never be obliged to warrant them; and albeit they be found unprofitable, or founded upon false or null grounds, yet the composition is never repeated; so, in this case, he could not be compelled to discharge the obligations. In respect whereof, the letters were found orderly proceeded.

No 41.

Fol. Dic. v. 1. p. 429. Haddington, MS. No 1677.

1684. *December* 19.

The DUTCHESS of LAUDERDALE *against* The EARL of LAUDERDALE.

No 42.
An heir male ratified a disposition of part of his brother's lands in favour of his brother's lady, and obliged himself to purge incumbrances affecting the lands. This was done in the view of succeeding to the rest of the estate. It afterwards appeared, that when he subscribed the ratification, there was an expired apprising which would carry off the rest of the estate. In these circumstances, the Lords found, that the heir was not obliged to fulfil his obligation, unless he had known of the apprising.

THE Earl, and the Lord Maitland his son, in the Duke of Lauderdale's lifetime, signed a ratification of the rights of Leidington, Duddingston, &c. disponed by him to his Dutchess: They being charged on this ratification, suspend on this reason, that it was but a conditional obligement, and a *synallagma* granted for a cause which had not existed, and so was null *per condictionem chirographi ob causam datam causa non secuta*, in so far as the ratification was given in contemplation *et intuitu* of the tailzie and succession to the Duke, as appears from its narrative, and the tailzie was the *causa finalis* and *procatarctica* of the ratification; but *ita est*, he neither had succeeded nor could, there being an expired comprising of the Duke's estate, led by Anderson of Hill in 1655, unpaid, which was a *medius obex et impedimentum*, debarring him from the succession; so that if he were to serve heir of tailzie, and that apprising were objected, the inquest could neither say nor retour that the Duke died last vest and seased as of fee; so the two things requisite to make up the *condictio causa data*, &c. are here, viz. *Aliquid esse datum factum vel solutum sub causa vel conditione*; 2do, *Illam causam non esse secutam, illamve conditionem non esse impletam*: And conditions implied *ex natura rei*, and from narratives, may be as pregnant as if they were set down in the most express terms of *if*, and the other hypothetical particles; or, *per ablativos absolute positos*. *Answered*, The cause of giving the ratification was the making of the tailzie, which is done and performed, and so *causa est secuta*; and the ratification obliges them to purge all debts and incumbrances, *ita est*, that incumbrance is a debt; and what my Lord Lauderdale meant *non refert*, seeing *propositum in mente retentum* (especially if it be an equivocation contrary to the express tenor of the writ,) *nihil operatur*. *Replied*, To make the naked granting of the of the tailzie the sole onerous cause of the ratification is ridiculous; for it was the actual succeeding which was the cause; so, if I cannot succeed, then I cannot ratify: And the obligement to purge debts is only of such as properly are debts, as comprisings within the legal, &c. but an expired comprising ceases to be a debt, and becomes a right of property. The LORDS before answer ordained the said comprising to be produced.

But Lauderdale being dissatisfied with this, and pressing to have a decision *in jure* on the relevancy of his allegeance; the LORDS, on the 23d of Decem-

No 42. ber, resumed the advising the defence; and found the reason of suspension relevant to elide the ratification, viz. that there was an expired comprising against the Duke of Lauderdale, unpaid at the time of their subscribing that ratification, which would evacuate and carry away the estate from the heirs of tailzie, so that they could not enter; and found the ratification implied a condition, in case they did and could succeed; unless the Dutchess offer to prove, by the Earl's oath or writ, that he knew of that comprising standing out unsatisfied at the time of his signing that ratification; and assign the 1st of February to him to prove; and grant him an incident diligence for recovery of the said comprising.

My Lord Lauderdale gave in a declinator against Harcarse, upon this ground, that he had formed and drawn the whole securities and writs granted by the Duke to his Dutchess, and so had given partial counsel, and would judge himself concerned to maintain his own deeds. But the Lords did not sustain the declinator, in regard he deponed, that he was intrusted and employed by both parties to draw those writs, at least by my Lord Maitland. Pitmedden *argued*, to cause the Earl ratify when he could not succeed, was to give him stones instead of bread, and a scorpion instead of a fish; and that such donations to wives ought not to be encouraged; for that exposed old men, deficient in due benevolence, to be their wives' prey. And Lauderdale is loth to be reproached, that his family is extinguished and killed by the hand of a woman.

1685. *January* 13.—THERE is a letter from his Majesty to the Lords of Session, in favours of the Dutchess of Lauderdale against the Earl, obtained by Secretary Lundie, and the Lord Guildford North, Chancellor of England; bearing, that he had considered their interlocutor, recorded *supra*, 19th December 1684, and found it to be downright contrary to the Earl's obligement and ratification; and commanding them to give an account of the same, and to stop any farther procedure till he declare his pleasure. Though this seemed to be *mali exempli*, yet it was alleged to be the king's undoubted prerogative to evocate any depending action to himself, and that he had this inherent power before the late act of his cumulative jurisdiction 1681, Cap. 18.; for it is a right inherent in the Crown; and *Bodin. de republica, lib.* 1. *cap.* 8. *Grotius de jure belli et pacis*, (though no great friend to monarchy,) and others say, *summum imperium non esset summum*, unless they had power to cognosce on causes, though depending before their own Judges. *Bodin. loc. cit.* makes it a badge of royalty, that the Prince, without his subjects' consent, may, *pro lubitu*, abrogate, derogate, subrogate, and obrogate to the standing laws, where he sees it necessary, excepting the laws of God, of nature, nations, and the fundamental laws of the land; and he makes it *caput majestatis* to have *supremam et ultimam provocationem*, the last and dernier resort and cognition of all causes; which justifies appeals to his Majesty at least protestations for remeid

No 42.

of law; though in 1674, the King was made to condemn and discharge the first.

