1672. *November* 15. MAJOR BIGGAR *against* The LAIRD of NIDDRIE.

IN a suspension raised at Niddrie's instance against the Major, of a decreet recovered at his instance, for payment of the principal sum and annualrents contained in a bond, to which he was assigned by the Laird of Wolmet, upon this reason, That he ought to have retention of the annualrents preceding the year of God 1650, conform to the Act of Parliament, allowing retention of annualrents *in anno* 1645 :—

It was ANSWERED, That the Act of Parliament was conditional, in case of payment of the annualrents punctually every year, whereas the suspender had been deficient for many years.

It was REPLIED, That the bond and decreet being conditional,—until the condition was purified, the suspender was not bound to make payment;—*viz.* The delivery of a letter of Slains for the mutilation of Wolmet.

It was DUPLIED, That the Act of Parliament was general and without distinction, and allowing retention only where annualrents were duly paid.

The Lords did find the reasons relevant; and that the Act of Parliament could only be interpreted to be of *debita pura*, where nothing impeded payment. But, as to conditional obligations suspending payment, it could not be the meaning of the Parliament that the debtor should not have retention until the fulfilling of the condition, at which time the debt became simple, and the debt was payable, the debtor not being *in mora* till that time.

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1672. *November* 15. EDWARD RUTHVEN, Son to the LORD FORRESTER, *against* The CREDITORS of The EARL of BRAMFORD.

THERE being a bill given in, in name of the said Edward, making mention, that, by an Act of the last session of Parliament, it was ordained that his name should be inserted in the decreets to be extracted, which were obtained before the Lords of Session, at the instance of the Countess of Bramford and the Lord and Lady Forresters, against the Earl of Callender and Others.

It was ALLEGED for the creditors of the Earl of Bramford, as likewise for the creditors of the Lord Forrester, That that Act of Parliament being only given in relation to a reduction of the Countess of Bramford's right, by virtue of a contract betwixt her and the Lady Forrester, as having right to the Earl of Bramford's debts, to which there was no person interested called but the said Countess;—it could be no warrant for extracting decreets in his name, in prejudice of any other person; and so fell under the Act *salvo jure;* and could not prejudge the creditors of Bramford, or the Lord Forrester, who had contracted with them in contemplation of his lady's right by the Act of Restitution.

It was REPLIED, That special Acts of Parliament, restoring against forefaultures, can never be questioned by any person, upon pretence that they were not cited, neither can they fall under the Act *salvo jure;* as hath been found formerly by the Lords, in the cases of the Earl of Rothess, and of John Stewart of Coldinghame. And albeit the said decreets were against the law for the

time, or informal, yet the Lords of Session are nowise competent judges, there being none that have authority to cognosce upon them but a Parliament.

The Lords having considered the Act of Parliament, that it was clear and positive that the petitioner's name should be inserted in all their decreets, as to which they were not *in casu dubio*, that needed interpretation, they did ordain that decreet to be so extracted. But, how far the same might import in law, and prejudge the lawful creditors of the Earl of Bramford, or the Lord Forrester, they declared they would not meddle *hoc loco:* but, that, by their ordinance, they intended no more but that the simple name of the petitioner should be inserted, in obedience to the Act of Parliament requiring the same; and that notwithstanding the Act of Parliament was not of the nature of an assignation to a depending process, *quo casu*, if the defender could allege nothing against the assignee's right, the Lords never refuse to grant extracts in his name; whereas, in this case, the Act of Parliament did not rescind the prior act of restitution in favours of the representatives of the Earl of Bramford, or declared that the petitioner had a better right; which was impossible in law; but only ordained his name to be inserted in all decreets, albeit recovered at the instance of other parties; which is against all law and custom.

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1672. *November* 15. ALEXANDER BAILLIE *against* GEORGE MITCHELL.

IN a reduction of a bond of 600 merks, granted by the said Alexander to William Reid, merchant, and assigned by him to George Mitchell, upon the reason, That the bond was granted for an apprentice-fee, as may appear by the bond and indentures being both of one date and written and subscribed by that same writer and witnesses. But so it is, that William Reid was so far from educating his apprentice in the trade of merchandizing, conform to the indenture, that he himself became bankrupt within a few months, and the apprentice forced to leave him; and, therefore, the bond was null, as being *causa data causa non secuta.*

It was REPLIED, That the bond bearing borrowed money, the defender was *in bona fide* to take assignation thereto, for an onerous cause, being a just creditor; so that the reason of reduction could not militate against him, but only against the cedent.

It was DUPLIED, That the indenture and bond being in effect as one deed, and being known to the defender before he obtained the assignation, which was granted after the cedent was known to be bankrupt, the reason ought to militate against the assignee as well as the cedent.

The Lords having debated amongst themselves, if it was sufficient that the assignee did know the cause of the bond to have been for an apprentice-fee, did not give their interlocutor upon that singly, but found, That his knowledge, and the receipt of the assignation, when he knew the cedent to be bankrupt, was relevant against him, as well as the cedent, to be proven by his oath. But as to the first point,—if the naked knowledge of the cause of the bond should put him in that same condition with the cedent? it seems that the point would have been more difficult; for the debtor, granting a bond for borrowed money,