

1667. *February 15.* SIR JOHN GIBSON and ALEXANDER GIBSON *against* HARRY TROTTER of MORTONHALL.

IN an action of improbation, pursued at Sir John and Alexander Gibsons' instances, against Harry Trotter of Mortonhall, there being an incident protested for, and raised *debito tempore*, and executed, but not being produced before the first term assigned for production thereof;—it was debated, in point of form, That, since the same was not produced *debito tempore*, albeit raised and executed timeously, whether the same ought to sustain.

The Lords repelled the incident, and turned the same in an exhibition; and gave a long term to the defender to produce all his writs called for.

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1667. *February 15.* SIR ROBERT SINCLAIR of STEINSON *against* The COUNTESS of HOME, JOHN FAIRHOLM, and JOHN FOULIS.

UMQUHILE Sir John Sinclair, younger of Steinston, *in anno* 1650, was infeft in an annualrent of 1800 merks, out of the barony of Hirshill, redeemable upon payment of £2000; and the infeftment was clad with possession, by uplifting the annualrent at the term of Martinmas 1650. Sir Robert Sinclair, now of Steinson, was infeft upon a precept of *clare constat*, *in anno* 1654, as heir to his brother; and, in April 1655, obtained decret for pointing of the ground. *In anno* 1663, the deceased Earl of Home granted bond of corroboration; whereby he acknowledged there was resting £5774, at Whitsunday 1663, of the bygones; which he obliged him to pay at Martinmas thereafter, with annualrent from Whitsunday; and, for annualrent of the said sum, assigns Steinson to the first, and readiest of the maills and duties; and eiked the said sum to the reversion. There is summons raised at Steinson's instance, making mention of the said right; and that the foresaid sums, contained in the foresaid bond of corroboration, are yet resting; and, since the granting of the said bond, there is run in arrear of the first annualrent of 1800 merks, the sum of £1926, for the term of Martinmas 1656, and preceding: For payment and security thereof he intends to comprise the ground-right and property, and has convened the Countess of Home, John Fairholm, and John Foulis, compriser, Robert Pringle of Stitchell, and Greenleill's brethren, who are infeft in a wadset of the said lands, to hear and see it found and declared, that the foresaid sum of £4774, due for bygone annualrents at Whitsunday 1663, and the said sum of £1626 of the said annualrent, for Whitsunday 1663 to Martinmas 1666, is still resting; and, that the ground-right of the said land and barony stands really affected therewith: that, therefore, it should be lawful to him to use all execution therefor; either by pointing the ground, or by apprising the property, or by both, or otherwise, as he shall think expedient.

There is compareance made for the Countess of Home, and it is ALLEGED for her, That the arrears of the annualrent being stated in two principal sums, and eiked into the reversion, in the first contract; and, since the granting of the said bond, the Earl having paid annualrent for the bygone so stated in two

sums, the same are innovated, and cease to be annualrent : so that they cannot be comprised for, as bygones, or arrears of the first annualrent ; being become a principal sum, bearing annualrent, and for which annualrent has been actually paid ; and, consequently, the property cannot be comprised for the same, as bygone annualrents drawn back to the first right.

To which it was REPLIED, That the same stands relevant ; and the allegiance ought to be repelled :—*1st.* By Act of Debtor and Creditor, the bygone annualrents, resting unpaid at Whitsunday 1667, are appointed to become, and made, a principal sum ; and, in case of not-payment of the said bygones at the terms mentioned in the foresaid act, annualrent is appointed to be due and payable for the same, in the same manner as if a security had been granted : And, consequently, whether the said bond had been taken or not, annualrent, by the Act of Parliament, had been due for the bygones ; and the nature of the said bygones would not have been innovated ; nor could the same prejudice the creditor to use real execution, by comprising for the said bygones. *2d.* The taking of the said bond did nowise innovate nor alter the nature of the said ——— ; because, the time of the taking of the said bond, there was no discharge given for the bygones ; but only, count and reckoning being made, so much acknowledged to be resting of the bygones, and bond granted for the same only in corroboration and for farther security, but prejudice of the former infestments and contracts ; and which bond cannot hinder him to comprise for the same, and for the arrears of the first annualrent run or since. And he cannot be hindered to quit or renounce the said security, which is only corroborative : nor can the lady allege any prejudice by his said diligence of comprising, which is usual and legal : nor can she be said to oppose the same, upon pretence of her right ; being a party disponer and consentor to the first right of annualrent, and who has subscribed the contract.

The Lords repelled the allegiance proponed for the Countess ; and decerned for the principal sum contained in the bond ; but assoilyied from the bygone annualrents thereof.

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1667. *February 15.* LAURENCE SCOTT *against* The HEIRS of BOSWELL of ACHFLECK.

IN the action pursued at Laurence Scott's instance, mentioned 22d November 1665, against the heirs-of-line of Boswell of Achfleck, the Lords found it sufficient to the heirs-of-line to renounce ; and that their receiving of an inconsiderable sum of money from the heir of tailyie could not make them successors *titulo lucrativo* to their father, they always having done no deed whereby the creditors might be prejudged of the payment of their debt out of the estate standing in the person of the heir of tailyie.

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