THE LORDS having considered the King's letter, appointed the President, Register, King's Advocate, (though none of their number,) and Pitmedden, to form the draught of an apologetick letter to the King, giving him a short hint of the grounds of that affair, and representing that his royal predecessors had founded this Court with a power to determine finally and ultimately, without any appeal either to King or Parliament; however they submitted to his Majesty's royal pleasure in the case.

1686. *January* 26.—The Dutchess of Lauderdale produced to the Lords a letter directed to them from the King in her favours, bearing, that she craved rectification of the interlocutor pronounced betwixt Lauderdale and her, on the 19th December 1684, finding that he is not bound to ratify her rights conform to his bond, because he cannot be heir, being excluded by an expired comprising in Barnton's person; and that it may be turned into an act before answer, and that Barnton and all others may be examined on the trust; and that, as his brother had done before, so he recommends her now to their favour, justice, and dispatch. Some proposed to record this letter in their books, but it was forborne, being represented not to be usual to record such letters.

1686. *February* 9.—There was a letter read to the Lords from the King, procured by the Lord Maitland; altering his former letter, mentioned 23d January last, thus far, that for the standing of the family of Lauderdale, they may submit the affair to some of the Lords, who may determine to her a reasonable jointure; and which of them two refused to stand to the determination, his Majesty will not countenance them. This she took in very bad part; and the President loves not this way of ruling the Session by letters. She chused the President and Harcarse; Lauderdale named Castlehill and Pitmedden; and the Chancellor was to be Oversman.

1686. *March* 23.—The King, as observed *supra*, 9th February 1686, having remitted them to arbiters, the same was deserted without any agreement, so she insisted. *Alleged*, The process was sleeping more than year and day. The President repelled this, because it was stopped and interrupted by the King's letter, and so she was *non valens agere*; though the letter and stop was obtained by herself. The treaty was renewed again.

1686. *November* 23.—THE Dutchess of Lauderdale insisting against the Earl for ratifying her rights, as mentioned 19th December 1684, the Earl craved a preliminary point first to be cleared, viz. That she may be obliged to pay her Lord's English debt, because it was a part of the communing and bargain,

No 42.

when he signed the ratification. *Answered*, That not being reduced to writ, was not obligatory. But the President affirmed, where a part of a transaction was redacted into writing, though not all, there was no *locus pœnitentiæ* for any part of it, it being one complex integral bargain. THE LORDS would not allow him to propone this, unless he would *simul et semel* ratify her rights; as to which point he resolved to be absent, though the President said this would not make it a decreet in absence, seeing he had compeared before; for Lauderdale thought the Lords' reputations were engaged not to alter what they had so solemnly done, in sustaining his defence on the expired comprising, and which they had justified to the king, when they were quarrelled thereon.

1686. *December* 1.—THE LORDS having advised the charge at the Dutchess of Lauderdale's instance against the Earl of Lauderdale and Lord Maitland, for ratifying her rights, as mentioned 23d November 1686, they repelled the Earl's reason of suspension, founded on Anderson of Hill's expired comprising (now in Sir Robert Milne's person), seeing he was bound to purge all debts and incumbrances; notwithstanding they had formerly sustained his allegeance on the said comprising, as sufficient to assoilzie him; and being then questioned by the King for it, they vindicated and justified their interlocutor, as agreeable to law, and called the contrary absurd; but now the same Lords (except the President, who is since come in, and Pitmedden now removed), altered their sentiments, and only three adhered, viz. Collinton, Redford, and Edmonston. The President read to the Lords, § 31. *Institut. De legatis, Quod falsa causa legato adjecta non nocet*; so the narrative of the ratification, speaking of the tailzie, did not make the ratification null, though the tailzie should prove ineffectual: But some thought the citation not apposite.

As to the allegeance, That she ought to pay the English debt, the LORDS found, If her oath of calumny was taken on it, seeing it was one precise single point, consisting in her own fact, without intricacy or qualities, they would construct it to be an oath of verity, and found it only probable *scripto vel juramento*, and not by the witnesses and communers; and if once they took her oath of calumny, they would not allow the Earl thereafter to produce any of her letters.

