process for restitution of it sustained here; seeing, by the rescissory Act of Parliament 1690, that case is expressly referred to the Commission. But, as to his conclusion that the 2000 merks bond should be redelivered to him, if he insisted on that ground of the common law that it was for the discharge of his fine, which he never got, and so was *causa data et non secuta;* that he could have the privilege of summary discussing, that being indulged to those within the compass of the act: but, if he insisted on the claim of right and Act of Parliament 1690, it behoved first to be instructed that he was in one of the cases there mentioned; though he argued, the case being as favourable, was the same. And here the decreet, not being recorded in the Privy Council books, (which should make the clerks liable on their omission,) the question occurred how it shall be proven what was the cause of his fining. Some proposed to take his own oath upon it; but the Lords ordained James Hay, upon oath, to produce the bond; and if it did not bear its cause, also to depone anent his knowledge of the cause of it, and for what the fine was imposed. *Vol. I. Page* 627.

1694. *July* 5. JOHN KINNAIRD *against* PATRICK M'DOUGAL.

THIS was a charge on a bond for £8 sterling. The reason of suspension was, —I offer to prove, by your oath, though the bond bore borrowed money, yet the true cause of granting thereof was for the price of a horse; and that being confessed, then I offer to prove, by the witnesses present at the bargain, that I having questioned the horse as having the cold, you in express terms promised to uphold it. ANSWERED,—That cannot be proven by witnesses, being a promise *et nuda verborum emissio;* and the debt being constituted by writ, the debtor's oath must be taken on the whole; and the manner of probation cannot be divided.

The Lords, *first,* found the allegeance not relevant, of his undertaking to uphold it, unless the suspender also joined this with it, that, how soon he discovered the distemper, he offered him back again, as the *edictum ædilitium* requires. *2do.* Found, if he, upon oath, acknowledged that the cause of the bond was for the horse's price, then it reduced it to this point, as if there had been no bond at all, or as if the bond had borne that express cause in its narrative; in which or either of these cases the terms and conditions of the bargain might be proven by witnesses; and therefore allowed it to be so proven here.

Vol. I. Page 627.

1694. *July* 5. JOHN HAMILTON in HALSIDE *against* GEORGE GORDON of EDINGLASSIE.

THIS was a summons on the passive titles, as lawfully charged to enter heir to his father and goodsire. The DEFENCES were,—No process, because he was designed *John,* whereas his name was *George;* and having now discovered their mistake, they mended it; but it was clearly vitiated. The Lords thought this was only *error in nomine,* seeing *constabat de persona;* and *esto* his first