No 66.
the tenor of a writ, necessary to make up his active title.

pursued against Lord Alexander by Mr James Inglis, as having right by progress to an infeftment of annualrent for L. 184, out of the estate of Eastbarns, upon an heritable bond granted by Mr Cornelius Inglis, the heritor, to Mr Patrick Kelly, for the sum of 4600 merks; the defender having *objected*, That the pursuer did not connect a process of right to the infeftment of annualrent, by producing the precept of *clare constat*, upon which Janet Kelly, his immediate author, was infeft as heir to Mr Patrick Kelly, the original creditor; the LORDS would not allow the pursuer to repeat a proving the tenor thereof *incidenter* in the process of reduction; albeit the defender, in a process, is sometimes allowed to repeat *incidenter* a tenor of writs founded on for his defence; because the pursuer, before he convened the defender in his reduction, ought to have made up a sufficient title for prosecuting his intended action, and cannot be allowed an incident for making up his title.

*Fol. Dic. v.* 2. *p.* 305. *Forbes, p.* 338.

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1712. *July* 3.

Mr JOHN SPOTTISWOOD, of that Ilk, Advocate, and other CREDITORS of Mr ALEXANDER BROWN of Thornydykes, *against* ALEXANDER BROWN of Bassendean.

No 67.
Reduction of a disposition of lands, on the act 1621, being raised, but not sustained, at the instance of the granter's personal creditor, the process, which sisted during the time the creditor was expeding his adjudication, was allowed to go on, after he obtained and produced it, without the necessity of raising a new summons.

MR JOHN SPOTTISWOOD, and other personal Creditors of Mr Alexander Brown, having pursued reduction, upon the act of Parliament 1621, of a disposition of the lands of Bassendean, granted by Mr Alexander to Alexander Brown, his second son; the LORDS, 24th June 1709, found, that a disposition, though not completed by infeftment, could not be reduced by a personal creditor: Whereupon the process stopped till the pursuers had adjudged; and then they insisted in their former reduction.

*Alleged* for the defender; The adjudication cannot be a title to insist in the old process; because, in all reductions, the pursuer's active title ought to be libelled, and given out *in initio litis*.

*Replied* for the pursuers; Albeit the adjudication be posterior to the summons of reduction, the bonds whereon it is founded are prior: And the Lords do ordinarily sustain an imperfect title *ad inchoandam litem*, as a charge upon a bond requiring requisition; 28th June 1671, Hume *contra* Lord Justice Clerk, *voce* REDEMPTION; a general disposition *omnium bonorum, jus sanguinis* in an apparent heir, or nearest of kin; and allow requisition to be used, a confirmed testament or retour to be produced *cum processu*, and the original process then goes on as if the title had been complete at the beginning.

*Duplied* for the defender; The instances mentioned by the pursuers do not meet the case; for requisition was allowed *pendente lite*, because the bond, and not the requisition, was the active title; whereas here, the adjudication, and

not the bond, is the active title. Again, a general disposition is sustained *ad inchoandam litem*, in respect it gives *jus ad rem*, though not *jus in re*; whereas, a personal bond *non tangit subjectum*, but doth only oblige the granter's person. The instance of *jus sanguinis* is as little to the purpose; seeing that, in some cases, doth afford not only *jus ad rem*, but *in re*; as in possessory actions, for continuing the defunct's possession; in other cases, it sufficeth *tam ad finiendam, quam ad inchoandam litem*, as in exhibitions *ad deliberandum*. No 67.

THE LORDS repelled the dilatory objection, and sustained process at the pursuer's instance, the former defect in his title being made up.