1686. *December* 14.—THE Dutchess and Earl of Lauderdale's case (mentioned 1st December 1686) being heard in presence, it was contended for the Earl, That the communers ought to be examined (they being all her own friends and trustees), whether it was not a part of the bargain, that she should pay the English debt, in fortification of her letter, bearing, in general, that she had undertaken great payments, and of the presumptions that in all her claim she never charged the English debt on my Lord Lauderdale; that the Lords *ex officio nobili*, had often done this; as in Leslie's case, about a bond of Stewart of Innernytie's, on very slender presumption, *voce* PROOF; in Colonel Fullar-

ton's case with the Viscount of Kingston, observed by Stair, 8th January 1663, No 11. p. 2558.; See also the index to his decisions, *voce* Witnesses *ex officio*, where there are more than twenty instances; and lately in Richard Cunningham's case with Duke Hamilton, 18th March 1686, *voce* PROOF; and that she ought to give her oath of calu mny, it being introduced by our law as a remedy to cut off pleas, where a party's own ingenuity is appealed to; and is enjoined expressly by the 125th act 1429, and again at the erection of the College of Justice, in 1537. *Answered*, This is to subvert our law, whereof these two are the *prima principia*; that a promise is only probable *scripto vel juramento*. 2*do*, That a matter above L. 100 Scots cannot be proven by witnesses; and Sir George M'Kenzie's Institutions were cited for this, *part* 3. *tit.* 2. and *part* 4. *tit.* 2. 3*tio*, Writ can only be taken away by writ, *idem eodem modo dissolvitur quo colligatur*; it is true, witnesses have been admitted *ex officio nobilissimo* in some cases, such as trusts, circumventions, *vis et metus*, concussions, trials of falsehood, in depositate or undelivered evidents, or for clearing dubious and ambiguous clauses, but never in so clear and precise a case as this; and that it were better the kingdom contributed to support Lauderdale's family, than to pass this bad preparative. The President declared, that, according to the favour of the circumstances, the Lords had often granted such expiscations by witnesses, and had as many times refused them; and therefore craved the lawyers not to expatiate on generals. Sir George M'Kenzie said, to cause Lauderdale ratify, and likewise to pay the English debt, was to make his ratification the winding-sheet of the earldom. Sir John Dalrymple added, that it was a ravenous cormorant appetite in her to devour all; which reflections were ill resented. She alleged the great payments mentioned in her letter were not the English debts, but her husband's funerals: And it was urged for her, that the faith of witnesses was turned so vacillant, that our law had derogated much from their testimonies in admitting them; and this is also the jealousy of France and Flanders, as George M'Kenzie observes on the 80th act 1579.

THE LORDS, before answer, ordained the witnesses inserted, and subscribing in the bond of ratification, or any other witnesses who were present at the communing, at or before the subscribing the said ratification, to be examined, if it was any part of their agreement, that the Dutchess should pay the English debt, reserving to themselves at advising, to consider what this should operate; but refused to examine in general any communers at other times before or after the ratification; because Lauderdale being called in, it was asked him, if there was any posterior agreement after the ratification? And he said he knew none. He was dissatisfied at his openness, seeing the use they made of it.

On the 18th of December (which being Saturday, was the last day before the vacance,) Lauderdale procured a new hearing, and before the Lords could get the debate advised, 12 hours was cried; yet the President caused close the

No 42. doors, and the Lords sat still, (though it was vacance this day after 12) and granted a commission, (not having assigned a day before) to London, to examine the witnesses there, to be reported the 14th of January, alledging the Lords had fully resolved before, to adhere to their former interlocutor; and so it was no judicial act. Lauderdale reclaimed, and threatened to appeal to the King; but the minute-book of this day not being read till the Session sat down again, on the 11th of January 1687, the extracting of the commission was delayed.

This cause being again called on the 12th of January 1687, it was *alleged* by Lauderdale, The former commission was null, being pronounced on the 18th of December, the last day of the Session after 12 o'clock, and so in the vacance, when *omnis actus judicialis cessare debet*. *2do*, It could not by act of sederunt be extracted till it was read in the minute-book, and 24 hours thereafter. But that was alleged to be only for the outer-house, though the reason is the same in both.——THE LORDS having advised it of new, they prorogated the diet for reporting the commission to the 1st of February, and allowed any of the two parties to report the commission, (for Lauderdale's main study was to cast it off this Session, but he could not get it done,) and refused to examine either the Dutchess or the communers, as to her promise at any subsequent communing, no agreement having followed thereon; but ordained her oath to be taken, if by the binding agreement mentioned in her letter produced, she did not mean an agreement by which she undertook to relieve the suspender of the English debts; and find the allegeance, that the Dutchess promised to give to the suspender the Duke of Lauderdale's books relevant to be proved by her oath; and granted warrant to Castlehill and Drumcairn to take her oath at her lodgings. And it being craved there might be a diligence granted for citing the Laird of Niddry and Sir William Sharp, to be present when her Grace shall depone, the LORDS allowed these persons to be present when she depones, if the Earl of Lauderdale can bring them, but refused to grant a diligence for citing them to that effect. But afterwards, on a bill, they allowed a diligence.

1687. *January* 13.—THE Dutchess of Lauderdale having raised an improbation of the comprising of the Duke of Lauderdale's estate, now in Milne of Barnton's person, and the 10th of January having been assigned for the first term, it was *alleged*, That the day assigned was an unlawful day, being feriat, the Yuile vacance lasting till the 10th of January inclusive; and the defender was prejudged, because he had not got an incident for recovery of it.——THE LORDS, on Kemnay's report, repelled the allegeance, but allowed the 10th of February for the second diet, and a diligence to be concluded against that day.

