment hath followed: And no real right can be reduced or declared against, except upon a real right. And if an apparent heir could pursue reductions and declarators of real rights, without establishing a title thereto, the service of heirs would be needless. And the defenders would find this inconveniency by it, that an absolvitor in their favour could not prove *res judicata* against remoter heirs, who still might serve heir to the Lord Whitelaw, and so shun the effect of *res judicata* against the preceding apparent heir: Therefore, titles must be established, that the contradictor be habile; 11th February 1635, Muir *contra* Muir, *voce* TITLE TO PURSUE; 21st June 1671, Leslie *contra* Jeffrey, No 20. p. 3998. The answer to the instance

betwixt the Creditors of Balmerino and Coupar is plain, for apparent heirs, as such, have the privilege to reduce death-bed deeds to their prejudice; seeing their simple consent, though not entered, excludes all reduction at the instance of them or their successors; which privilege is not to be extended to other cases. As to personal creditors upon the act of Parliament 1621, their privilege is founded on a particular statute; and reductions *ex capite inhibitionis* are founded in law; besides that the inhibition, in some measure, affects the subject.

*Triplied* for the pursuer; Though adjudication cannot force production of rights completed by infestment, yet a naked adjudication is, of itself, a sufficient title to reduce even rights completed by infestment, when produced.

THE LORDS sustained the pursuer's title, he completing the same by an adjudication, before he can further insist; and, in the mean time, stopped procedure in the process.

Thereafter, 20th March 1707, the defenders craved that the Lords would explain their foresaid interlocutor, by declaring that nothing more was intended thereby, than that the pursuer should not be put to further expense and loss of time, in raising a new process; and that the citation is not sustained as to other effects that may, perhaps, afterward occur in the process, *viz.* as an interpellation against the defender, to hinder a posterior edict or confirmed testament, to cover a prior intromission from vitiosity; for that, it is no new thing to sustain citations *ad fundandam litem*, which have been repudiated as to other effects, as in declarators of non-entry.

*Answered* for the pursuer; It is needless and incompetent, in this state of the process, to desire the Lords' answer to queries: For, whatever debate may arise in the course of the process, as to the particular effects of the citation, that comes in most properly and naturally, when any such effects are insisted on by the pursuer; it not being the Lords' way to determine points upon supposed cases.

THE LORDS declared, that the allowing process to go on at the pursuer's instance, he completing his title, is only to be understood for carrying on the process without any new citation; and that the citation, as to other effects, can have no force but from the completing of the title, which makes the pursuer an idoneous contradictor.

*Fol. Dic. v. 2. p. 305. Forbes, p. 145.*

1709. July 2.

MR JAMES INGLIS, of St Leonard's, *against* LORD ALEXANDER HAY.

AT advising the reasons of reduction of a decret of preference, obtained by Lord Alexander Hay against the Creditors of Mr Cornelius Inglis of Eastbarns,

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No 66.

The pursuer of a reduction not allowed to repeat incidenter a proving.