*Fol. Dic. v. 2. p. 305. Forbes, p. 606.*

*** Fountainhall reports this case:

I REPORTED Mr John Spottiswood, Advocate, and George Brown, younger of Thornydykes, against Alexander Brown of Bassendean, his brother.—Alexander Brown, elder of Thornydykes, dispones his ancient paternal estate of Thorn to George, his eldest son, in his contract of marriage with Janet Spottiswood, and they divide the debt betwixt them, conform to an inventory; the son undertaking one part, and the father another, which was expected to be paid out of his new conquest lands of Bassendean, as a fund sufficient thereto: But his second son, Alexander, coming to marry Betty Swinton, daughter to Mersington, Thornydykes, in his contract of marriage, dispones these lands of Bassendean to him. This alarming the father's creditors, they fall on him and his eldest son; and to relieve his brother-in-law out of prison, Spottiswood pays sundry of the debts; and he, in the creditors' name and his own, raises a reduction of the said disposition, as in defraud of their anterior debts, on the act 1621. *Alleged* for Alexander Brown, That personal creditors could not quarrel his right, unless they affected the subject by adjudication, or otherwise. THE LORDS, 24th June 1709, (*voce* TITLE TO PURSUE) found they had no interest to reduce his disposition, till he had first adjudged. Though this seemed to be a great alteration of the former practice, yet Spottiswood complied with it; and having obtained a decreet of adjudication, to complete his title, he then insisted in his former process of reduction. *Objected*, That this adjudication being two years posterior to the summons, yea, after interlocutor, rejecting his title, it can never be sufficient to sustain process on that old summons, wherein nothing was libelled but the personal bonds, and not the adjudication, which was not then in being: For, at this rate, a person having no debt owing him may raise a process against another, and, *pendente lite*, purchase an assignation to a debt, and then plead, that, to prevent multiplication of processes, his libel should be sustained; this were *filius ante patrem*. And however Spottiswood may now be a creditor, yet he is not a necessary one; for he most officiously bought in debts, and should most justly be remitted to a new process. *Answered*, The title in the former summons cannot be called null, but only defective, as wanting the su-

No 67.

perstructure of an adjudication, to make the personal bonds (the foundation of this process) an effectual title; and that being now done, it must be drawn back to its original; so there is neither hearsay nor incongruity to carry on the process by this supervenient title; and this is no more than what is done every day in parallel cases, as 28th June 1671, Home against Renton, *voce* REDEMPTION, where a horning was sustained, though requisition was not used, in the terms of the bond, requisition being made before extracting; and lately in my Lord Pitmedden and his Son's case, against the Creditors of Dunfermline, See APPENDIX, the title as heir *designative* was not sustained, but he was allowed to produce a retour *cum processu*. And how often is a general assignation sustained, they confirming before extract? *Replied*, Here is no foundation to make a superstructure on; for personal bonds *non tangunt subjectum;* they do not reach the land; and it is absurd, that he who cannot possess the subject should make void another's title; and the cases cited are where there is a *jus sanguinis fundatum*, which is good *ad inchoandam litem*, though not *ad finiendam*, till perfected; which is otherwise here, where it gives neither *jus in re*, nor *ad rem*. THE LORDS found the adjudication might be joined to support the old summons; and, therefore, sustained Spottiswood's process, without putting him to raise a new one.

*Fountainhall, v. 2. p. 748.*

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1714. *July* 20.

JAMES DUNBAR, and his ASSIGNEES, *against* JAMES Earl of MORTON.

No 68.

Found in conformity with Inglis against Lord A. Hay, No 66. p. 13293.

IN the action of mails and duties, at the instance of James Dunbar, and his Assignees, against James Earl of Morton, and his Tenants of Orkney, the pursuer's title, which was an extract of an heritable bond, granted by William Earl of Morton and Robert Lord Dalkeith, his son, to Mr Andrew Dick, with a charter of resignation, and sasine thereon, being quarrelled by the defender, because the said extract was grievously torn and lacerated in many places, so as it could not be read; the pursuer, to supply that defect, raised and executed a summons, for proving the tenor of the principal bond, which they craved might be summarily and *incidenter* received; especially considering that such actions used to be received *incidenter*, even when the tenor of a whole writ is to be made up; and in the case of the Lady Eccles, See APPENDIX, the Lords allowed two full sheets of a disposition to her by young Leny to be supplied by the oaths of two instrumentary witnesses, upon a supplication at her instance; and much more in this case, a few words lacerated and torn, by much using and careless keeping, ought to be allowed to be made up summarily, when the adminicles are most pregnant, and all in the field.

*Answered* for the defender; The pursuer cannot be admitted to support or supply his title by an incident proving of the tenor; because, 1*mo*, Though