No 67.

perstructure of an adjudication, to make the personal bonds (the foundation of this process) an effectual title; and that being now done, it must be drawn back to its original; so there is neither hearsay nor incongruity to carry on the process by this supervenient title; and this is no more than what is done every day in parallel cases, as 28th June 1671, Home against Renton, *voce* REDEMPTION, where a horning was sustained, though requisition was not used, in the terms of the bond, requisition being made before extracting; and lately in my Lord Pitmedden and his Son's case, against the Creditors of Dunfermline, See APPENDIX, the title as heir *designative* was not sustained, but he was allowed to produce a retour *cum processu*. And how often is a general assignation sustained, they confirming before extract? *Replied*, Here is no foundation to make a superstructure on; for personal bonds *non tangunt subjectum;* they do not reach the land; and it is absurd, that he who cannot possess the subject should make void another's title; and the cases cited are where there is a *jus sanguinis fundatum*, which is good *ad inchoandam litem*, though not *ad finiendam*, till perfected; which is otherwise here, where it gives neither *jus in re*, nor *ad rem*. THE LORDS found the adjudication might be joined to support the old summons; and, therefore, sustained Spottiswood's process, without putting him to raise a new one.

Fountainhall, v. 2. p. 748.

1714. *July* 20.

JAMES DUNBAR, and his ASSIGNEES, *against* JAMES Earl of MORTON.

No 68.

Found in conformity with Inglis against Lord A. Hay, No 66. p. 13293.

IN the action of mails and duties, at the instance of James Dunbar, and his Assignees, against James Earl of Morton, and his Tenants of Orkney, the pursuer's title, which was an extract of an heritable bond, granted by William Earl of Morton and Robert Lord Dalkeith, his son, to Mr Andrew Dick, with a charter of resignation, and sasine thereon, being quarrelled by the defender, because the said extract was grievously torn and lacerated in many places, so as it could not be read; the pursuer, to supply that defect, raised and executed a summons, for proving the tenor of the principal bond, which they craved might be summarily and *incidenter* received; especially considering that such actions used to be received *incidenter*, even when the tenor of a whole writ is to be made up; and in the case of the Lady Eccles, See APPENDIX, the Lords allowed two full sheets of a disposition to her by young Leny to be supplied by the oaths of two instrumentary witnesses, upon a supplication at her instance; and much more in this case, a few words lacerated and torn, by much using and careless keeping, ought to be allowed to be made up summarily, when the adminicles are most pregnant, and all in the field.

Answered for the defender; The pursuer cannot be admitted to support or supply his title by an incident proving of the tenor; because, 1*mo*, Though

defenders in improbations have been allowed to repeat provings of the tenor *incidenter*, and have got time for that effect, and defenders have been allowed to repeat a proving of the tenor, to prevent the hardship of a *res judicata* against them, upon competent and omitted; no person was ever allowed, in any case, to support the active title of his own process, by an incident proving of the tenor; seeing pursuers ought to come *parati*, and to have a sufficient well connected progress of right, before they commence their process; as was decided, 2d July 1709, in the case betwixt Mr John Inglis and Lord Alexander Hay, No 66. p. 13293. where the pursuer, for that very same reason, was not allowed to repeat *incidenter* a proving the tenor of a precept of *clare constat*, necessary for supporting his title; *2do*, The tenor of a bond was never admitted to proof, without calling the heirs and executors of the deceased debtor; 5th March 1628, Hammermen in Glasgow *contra* Crawfurd, No 130. p. 2247.; and here, neither heir nor executor of the granter of the bond under debate is cited. No 68.

Replied for the pursuer, *1mo*, A proving of tenor being an accessory action, brought in to adminiculate and support other actions, should be admitted *incidenter*; *2do*, The Earl of Morton, apparent heir to the granter of the bond, is in the field, and though there may be executors or nearest of kin concerned, the pursuers take their hazard, and seek it may be only *res judicata quoad* the Earl.

THE LORDS refused to admit the action of proving the tenor *incidenter*.

Fol. Dic. v. 2. p. 305. Forbes, MS. p. 92.

See APPENDIX.
See LITIGIOUS.