No 151. may be elided by a reply of interruption, which requires a course of probation, and puts the pursuer to the delay and expense of an act; but here it is *nullitas juris*, resulting from the writ, and all instantly verified. The Lords found Craigdarroch might propone it, without acknowledging the passive titles. Then he insisting on the nullity of the bond, for want of the writer's name, it was *alleged*, The same was sufficiently supplied, because of the several obligants and witnesses all signing, and that the filler up of the witnesses' names and date was mentioned and designed in the bond, and he could not, on his oath of calumny, deny but William Alves was the writer, who was ready to depone; and the design of the act was only to find out the writer, which is abundantly clear in this case. *Answered*, That the number of witnesses, how great soever, did not supply this nullity, which is a distinct and separate point; and the foresaid act of Parliament declares, where it is omitted, that it is unsuppliable; and to make it up, were to prove debts by the uncertain testimony of witnesses, or the fallacious conjecture of comparing hand-writs; and the condescending now on William Alves as the writer, is not sufficient; nor does offering to seek their oath of calumny on it satisfy the act of Parliament, which is most positive, and expressly calculated to obviate and debar all such condescendences now for supplying that defect. The Lords thought it, in a court of conscience, a good and sufficient bond; but, as our law stood, it was null; though it was both unmannerly and unneighbourly to propone this nullity, yet being proponed, the Lords behoved to sustain it, though hard, *quia ita lex scripta est*: And if this were dispensed with, then a great mean of improbation of writs as false would be cut off, viz. the writer of the body of the writ, that being the main reason of inserting his name: Some thought if the debtor Craigdarroch, who had subscribed it, had been in life, his oath might have supplied; but here it was his son, who knew nothing of it, being then an infant. Others said his oath could not have been required, unless the debt had been also referred to his oath. Then it was insinuated, That William Alves should be liable *ex delicto vel quasi*, for omitting to insert his own name as writer, especially the debt having come into his person, and he having assigned it with warrandice to Closeburn; but this was not debated at this time. See Writ.

Fol. Dic. v. 2. *p.* 187. *Fountainhall, v.* 2. *p.* 240.

No 152. Where the libel was entirely informal, this dilatory defence was admitted, after peremptory defences had been made.

1709. *November* 10. Earl of Lauderdale *against* Lord Yester.

The Lords, in the process betwixt the Earl of Lauderdale and the Lord Yester, (See Appendix.) found the Lord Yester bound in regard of his mother's renunciation to the Duke of Lauderdale, her father, and as lawfully charged to enter heir to her, and otherwise representing her, to denude of Dunfermline's apprising in favours of the Earl. Yester now gives in a petition, representing, that the Lords' interlocutor went upon a mistake, as if he had

No 152.

been pursued, as lawfully charged to enter heir to Lady Mary Maitland, his mother, whereas there were no such letters of general charge to enter, nor any execution thereof produced; nor were the passive titles, in so far as concerned her, libelled, but only as representing the Duke, his grandfather; and therefore, the summons being wrong laid, he ought to be assoilzied *ab hac instantia*. *Answered*, 1*mo*, This is out of the road of all form, seeing there is nothing more incontestable in law, that after peremptors proponed, and interlocutors in presence thereon, a defender cannot recur to a dilator, or be allowed to deny the passive title; so that his peremptory defence, that his mother's renunciation did not comprehend this apprising, was a clear acknowledgment of, and acquiescence in the passive titles; 2*do*, If my Lord Yester had *in initio litis* denied his representing my Lady, his mother, then my Lord Lauderdale would have insisted in the other conclusion of his libel, to have it declared, that he had the sole and only right to the comprising in question, *declaratoria juris*, and which was competent against an apparent heir, to force him to denude; But, 3*tio*, He is truly convened as representing his mother, (though there be no charge against him) and so the libel ought still to be sustained. *Replied* for my Lord Yester, That so long as there is nothing extracted, he may object a nullity in the summons; for it would be an ill grounded interlocutor, that is founded on a *non ens*, viz. that he is pursued as representing his mother, when there is no such thing; for though it be transiently mentioned after the will of the summons, yet not being in the premisses, it is impossible any formal decreet could be extracted thereon; for nothing is taken into the decreet, but what is libelled before the will, which is altogether forgot here. THE LORDS found no process on this informal libel.

Fol. Dic. v. 2. *p.* 188. *Fountainhall, v.* 2. *p.* 524.

*** Forbes reports this case:

December 13.—IN the action at the instance of the Earl of Lauderdale, as heir-male to the Duke of Lauderdale his uncle, against John Lord Yester, as charged to enter heir to, or otherwise representing the deceased Mary, Marchioness of Tweeddale his mother, to denude of an apprising led against the estate of Dunfermline in the year 1653, and conveyed to the Duke of Lauderdale, *anno* 1668, upon this ground, that the said Marchioness had, *in anno* 1676, renounced all right and interest in the estate of Lauderdale, and others belonging to the Duke her father, in favours of him and his heirs-male; the reasons alleged for the defender, why the renunciation did carry no right to the apprising in question, being repelled 22d June 1709, (See APPENDIX.) he now contends, That no process can be sustained against him, because he is not charged to enter heir to his mother; nor was that passive title libelled against him.

Replied for the pursuer; The defender cannot be allowed to recur now to a no process, after his proponing a peremptory defence, which liberates the pursuer from proving the passive titles.

No 152.

Duplied for the defender; The defence proponed by him was not *peremptoria causa*, such as infers a representation, but only an objection against the pursuer's title to the apprising, which is peremptory of the instance, and may be proponed without acknowledging the passive titles; seeing the pursuer's title must be instructed, before process can be sustained at his instance; 2*do*, Tho' the defence had been such a peremptory as owned the passive titles, it could not fix the defender; because no passive title is libelled, but that of charged to enter heir, and no charge is produced: For the proponing peremptories does only free the pursuer from the trouble of proving the passive titles libelled; and the libel cannot be now amended in such a fundamental, though sometimes an amendment in circumstantials is allowed.

The Lords found no process against the defender, in regard there were no passive titles libelled against him as representing his mother, but as charged to enter heir, and no such is produced: And they would not allow the pursuer to amend his libel.

Forbes, p. 365.

1713. *February* 11.

Margaret Lundy and Mr George Henry her Husband *against* The Lord Sinclair.

No 153.
Found in conformity to Stuart against Lamont, No 149. p. 12060, That one cannot be allowed to allege prescription denying the passive titles.

The Lord Sinclair's grandfather granted a bond of 2000 merks *in anno* 1648, which being confirmed in a testament *ad non executa* by Margaret and Mary Lundies his daughters, the said Margaret now insists against the Lord Sinclair, as representing his grandfather, for payment.

The defender denying the passive titles, *alleged*, The bond was prescribed.

It was *answered*; Prescription being a peremptory defence, relieves the pursuer from proving the passive titles; and therefore the defender cannot be allowed to allege prescription, and at the same time deny the passive titles.

Replied; A defence *in facto* requiring probation, cannot be admitted without acknowledging the passive titles; but *in jure* it may, when the defence arises from the pursuer's title produced, as if a bond were null, wanting writer's name and witnesses, or prescribed; which appears, by comparing the bond with the summons; and there is neither law nor practice to hinder apparent heirs to allege any thing that is competent *in jure*: On the contrary, it was found, 10th December 1674, Auchintoul *contra* Innes, observed by my Lord Dirleton, No 141. p. 12055, that a defender proponing a defence *in jure*, viz. that the annuities were discharged by a late proclamation, does not confess the passive but if he did propone a defence upon a right in the person of his predecessor, it would exclude him.

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