

1686. December 11. Mr WILLIAM DUNDAS against HUGH WALLACE.

No 282.

MR WILLIAM DUNDAS, Advocate, having raised a reduction against Hugh Wallace's son, of Major Biggar's rights to him of the lands of Wolmet, as mentioned 10th November 1683, *voce* QUOD AB INITIO VITIOSUM; and the first term being run, he takes up his process, because of Melfort's favour for Hugh; whereupon Hugh Wallace gives in a bill, craving he may be ordained to re-produce it, and to insist; and *alleged* from Stair's Decisions, 6th June 1665, where Sir William Thomson was ordained to give back his process anent the clerkship, against the Town of Edinburgh, which he had thus stolen up, *voce* PUBLIC OFFICER. *Answered*, That was after debate; and Pitmedden, in Reid of Bara's case, 23d December 1685, No 280. p. 12145. was permitted to pass from his summons.—THE LORDS would not force Mr William Dundas to re-produce it.

Fol. Dic. v. 2. p. 196. Fountainball, v. 1. p. 436.

1693. November 25.

Mr JOHN SWINTON against Mr ARCHIBALD PRIMROSE of Dalmeny.

No 283.

IN the concluded cause, Mr John Swinton against Archibald Primrose of Dalmeny, for the tack-duty of a salt-pan set to Sir Archibald Primrose, his father, it was now *alleged*, That it is prescribed *quoad modum probandi*, not being pursued within five years after the ish of the tack, and the tenant's removal. *Answered*, This was not receivable now, after an act of litiscontestation, and probation led on it; but was a dilator that was only competent *in principio litis*. *Replied*, He proponed it *peremptorie*, and it was yet receivable, and abides no probation, being founded on a clear statute; and the intending this process being more than five years after Sir Archibald the tacksman's death. *Duplied*, It cannot be received now to the pursuer's prejudice, who (if it had been *debito tempore* proponed) would have offered to prove interruption, whereof he is now precluded. THE LORDS thought it not receivable now; for that were to engage the pursuer to a new act of litiscontestation, and to seek terms to prove interruption; and that the defender's offer to pay his expenses was not sufficient, and his mean of probation might be now perished.

When a process came to be advised, the defender recurred to a defence not formerly oponed. Not allowed, even upon paying expenses.

Fol. Dic. v. 2. p. 199. Fountainhall, v. 1. p. 571.

1693. December 2.

M'CORKAL against SANDERSON.

No 284.

IN sundry concluded causes, advised this day, as between M'Corkal and Sanderson, and between Blair and M'Gilchrist, against Janet Lorn and Others, the LORDS followed this method, that they received new allegeances, not proponed.

In advising a concluded cause, the Lords allowed.

No 284.
a new allegiance, not pronounced in the act, to be proved by the party's oath; but found it must be *cum onere impensarum*, if he deponed negative.

in the act to be proved by the party's oath. The LORDS were all clear, that if he was at the Bar, the referring a relevant allegiance, though new, to his oath, was an instant verification, if they were willing to make faith, that it was *noviter veniens ad notitiam*, and not *dolose* omitted. But many of them thought it could not be received, if the party was not in the town of Edinburgh, seeing they were not obliged to attend: But the plurality carried it, that it should be admitted, and a day assigned them to come in and depone, but *cum onere maximarum expensarum* against the other party, if he denied the fact referred to his oath: And thus, in M'Corkal's case, Sanderson offered to prove by his oath, that he had homologated his decreet of pointing he had produced for eliding the spuilzie pursued against him, by threshing out the corns himself, and delivering them; but here Sanderson's allegiance was adminiculated by one witness's deposition; and, in Blair and Lorn's case, the LORDS yet allowed Lorn to crave Blair's oath, whether he had right from the date of his assignation, or if, *ab initio*, the bond was for his behoof, though blank, and then filled up in M'Gilchrist's name, and assigned by him to Blair long after, to the effect it might appear, whether Blair's general discharge to Wallace, posterior to the date of the bond, but prior to the assignation, would include or comprehend the debt of this bond or not; and in the case, 25th November 1693, of Swinton and Dalmeny, No 283. p. 12147. the LORDS refused this allegiance, offered to be proved by the pursuer's oath, that he neither knew nor heard of any interruption of the quinquennial prescription, seeing the pursuer was not the setter of the tack, (who was dead,) but his assignee, and so could not know whether there were interruptions or not.

Fol. Dic. v. 2. p. 199. Fountainhall, v. 1. p. 574.

1693. December 23. DOUGLAS against COCKBURN.

No 285.

IN the pursuit Douglas against Cockburn in Haddington, for payment of a debt contained in his father's bond, on the passive titles, referred to his oath; and one of them being as intromitter with the rents of his father's lands, he deponed he did intromit, but by a singular title, as having acquired some adjudications led against his father's estate; and he being interrogated, what he paid for these adjudications; because, by the 62d act 1661, they are declared redeemable from the apparent heir, within ten years, for the sums he paid, and so he was bound to communicate the eases he got from the adjudger; he declined to depone thereanent, in regard the pursuer was only a personal creditor, and had done no real diligence; and he was not bound, *hoc loco*, to answer that interrogatory anent the eases, it not being libelled, but they behoved to raise a new process of declarator thereon: But the LORDS, on a bill and answers, found it unnecessary to multiply processes, and that it naturally occurred from his