

ing, that then he was obliged to have made it the rule of his management and administration.—On a new report he was found liable for this rent.

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1697. *January 7.* JOHN MENZIES *against* The CREDITORS of SIR ADAM BLAIR of CARBERRY, and STRACHAN of GLENKINDY.

THE Lords heard and advised the debate between Mr John Menzies, and other creditors of Sir Adam Blair of Carberry, (who was donatar to Strachan, of Glenkindy's bond of £20,000, incurred through his not producing some tenants in the process for the murder of Alexander Sour,) against the said Glenkindy. His reasons of reduction of the said bond and act of adjournal, (which was remitted by the Parliament to the Lords, else, the justiciary being a sovereign judicatory, the Lords would have been straitened in point of competency and jurisdiction,)---were, *1mo.* This bond was extorted *vi carceris*; for, being in prison on suspicion of his accession to the said slaughter, he could not otherwise obtain his liberation but by granting this bond, though the crime was bailable; and so it was impetrated by concussion and *metu potentia*, which he could not then resist. *2do.* The exacting of such a bond was most unjust; for it is against the law of nature to oblige a man to furnish probation against himself; likeas, it was impossible for him to produce men that were not in his power, but had fled. *3tio.* The bond was taken for a most exorbitant sum, both contrary to the 166th Act Parliament 1593,—that the penalty for a baron shall be only £1000, and a freeholder 500 merks,—but also against the claim of right, condemning all such exorbitant fines. *4to.* The bond was never forfeited; because, being taken, in general terms, to produce his men, tenants, and servants to be witnesses in that criminal trial against him, it was neither proven they were his men, tenants, nor servants, nor were their names intimated to him.

ANSWERED,—The bond was most legal and warrantable; for, there being violent presumptions against Glenkindy, loading him with that base murder, the Lords of Justiciary did most justly imprison him; and he petitioning to be set at liberty on caution, the Lords adjected this quality, that he should not only find caution for his appearance, but likewise produce his servants, who were the material witnesses; and he having accepted of his liberation in thir terms, he cannot now reclaim, because it was optional and free to him to have lain still and abide the criminal trial, but he choosed rather to accept of the favour, as it was offered. And, in many cases, one may be obliged to furnish probation against themselves, as in the case of tutors and factors, and where actions are pursued *ad vindictam publicam*: neither was there any impossibility in the case; and though there had, *loco facti imprestabilis succedit damnum et interesse.* And, by the 94th Act 1587, the pledge may be executed to the death, if the pledger do not redress the depredations made; and, by the Acts of Parliament for securing the peace of the Highlands, masters are bound to produce their tenants and servants; and particularly by Act 6th, 1528: and the 166th Act, cited, relates only to legal penalties, but not to pactional ones; and, as to the incurring the bond, the creditors opposed the writs produced.

The Lords began with the objections against the legality and warrantableness

of the bond ; and, finding the same usual in such cases, sustained the bond ; but forbore to determine if it was forfeited, at Glenkindy's procurator's desire, till they gave informations, and so have an opportunity to treat in the meantime, and agree.

The Lords, having heard the cause in presence, and advised it, they found the penalty of the bond was not incurred by Glenkindy, it not being proven they were his servants, nor legally intimated to him whom he was to produce.

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1697. *January 13.* ELISABETH NASMITH *against* ROBERT MALLOCH.

ARBRUCHELL reported Elisabeth Nasmith against Robert Malloch, in a reduction and declarator for count and reckoning. ALLEGED,—I cannot take a term at your instance, because you have no active title to pursue ; your right being only a voluntary disposition from the Lady Bearfoot, who had taken out a *bonorum*, and disposed her whole goods and estate to her creditors, and so could make no posterior disposition.

ANSWERED,—She being infest in a liferent of 2500 merks, the same was not able, at the time of her *bonorum*, to pay all her creditors ; but she having lived now many years, Robert Malloch and her other creditors are more than paid ; and therefore no law nor justice can debar her from her jointure ; for if a bankrupt come *ad pinguiores fortunam*, or fall into an adventitious estate, the same may be affected by the creditors, notwithstanding the former disposition on the *cessio* ; which proves the said disposition is not given to the creditors *in solutum*, but only *in securitatem* of their debts ; and, if all be paid, their interest ceases. But the Lords thought it unreasonable that one creditor should be singled out, and put to count, when he could not be sufficiently exonerated, unless all the rest were likewise brought into the field ; therefore they sustained the disposition *ad hunc effectum*, to cause the defender take a term ; but declared he should not be obliged to take a second term, unless all the creditors were likewise cited by her ; and granted an incident diligence for that effect. Some proposed caution might be found for his expenses, in case the pursuer succumbed ; but the Lords could not oblige them to do the same.

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1697. *January 14.* THE CREDITORS OF LINDSAY OF PYESTON *against* WALTER PITULLO.

HALCRAIG reported the Creditors of Lindsay of Pyeston against Walter Pitullo, clerk of Dysert : it was an objection of a nullity against his heritable bond, and the seasine taken thereon. OBJECTED against the bond,—That the witnesses' names were filled up with a different hand from the body of the writ, and did not mention the upfiller. This the Lords did not regard, seeing there was no Act of Parliament before 1681 requiring it ; and this bond was prior. The only Act concerning it is the 175th Act 1593, requiring all writs to bear the writer's name, under pain of nullity, which this bond did *quoad* the body of the