

No 61.

A charge to enter heir in order to adjudge, was sustained, although at the instance of an assignee, whose assignation was posterior; as no execution followed till after the assignation.

1703. February 11.

Competition CREDITORS of ECCLES.

IN a competition between Ker of Moriston and Pringle, Charles Ormiston, and other Creditors to Home of Eccles, Moriston objected against Pringle's adjudication, that it was null and informal, because he being constituted assignee to most of the debts for which it was led, he had raised his charge to enter heir against Eccles before he had got these assignations in his person, and so the charge was *filius ante patrem*. *Answered, 1mo*, He had a debt due to himself, which was sufficient to support the charge, that debt being antecedent thereto; *2do*, Before the charge to enter heir was executed, he had all these assignations in his person, which was sufficient, the giving the charge being the true application of the diligence. *Replied*, They did not quarrel the adjudication as to his own debt, but only *quoad* those conveyed to him. *2do*, The charge being the warrant by which he was charged to enter heir, and these assignations being posterior to the date of the charge, they were unwarrantable and destitute of a warrant; and so the Lords found, 15th November 1666, Abercrombie, marked both by Stair and Dirleton, though Dirleton subjoins another between Kennedy and Hamilton to the same purpose, yet the first speaks only of an assignation taken after the summons was executed, see No 47. and No 48. p. 13277. The Lords divided on the question, five against five, and the President for the time did cast the balance by finding the adjudication not null, though the charge preceded the assignation, seeing the execution on the charge was posterior, and so repelled the objection. *Fol. Dic. v. 2. p. 304. Fountainball, v. 2. p. 179.*

1704. November 22.

LIBBERTON and WELLWOOD *against* JANET PITCAIRN and GEORGE HOME
Town-Clerk of Edinburgh.

No 26.

One was, by the condition of a bond, only liable in case he should have intromitted with certain subjects. Adjudication was led on the bond, without previous proof of intromission. The adjudication was allowed to subsist as a security.

THIS was a reduction of Libberton's adjudication, on this ground of nullity. That it was led for a bond of provision of L. 10,000 Scots, bearing this express condition and quality, that he should not be liable in payment, unless he actually intromitted with as much of the heritable and moveable bonds disposed to him, as would extend to the said sum; but so it is, the decret *cognitionis causa* and adjudication proceed without any trial or pobration of his intromission, and so are null; and the offering to prove it now is not sufficient, because, before any sentence could pass, it should have been instructed to the Lords, that the condition was purified; and as there could be no decret for payment till then, so neither could they validly adjudge; for apprisings and adjudications in heritage are equivalent diligences to poindings of moveables, and none will affirm they could have poinded on this bond, till the condition was first instructed to have been implemented and purified. *Answered*, The

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.