

1631. *January 26.* LD. GADGIRTH *against* LD. AUCHINLECK.

A DECREE in a process, finding upon probation, a man heir to his father *passive*, as having intromitted with the heirship goods, was found no probation of that passive title in a new process at another party's instance; the defender alleging in this new process, that his father was such a person as could not have an heir; which allegiance was omitted to be proponed in the first.

*Fol. Dic. v. 2. p. 347. Durie.*

\* \* \* This case is No 58. p. 9709., *voce* PASSIVE TITLE.

No 11.

1632. *January 25.* KAIDISLIE OF ANDERSON *against* LAWDER of Whitslaid.

THE said Lawder being convened as heir to his father, for payment of a sum contained in his father's bond; and for verifying him to be heir, a decret being produced, given at another party's instance against the same defender, being then pursued as heir to his father, by the which decret he is decerned as heir to him, being found proved by production of a sasine given to him as heir to his father; which decret proceeding upon the said probation, the LORDS found proved this party heir in this process, and that there was no necessity to produce the sasine, nor any other writ, except the said decret, to prove him heir, so long as the said decret stood unreduced; albeit the defender *alleged*, That that decret was given against him, being absent, and for not compearance, and that deducta in uno processu non probant in alio, et res inter alios judicata aliis non nocet, and that if the party will produce the sasine used in the other process, he will offer to improve the same; for he alleged that there was never such a sasine; which allegiance was repelled, in respect of the said decret, which behoved to prove, ay and while the same were reduced, and the manner whereby it was there found proved taken away.

*Act. Hart.*

*Alt. Burnet.*

*Clerk, Gibson.*

*Fol. Dic. v. 2. p. 347. Durie, p. 614.*

\* \* \* Spottiswood reports this case :

1632. *July 25.*—IN an action of registration pursued by Margaret Anderson against Gilbert Lawder of Whitslaid, as heir to his father; for verifying him to be heir she produced a decret obtained against him as heir to his father, at the instance of Richard Lawder, and that by production of a sasine of a tenement in Lawder, given to the said Gilbert as heir to his father, which sasine the decret bore to have been produced. *Alleged*, That decret was obtained for non

No 12.

A party to verify another to be heir to his father, produced a decret at a third party's instance against him which bore, production of a sasine in his favour as heir. Found sufficient evidence, altho' the decret had been in absence.

No 12. compearance, and therefore ought not to be respected, except the sasine mentioned therein were now produced, which when it shall be, the defender will offer to improve it; otherwise it were hard to make a decret obtained upon the production of a false sasine perhaps, to work ever after against the defender. *Replied*, That ought to be repelled in respect of the decret standing, given upon lawful probation. "THE LORDS repelled the allegiance.

*Spottiswood, (HEIRS.) p. 142.*

No 13.

Found, that a debtor's deposition in a furthcoming to which his creditor was called, was conclusive in all processes about that debt.

1664. February 13. RUSSEL against CUNINGHAME.

LAWRENCE RUSSEL pursues George Cuninghame, for making a debt forthcoming as arrested in his hands, whereof he was debtor to Harry Moffat; and being referred to the defender's oath, he swears and is assoilzied. Moffat being called in the process thereafter, there is a new process pursued before the Lords at Moffat's instance against Cuninghame, who *alleges*, That *res est bactenus judicata* upon his oath, Moffat being called. It was *answered*, That Moffat was not compearing, nor pursuer of that process. *Replied*, His creditor arrester was pursuer compearing, and he himself called, whom the defender could not force to compear, and he himself forced to give his oath, otherwise to be holden as confest, and oaths so taken end the controversy without recovery.

THE LORDS assoilzied, yet they inclined to cause re-examine Cuningham, if it could be made appear, that there was any unclerness in the oath.

*Fol. Dic. v. 2. p. 347. Gilmour, No 96. p. 73.*

1665. February 1.

BROOMHALL against The MARQUIS of DOUGLAS, and EARL of LAUDERDALE.

No 14.

Altho' in an action of proving of the tenor of a bond, against one of two obligants the *casus amissionis* has been proved in another proving of the tenor against the other obligant, a new proof must be brought.

THE umquhile Marquis of Douglas and umquhile Earl of Lauderdale being addebted to Broomhall by bond, conjunctly and severally, with a mutual clause of relief; and this bond having been burnt in the Lady Brand's house at Edinburgh; Broomhall raised a summons for proving the tenor against the Marquis of Douglas, wherein having libelled *casum amissiones*, and adduced many other adminicles, he obtained decret against the said Marquis. Thereafter he raises summons against the Earl of Lauderdale, for proving likewise the tenor against him, wherein he having only produced the decret recovered against the Marquis of Douglas, for instructing his *casum amissionis*, and the other adminicles; the LORDS would not suffer the pursuer to repete the decret recovered against the Marquis in this process, but found, that he behoved to lead the same witnesses for proving his summons, without prejudice to the Earl of Lauderdale,