1687. *February* 3.—THE Earl of Lauderdale having referred to the Dutchess's oath, (as mentioned 14th December 1686,) her undertaking the English debt, and her promising to give the family the library of books; and she refusing to

depone on what expressions she had to the Bishop of Edinburgh, Niddry, and Sir William Sharp; Lauderdale gave in a bill craving she might depone thereon, and that these persons might confer with her in private before hand, to refresh her memory.——THE LORDS refused both, though they have often allowed it in other cases; and it was pretended the act 18th, Parliament 1686, did not allow both parties and their advocates to be present at the deponing, but *alternative* one of them in their option.

No 42.

1678. *February* 12.—THE Dutchess of Lauderdale's oath in the cause betwixt her and the Earl, mentioned 3d current, was advised. She denied that she ever undertook the English debt, and ascribed the great payments mentioned in her letter to some accounts, and her husband's funeral charges, which she paid, knowing she would get relief of the Earl; and denied that she promised to give the library to the family, or that she ever saw any disposition thereof by her Lord.——THE LORDS found her oath proved not the allegeance; and therefore found the letters orderly proceeded, though sundry contradictions were urged betwixt her oath and her letter; and the King afterwards declared, on hearing of the oath, that she had acknowledged to him her undertaking the English debt.

1678. *November* 18.—THE Dutchess of Lauderdale seeking an extract of the certification she had got against Sir Robert Milne in her improbation of Anderson of Hill's comprising on the estate of Lauderdale, (mentioned 13th January 1687,) the LORDS, upon a bill, stopped it; in regard there was a process of proving the tenor of that comprising depending at his instance, wherein probation was led, and that it behoved first to be advised; though the Dutchess alleged the true *casus amissionis* was, that it had been satisfied, retired, and extinct; and that a comprising could not be made up, because it might have had defects, nullities, and informalities *in gremio*, which no witness can remember or distinctly depone on, no more than the tenor of letters of horning can be proved or made up by witnesses, by act 94th Parliament 1579; which was in Lauderdale's predecessor's case; and this was likewise Sir John Nisbet of Dirleton's opinion; though the Lords have often made up comprisings.

This cause being called in presence on the 23d and 24th of November, (when she came herself, and on her petition was admitted to sit between the bars, though there be an act of Sederunt against all except Princes of the Blood,) it was debated for her, 1*mo*, against the tenor, That it could not be made up for the reason foresaid; 2*do*, *Esto* it were made up, that debt was extinct, retired, and satisfied by payment.—*Answered*, These points could not be mixed, for what has payment to do with the proving a tenor? Let it once be made up, and then in the mails and duties, reduction, declarator, or the like process, let them say paid. Yet the LORDS declared they would take them both complexly to their consideration, viz. the adminicles of the tenor, (as the letters taken off the

No 42. signet, the recording, Mr Thomas Lermonth's oath, who deponed that he saw and read that comprising, &c.); as also the reasons of reduction and extinction upon payment, and all the presumptions thereof, viz. that it was transacted, and new securities given for the money; which extinguished the comprising. Yester also gave in a bill, craving to be heard against this comprising, least it should cut off his debt.

At this time it was discovered, that the Dutchess had wrote letters to my Lord Glendoick, acknowledging she had agreed to pay her Lord's English debt, though she had sworn the contrary *supra*, 12th February 1687. So this was aggravated of purpose to cause her agree, and to stop the advising of the tenor; for though perjury does not annul the sentence, (see M'Kenzie's pleading in Lady Milton's case,) yet it affords the party damnified an action for damage and interest; and though it be *juratum*, being but an oath of knowledge, may be recanvassed; See *Perez. ad Tit. C. De reb. cred.*, and Stair, 23d Nov. 1665, Campbell, *voce* Litigious; and 27th Feb. 1678, Campbell, *voce* Multiplepoinding. Hugh Ross, Glendoick's servant, being the person who had stolen up these letters, and offering them to Lauderdale for 1000 merks, the Dutchess hearing of it did out-bid him, and prevailed with Hugh to give her up the letters, which she destroyed; whereon he was imprisoned for his trinketing and falsehood to both. But there are more of these letters yet extant, though not so clear.

On the 14th of December, the Lords advised this cause, and found the tenor not proved; but worded it so that they refused to sustain the tenor; and therefore assoilzied the Dutchess from it, and granted certification of her improbation of that comprising.——This decreet may be found null hereafter, because Anderson of Hill's heirs, in whose name the comprising was led, were not cited, nor several of the creditors for whose use it was led. Some suspected the comprising was extant, but that it laboured under some nullities and informalities which would be discovered and objected to, if it were produced; and therefore, to make up its tenor was a more compendious way to cover all these. And some touched at Mr Lermonth's oath, that it was not easy even for a lawyer, as a witness, to depone that it was a formal comprising, as he did; but all that in reason they could say was, that they observed no faults in it. It weighed with the Lords as unfavourable, that if this comprising were made up, it might cut off the Duke of Lauderdale's Creditors' diligence, and so make him die a bankrupt. But it was truly designed only against the Dutchess.

Fol. Dic. v. 1. *p.* 429. *Fountainhall, v.* 1. *p.* 322. 330. 398. 401. 409. 430. 433. 436. 439. 445. 447. & 480.

*** P. Falconer reports the same case:

1684. *December* 23.

No 42.

