

No 369.

1709. *January 4.* KER *against* PRIMROSE.

THE LORDS sustained a decree of adjudication pronounced by a Sheriff upon a renunciation to be heir.

Fol. Dic. v. 1. p. 510. Forbes.

. This case is No 8. p. 46. *voce* ADJUDICATION.

1710. *June 23.*

No 370.

JANET DALRYMPLE, and SKENE of Hallyards, *against* DANIEL JOHNSTON.

IN an advocacy at the instance of Janet Dalrymple against Daniel Johnston, an arrestment being laid on by virtue of the Sheriff's precept in a person's hand within his jurisdiction, and that person having changed his domicile, the bailies of the place of his present residence were found competent to judge in an action of furthcoming upon the arrestment, albeit that was alleged to be contrary to the decision, Smith *contra* Miller, March 8. 1634. No 199. p. 7484. in respect the Lords were not unanimous in that practick; and my Lord Stair, *Instit. Lib. 3. tit. 1. § 24.* clears, that one inferior judge may sustain process of furthcoming, upon an arrestment laid on by warrant of another.

Forbes, p. 415.

1711. *January 24.*

Mr THOMAS BINNING in Dalmarnock *against* CHRISTIAN COOK, and Mr HUGH ARNOT, her Husband.

No 371.

A sheriff-clerk competent to judge in absence of the sheriff-depute by virtue of a commission from the sheriff-principal; and his clerk-depute to officiate as clerk.

CHRISTIAN COOK and her Husband suspended a decret pronounced against them by Mr James Leslie, as sheriff-depute of Fife, at the instance of Mr Thomas Binning, upon this ground, That it was null, because Mr James Leslie, the pronouncer, was principal sheriff-clerk; and it was inconsistent and irregular for one man to be both judge and clerk, two distinct offices that should be independent of, and mutual checks to one another.

Replied for the charger, Though it be incompatible for the same person to sit both as judge and clerk *in eodem judicio*, why may not the principal sheriff-clerk, (as it was in this case) sit in absence of the sheriff-depute, by virtue of a commission from the sheriff-principal, or from his depute, and the clerk-depute officiate as clerk, which is the general practice in all inferior courts, the principal clerk being most capable to judge in absence of the judge-depute? The cause of a principal sheriff, steward, or bailie, may be judged by

their deutes, act 84. Parl. 6. James VI. ; albeit the former may have as great influence upon the latter, as a sheriff-clerk *qua* judge can have upon his clerk-depute. And there appears no greater danger to the lieges from the sheriff-clerk's judging as depute-sheriff, than from the sheriff-depute himself; yea, a greater presumption of partiality lies against the sheriff-depute, especially in decreets condemnatory, where he gets sentence-money; since the sheriff-clerk's dues are the same, whether the sentence condemn or assoilzie.

Duplied for the suspender, There being necessity for an act of Parliament to allow deutes to judge in the case of their constituents, it seems yet unlawful for a sheriff-clerk and his depute to officiate as a judge and clerk *in eodem judicio*. Yea, a depute's judging his constituent's cause is not so dangerous; seeing the clerk of court, who is altogether independent both of the sheriff and his depute, is a check to him; whereas here, Mr James Leslie had no check upon him, but what he might remove him at the next turn in case of a disobligation.

THE LORDS repelled the nullity objected against the decret.

Forbes, p. 486.

1752. December 14. MAGISTRATES of Stirling *against* SHERIFF-DEPUTE.

THE Sheriff has no power of judging as to the erecting of buildings or encroachments on streets within burgh, this belonging alone to the Dean of Guild and Council.

Fol. Dic. v. 3. p. 360. Fac. Col.

* * * This case is No 302. p. 7584.

1772. February 22.

JAMES CATHCART of Carbieston *against* JAMES ROCHEID of Inverleith.

MR ROCHEID standing in the right of three-fourths of the lands of Inverleith, in the county of Edinburgh, and of Darnchester in the county of Berwick; which two estates, under a deed of entail executed by Sir James Rocheid, proprietor thereof, had devolved upon four heirs-portioners, and hitherto had been held *pro indiviso* by them, or those deriving right from them; in April 1771 took out a brief of division from the chancery, which was directed to the sheriff of Edinburgh, within whose jurisdiction the lands of Inverleith are situated; and, after being published in common form, was, by virtue of letters of supplement, executed against James Cathcart, as the proper party to the division, being in the right of the remaining fourth, both of Inverleith and Darnchester.

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The Sheriff of the county where the lands are situated, is the only judge competent to a brief of division among heirs-portioners. Advocation from him, when *in cursu* of obtempering a brief at one party's instance, for