

pursuer were served heir to his brother, he could have no right to the said contract; and consequently could not force them to produce. Replied, *1mo.* This defence was not competent to the defenders, except they did allege some right in their person flowing from the said Andrew; *2do.* Andrew's general service, there having no other thing followed upon it, would never impede his brother to serve himself general heir to his father, and claim right to the contract that way, as well as if he had been served heir to his brother; for the king's advocate and Mr Thomas Nicolson, (who were for the pursuer,) contended that a man might have more general heirs than one; and that if he, who was first served, did no further on his service, he that after him served himself to that same predecessor, would have right to any contract, reversion, &c. made in that predecessor's favours; because a general service was but *actus inchoatus et non completus*, and it is only in special services to lands that one cannot leap over him that was last retoured, but holds not in general services. Sir Lewis Stuart, on the other part, for the defenders, maintained, that a general service was *actus consummatissimus in suo genere*, and did establish the right of contracts, &c. in the person of him who was so served, as perfectly as any special service did settle the right of lands on any one; and the right being once established in him that was served, it was impossible that it could pertain to any other but to his heirs; and instanced, if Andrew had creditors, the right of the libelled contract doubtless would pertain to them, and not to the pursuer as heir to his father. This was not decided by the Lords; for the defenders took the pursuer away by another allegiance, That the right of this contract was disposed to them by Andrew: But the whole Lords, in effect, were of the mind that the allegiance could not be repelled, it being *exclusivum juris agentis*; and that after it was twice or thrice heard in their own presence, in the beginning of July 1636.

Page 144.

1636. July 19. DAVID SETON *against* The LAIRD of BANF.

THE Laird of Tolquhon, younger, as principal, and the Sheriff of Cromarty, and Laird of Banf, as cautioners for him, gave bond to Alexander Forbes for 3000 merks. Banf being charged for payment of this sum; for his relief, the Laird of Fren draught, as principal, and the same Laird of Banf, as cautioner, gave bond to the said Alexander Forbes, for that same sum; and Banf gave Fren draught a back-bond, declaring, that, although he was principal in this last bond, yet the money was truly addebted by Banf, and that therefore he obliged him to relieve Fren draught thereof: Fren draught makes his man, David Seton, assignee to his back-bond, who raised a summons against Banf, for proving of the tenor thereof, in respect he libelled it was burned in the house of Fren draught amongst many other writs that were lost there. Alleged, He could not prove the tenor of the back-bond libelled, unless he would produce some adminicles in writ; otherwise it should prove a matter of very dangerous consequence to make bonds of great sums this way by the depositions of two witnesses. Replied, Adminicles are indeed required in proving of any writs concerning heritable rights, such as contract, charter, sasine, confirmation, &c. which have a coherence and dependence one upon another; so that one of them

being lost, it is reasonable that some of them that are extant, either preceding or flowing from it that is lost, be libelled and produced, for an adminicle to sustain the proving of the tenor of the other. But, in simple bonds, which cannot be sustained by any adminicle of another writ, this cannot be required: Yet, albeit the pursuer can have no adminicle in writ to sustain his back-bond, he will offer to prove, by the defender's oath, (which is in a manner equivalent to writ,) *Imo*. That the defender was bound as cautioner for Tolquhon, younger, to Alexander Forbes in this sum; *2do*. That Frendraught became obliged, for the defender's relief, in the second bond to the said Alexander; *3tio*. That the defender gave a back-bond to Frendraught, acknowledging that the debt was his own, and not Frendraught's; *4to*. That Frendraught, having got an assignation of the first bond from Alexander Forbes, transferred the same in the person of John Sutor, servant to Banf, at the defender's own desire; which John Sutor had recovered payment of 2000 merks of the said sum, from Cromarty, for his part of the said principal sum, with the bygone annual-rents, and that to the behoof of the defender; *5to*. That the back-bond was never delivered by Frendraught to the defender, after the subscribing thereof. In respect of which circumstances concurring with the notoriety of the *casus amissionis* libelled, the summons ought to be sustained. The Lords found the circumstances contained in the reply sufficient; adminicles being proven, by the defender's oath, to sustain the summons for proving the tenor of the back-bond libelled.

*Page 251.*

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1636. *July 20.* The EARL of QUEENSBERRY *against* LORD TORTHORWOLD.

THE Lord Torthorwold having raised reduction against the Earl of Queensberry, the defender got a protestation against the pursuer for not insisting in his reduction, and, after, raised a summons against the said Torthorwold, to insist; with certification if he did not, he should never be heard thereafter. Torthorwold being twice summoned, and a day assigned to him to insist, and when the day came, he refusing to insist, the certification was given against him compearing, though he desired he might pass from his compearance. Which the Lords would not grant, in respect of the day assigned to him before compearing.

*Page 322.*

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1636. *July 21.* GEORGE HERIOT *against* WALTER HERIOT and JEAN LAW.

MR George Heriot, as heir to his brother Walter Heriot, fiar of Romorny, pursued his father Walter Heriot elder of Romorny, and Jean Law his brother's relict, liferenters of the whole lands to which he was to succeed, for a modification whereupon to live. The Lords would not sustain the summons against his brother's relict; because his father, who was liferenter of the one half, was alive, who was bound by the law of nature to entertain him, and not his sister-in-law, who had her liferent of the other half for an onerous cause, in recompense of her debt. As for the father, the pursuer insisted not much against him.

*Page 145.*