THE Earl of Lauderdale and my Lord Maitland having granted a ratification to my Lord Huntingtour of a disposition made by the Duke of Lauderdale to my Lord Huntingtour, for the behoof of the Dutchess, of the lands of Leidington and others; in which ratification there was a clause, wherein the said Earl of Lauderdale and Lord Maitland were obliged to purge all incumbrances that might affect the lands, and particularly comprisings; upon this ratification the Earl of Lauderdale and Lord Maitland being charged, they suspended, and raised reduction, the reason whereof was, That this was a conditional writ, in case they should succeed to the lands tailzied to them by the Duke, which, albeit not hypothecally conceived, yet the condition was implied, in so far as the said ratification bore in the narrative, 'Forasmuchas the said Duke had granted 'a tailzie to the Earl in liferent, and to the Lord Maitland in fee, and that it 'was just and rational that the Lady should be secured;' it did necessarily imply, that if either the Duke should have heirs of his own body, or that if the Duke, conform to the power reserved to him, should alter the same, it were neither just nor rational that they should be liable to warrant the lands to the Dutchess; and albeit that neither of these two have fallen out, yet the equivalent has, which is, that there is an expired apprising against the Duke of Lauderdale the time of the tailzie, whereby they were secluded; so that they neither did, nor could enter heirs of tailzie to the Duke in the said lands.—It was *answered*, That they opposed the ratification, which, whatever the narrative was, yet the obligatory part was pure and simple, and wherein, particularly, comprisings are enumerated; and that a false or wrong narrative did not derogate from the obligatory part; and that the narrative, even as it was conceived, bore, that the Duke had granted a bond of tailzie, which was true.—It was *replied* for the suspenders, That it did appear by the writ itself, that the true cause of the granting thereof was in contemplation of the succession to the tailzied lands by the tailzie; so that by the comprising, the tailzied lands being carried away, the obligatory part of the ratification ought to be declared null, being *causa data et non secuta*, and that the meaning of the clause anent the purging of the comprisings, was clear to be in relation to the lands disponed; so that the lands tailzied being carried away by an expired comprising, they could not be obliged to purge the lands disponed of comprisings affecting the same. ——THE LORDS found, That the cause of the ratification being the tailzie, and by virtue thereof the succession in the lands tailzied, that if there was an express apprising of the lands tailzied standing against the Duke, by which the tailzied estate was carried away, so that they could not succeed thereto, that the letters ought to be suspended as to the obligatory part of the ratification, the ratification being *causa data et non secuta*.

P. Falconer, *No* 96. *p*. 66.

*** This case is also reported by Sir P. Home :

1685. *March.*

No 42.

The Earl of Lauderdale and Lord Maitland having granted a bond of ratification to the Dutchess of Lauderdale, making mention that the Duke, by a bond of tailzie of the date of the ratification, had provided his estate and dignity to the Earl of Lauderdale in liferent, and to the Lord Maitland in fee; and had conveyed in favour of the Dutchess and Lord Huntingtour, certain lands; and by former rights and settlements, had established upon the Dutchess, the houses and lands of Ham, and his whole moveables; and that the Dutchess had accepted of the same, and to quit her liferent, and other conveyances in her favour as to the tailzied estate; therefore the Earl of Lauderdale and Lord Maitland did ratify and approve the rights and conveyances made in favour of the Dutchess and the Lord Huntingtour, and for their further security, are obliged to warrant the said rights, and for that effect, to free, relieve, purge, and disburden the same of all debts and sums of money, dispositions, infeftments, apprisings, inhibitions, and other burdens and incumbrances whatsoever, that may anywise trouble or molest the Dutchess or the Lord Huntingtour in the peaceable possession of the lands; and, if need be, to grant new securities thereanent. Whereupon the Earl of Lauderdale and Lord Maitland being charged, they suspended upon this reason, That the bond of ratification did proceed upon the narrative and cause, that the Duke of Lauderdale, by a bond of tailzie, had provided his estate to the Earl in liferent, and to the Lord Maitland in fee, whereby they might succeed as heirs of tailzie; whereas now they can have no benefit by the said tailzie, nor can they succeed to the estate, there being an expired apprysing of the same, at the instance of Mr David Anderson, which now, by progress, is conveyed to Sir Robert Milne of Barntown; so that the ratification was granted *ob causam datam et non secutam.* And albeit the ratification was not conditionally conceived, yet the condition was implied; seeing it did bear in the narrative, in so far as the Duke had granted a tailzie in favour of the suspenders, failing of heirs male of his own body, and that it was just and reasonable that the Dutchess should be secured, it did necessarily imply, that if either the Duke should have heirs of his own body, or that if, conform to the power reserved to him, he should alter the tailzie, the suspenders could not have been obliged to warrant the lands to the Dutchess, by virtue of the bond of ratification. And albeit neither of these two has existed, yet the equivalent has, which is, that there was an expired apprising against the Duke the time of the tailzie, whereby they were secluded from the estate and succession.—*Answered,* That the narrative of the ratification bears only that the Duke had made a tailzie in favour of the suspenders, which then was, and still is true. And it does not import whether the tailzie could be effectual or no, seeing the obligatory part of the bond is pure and simple; and a false or wrong

narrative doth not derogate from the obligation; and the narrative of the bond does not only mention the tailzie, but likewise the rights made in favour of the Dutchess and Lord Huntingtour; and that it being just and reasonable that these rights and conveyances should be secured, therefore they are obliged to warrant the same, and to free the lands of all debts and incumbrances, and particularly of apprisings; and it is just the case as if a father should dispone his estate to his son in his contract of marriage, and if the son should grant a bond of corroboration to the father's creditors; and albeit there were an expired apprising, yet that will not free the son from his obligation by the bond of corroboration.——THE LORDS found the reason of suspension relevant, bearing, that the bond of ratification being granted in contemplation of the suspenders their succeeding to the tailzied estate, that they are excluded, and cannot enter heirs of tailzie by an expired apprising of the tailzied lands, which was expired the time of the making of the tailzie; unless it were offered to be proved by the suspender's oath, or by writ, that the time of the granting of the bond of ratification, they knew that the apprysing was expired and unsatisfied.

1686. *November*.—IN the action at the instance of the Dutchess of Lauderdale and Lord Huntingtour, against the Earl of Lauderdale and Lord Maitland, mentioned in March 1685, it being farther *alleged* for the Dutchess, That albeit there were such an apprising, yet that could not hinder the suspenders to enter heir to the Duke by virtue of the tailzie, and there are several baronies of lands, such as Cranshaws, Swinton, and others, amounting to above L. 20000 yearly that are not contained in the apprising, being but lately acquired by the Duke; as also, the suspenders have accepted of the tailzie in so far as they made resignation thereupon in the King's hands, and there being a former tailzie of the estate and dignity in favours of the Lord Yester's children which did cut off the suspenders from the succession, they can have no right either to the estate and dignity, but by the last tailzie in my favours, which is expressly with the burden of the rights and settlements made in favours of the Dutchess and Lord Huntingtour; and, by the acceptation thereof, the heirs of tailzie are expressly obliged to warrant the land to the Dutchess and Lord Huntingtour, and to purge the same of all debts and particularly of apprisings, in the same terms of the bond of ratification; and seeing they have made resignation upon the tailzie, and assumed the title and dignity, it must be ascribed to the tailzie and import an acceptance; and, albeit there were no lands to which the suspenders ought to succeed by virtue of the tailzie, and albeit they had not accepted of the same, yet notwithstanding they ought to fulfil the ratification, and cannot be liberated of that obligation upon pretence that there is an expired apprising as if the bond had been granted *ob causam datam et non secutam*, seeing there is such a tailzie, and that the suspenders are particularly obliged to relieve the lands of all debts and incumbrances, and particu-

No 42. larly of apprisings; and, at the same time, when they granted the bond of ratification, that they did write several letters to the Dutchess, acknowledging how infinitely they are obliged to her in being so instrumental in getting the estate and dignity settled in their favours, which had been formerly provided in favours of the Lord Yester's children; and albeit the tailzie in favours of the suspender, had been the cause of the granting of the obligation, and that the same could not be effectual, yet it is a principle in law that *falsa causa non nocet*, and does not annul the obligation, Inst. L. 2. T. 20. § 31. De Legat. 'Longe 'magis legato falsa causa (adjecta) non nocet, veluti cum quis ita dixerit "Titio, "quia me absente negotia mea curavit, Stichum do, lego." Vel ita, 'Titio, quia "patrocinio ejus capitali crimine liberatus sum, stichum do, lego.' Licet enim 'neque negotia testatoris unquam gesserit Titius, neque patrocinio ejus libe-'ratus sit, legatum tamen valet;' especially in this case, where the obligation is simple and absolute, and not conceived by way of condition, and Leg. 2. Cod. De falsa causa adjecta legato vel fidei-commiss. 'Etiamsi veritas debiti non subest, 'falsa tamen demonstratio non perimit legatum, et ex testamento ejus quoque 'nomine competit actio,' and if it were otherwise sustained, it might be a ground to overturn all settlements; and this apprising being disponed by Anderson to the Laird of Niddry, who was one of his friends and one of his trustees that managed his affairs, and transferred by him to Sir John Maitland, and by him to Barnton, who is likewise the suspender's friend and trustee, is nothing but a fraudulent contrivance of design to carry away the estate, in prejudice of the Dutchess and Duke's lawful creditors, this apprising never being heard of until of late, and it certainly has been settled and transacted with the Duke or his friends, for the creditor never pretended to any more but the payment of the annualrent of the sum contained in the said apprising; and it is clear, by the list of the debts signed by the Duke and Sir William Sharp, when the Duke set a tack of the estate to Sir William for payment of his debts, in which this debt is stated as a personal debt, and it cannot be thought that the Duke, who had an opulent estate and purchased lands, would have suffered an expired apprising to be standing against his estate, and not to have transacted the same, albeit the Dutchess cannot now instruct it, not being master of the Duke's papers. *Answered*, That the former interlocutor was opponed sustaining the reason of suspension, that the bond of ratification being granted in contemplation of the suspenders their succeeding to the tailzied estate, they are excluded by an expired apprising of the tailzied lands, unless it were offered to be proved by the suspenders oaths, or by writ, that the time of the granting of the bond of ratification, they knew that the apprising was expired and unsatisfied; which interlocutor was founded upon this just ground, that seeing the bond of ratification was granted in contemplation that the bond of tailzie was to be effectual to the suspenders, and that they were to succeed to the tailzied estate, which now being evacuated and made of no effect to the foresaid expired apprising, it were unreasonable that the suspenders should be obliged to fulfil the

bond of ratification and obliged to relieve the Dutchess of the debts, seeing they could not enjoy the estate out of which the debts were to be paid, and the suspenders are content to make faith that they did not know that there was any such apprising the time when they granted the foresaid bond of ratification, and it cannot be made appear that the apprising was settled and transacted by the Duke, neither have the suspenders any interest in the same, being disponed to Barnton for onerous causes; and, albeit the suspenders could be obliged to fulfil the bond of ratification, yet the Dutchess ought to relieve them of the English debts due by the Duke, because it was a part of the transaction when the ratification was granted, that the Dutchess should relieve the suspender of these debts, and craved her oath of calumny if she had just ground to refuse that this was a part of the transaction. *Replied*, That the foresaid interlocutor was stopped before the parties were farther heard, and seeing there is nothing yet extracted, it is ordinary for the Lords to resume to their consideration interlocutors, and to alter and ratify the same as they should think just, and there are several things represented in behalf of the Dutchess that were not then alleged, as that there were several lands contained in the tailzie to which the suspenders might succeed, and could not be excluded by the apprising, and that they had accepted of the tailzie by making resignation thereupon, and assuming the title and dignity, and albeit the tailzie was mentioned in the narrative of the ratification, yet the obligation to relieve the Dutchess of all debts, and particularly of apprisings without any condition or qualification, was obligatory against the suspenders whether the tailzie was effectual or not; and the Dutchess could not be obliged to relieve the suspenders of the English debts, that being expressly contrary to the bond of ratification by which they were obliged to relieve her of all debts that might anyways affect the lands disponed to her in Scotland, or the lands of Ham. THE LORDS having considered the debate with the former interlocutor and minutes of process, and the bond of ratification, they repel the reason of suspension founded on the expired apprising, and sustain the other reason, that the charger, the time of the transaction, or thereafter, promised to relieve the suspenders of the English debts, to be proved by writ or oath of the charger; and declare, if the defenders procurators shall insist to have the charger's oath of calumny upon the reason, that the same shall be held as an oath of verity, so that the suspenders shall not be allowed thereafter to make use of writs for proving the reason, the same being in a precise point, and upon the Dutchess's own deed.

No 42.

It was farther *alleged* for the Earl of Lauderdale and Lord Maitland, That they would not have the Dutchess her oath of calumny; but craved that the writs and witnesses in the bond of ratification and communers might be examined *ex officio*, upon these points, if before the bond of ratification, or the time of that settlement, or at some communing thereafter, the Dutchess did promise to relieve them of the English debts; and, albeit regularly, writ was only to

No 42. be taken away by writ, or oath of party, and that a promise of payment or to relieve of debts, was not probable by witnesses, yet, in this case, the witnesses and communers ought to be examined for clearing of the terms of the communing, seeing it appears by a letter under the Dutches's own hand, whereby she writes, that she did take both herself and the suspenders to stand so far bound by their last agreement. that she did not see what there was more to be done, but the confirmation of the same; which agreement had been so binding upon her, that she had, to the uttermost of her power, extended even more than her ability, to make great payments, which might infer, that at some preceding communing the Dutchess had promised to relieve the suspenders of the English debts; and albeit by the ratification the suspenders be obliged to relieve the Dutchess of all debts, yet, seeing it is thereafter added, and of all inhibitions, comprisings, and infeftments, all which are Scots incumbrances, it is probable that the parties have only understood the Scots debts; and if the English debts and incumbrances had been understood, they would have been expressed either in general terms all Scots and English debts, or at least the mortgages which did affect the lands in England; and when there was a special charge formerly given in, there was no mention made of the English debts, and there are several presumptions in this case that the suspenders would not undertake the English debts, because these debts being above L. 16,000 Sterling, they would have exhausted the remainder of the estate; and if the suspenders had been liable, the English creditors would have pursued them for payment thereof, which they never did; and in many cases the Lords allow witnesses and communers to take away express writ, as in the case of the Lord Kingston against Colonel Fullerton and the Earl of Lothian, No 11. p. 2558.; and lately, in the case of Lauchlan Leslie against Stewart of Innernytie, *voce* Proof; and as a tenor of writ may be made up by witnesses, so it may be taken away with witnesses; and in many cases of trust, witnesses may be received to take away express writ; as, if a father should dispone his estate to his servant, and that servant should acknowlege before witnesses, that it is in trust to the children's behoof, in that case, and many others of that nature, especially where the presumption of law is against the express writ, witnesses may be examined for taking it away. *Answered*, That by the interlocutor, the promise to relieve the suspenders of the English debts, was only found probable by the Dutches's oath, or by writ, and this being a reason of suspension, it must be instantly verified; and the interlocutor is founded upon this certain principle in our law, that writs cannot be taken away but by writ, or oath of party; and a promise to relieve being equivalent to a promise of payment, which being *nuda emissio verborum*, the one was no more probable by witnesses than the other; and if the promise to relieve the suspenders of the English debts were allowed to be proved by witnesses, then, by the same reason, witnesses may be admitted to prove that the Dutchess promised to relieve the suspenders of the Scots debts, and of any other provision contained in the bond of

ratification, so that by this means the whole bond of ratification might be evacuated and made ineffectual, contrary to the express tenor of the writ; and there is nothing in the Dutchess's letter that can in the least import a promise to relieve the suspenders of the English debts, and the payment which the Dutchess said she made beyond her ability was only a part of the Duke's funeral charges, which she was necessitated to undertake and pay, she being the Duke's executrix in England, which she the more willingly did, because she knew she was to get her relief from the suspenders, upon the bond of ratification; but she never looked upon any agreement to be binding, but the bond of ratification by which the suspenders being obliged to relieve the Dutchess of all debts, burdens, and incumbrances whatsomever that might hinder them to possess and enjoy the lands, which must comprehend the English as well as the Scots debts, and the mentioning inhibitions and apprisings, which are Scots diligences, cannot restrict the word 'debts,' seeing the ratification bears expressly 'all debts,' and there was no necessity to mention mortgages that did affect the lands of Ham, it being sufficient that it mentions all burdens and incumbrances that may affect these lands, as well as the Scots estate; and the greatness of the English debts can be no presumption that the suspenders would not undertake the same; for that argument is retorted, that seeing the debts are so great it cannot be imagined that the Dutchess would undertake them, because they would have exhausted almost all the estate in Scotland disponed to her and the Lord Huntingtour, so that she would have been in far worse case than if she had made no such agreement, or had accepted such a bond; and albeit in some cases the LORDS allow witnesses and communers to be received for taking away writ, that is only in the case, where there is a dubious clause in writs, or that the grounds alleged for taking away of the writ consists in matter of fact, and falls under, and so may be probable by witneses, as in the cases above mentioned; which cannot be allowed in this case, seeing the writ is express and clear in itself, and the grounds for taking away of the writ are not matters of fact, but an alleged promise, which being *nuda emissio verborum*, is not probable by witnesses to make a party liable for L. 100 Scots, much less for so great a sum as the English debts; and the reason why the creditors in England did not pursue the suspenders for the debts was because, as for real debts they were secure by the mortgages of Ham, and as for the accounts and other personal debts, the Dutchess being confirmed executrix in England, the creditors had immediate access against her for the same, and where the Dutchess was liable the creditors would not trouble themselves to pursue the suspenders who live in another kingdom; and the special charge that was first given in was only of the Scots debts, which the Dutchess did insist to be relieved of, in the *first* place, because they did immediately affect her estate in Scotland, and her lawyers then had not gotten a particular list of the English debts, and therefore there was a protestation added, in the special charge, that it should be without prejudice to add all other debts; and accordingly when they did insist to discuss

No 42.

No 42.

the suspension they did likewise insist for the English debts. The Lords, before answer, ordain the witnesses inserted in the bond of ratification, and the communers at the agreement when the bond of ratification was subscribed, to be examined, *ex officio*, if it was then treated and agreed that the Dutchess should relieve the suspenders of the English debts; reserving to the Lords, after they are examined, to consider what the depositions shall import; and ordain the suspenders procurators to condescend upon the communers, and refuse to examine the communers as to any subsequent communing.

Sir P. Home, MS. v. 2. *No* 718. 811. & 812.

1686. *March* 23. Rory Davidson *against* John Wauchop's Heir.

No 43.

In the case between John Wauchop's heir and Rory Davidson, for 3000 merks he had obliged himself to pay to the said John, if he would demit his office of macer, *alleged*, He got not the place, but James Gordon was preferred, and so it was *sine causa, et causa data causa non secuta*. *Answered*, Its cause was, that I by my demission should make the place vacant, which was all I was obliged to do; and you by the Register's recommendation was to procure it for yourself; I was not bound to get you to succeed me; so it was *emptio spei et jactus retis*. The Lords found Rory liable.

December 9.—Rory Davidson's case with John Wauchope's heir, mentioned 24th March 1686, was debated *in præsentia*. *Alleged*, The bond was *causa data causa non secuta*, and so null. *Answered*, The cause and condition failing *casu fortuito*, by John Wauchop's death, without any fault or *mora* on his part, and this being *jactus retis et emptio spei* on Rory's part, *condictio chirographi et et repetitio pecuniæ cessat, per claram leg.* 10. *C. De condict. ob causam datorum. Replied*, It was not a completed bargain, but pendent till November 1682, till which time John Wauchope was bound to serve as macer, and he having died before, *nihil tibi deest*, you are *in lucro captando*, and I *in damno vitando*, likeas it depended *super implemento tertii*, the King's acceptance; and I had not so much time as to procure a new gift, because of his sudden intervenient death, and James Gordon's preference to it. And Vinnius is of the mind, that *condictio* holds in this case, in his additions to *Vecembecius, ad Tit. D. De condict. causa data*. The Lords adhered to their former interlocutor; but allowed him, out of the 4000 merks, 1000 merks for the expenses of his journey to London, in contemplation and prosecution of the bargain; which is conform to *l.* 5. *princ. D. eod. tit.* where the expense I am put to *intuitu* of the agreement, must be refunded to me.

Fol. Dic. v. 1. *p.* 429. *Fountainhall, v.* 1. *p.* 409. & 435.