

* * * Haddington reports this case.

No 2.

DUFF pursued declarator of Kellie's escheat. Compeared Stephen Boyd, for himself, and Robert Keith, for himself, as having interest, because Kellie was owing just debts to them; and *alleged*, That the gift was taken to the rebel their debtor's behoof, and qualified their allegiance relevantly; which being admitted to probation, Boyd used diligence to prove by writ, and Keith not having used diligence, referred it to Duff's oath. He *alleged*, That the two probations could not be permitted, lest the probation by writ, being contrary to his oath, might bring upon him the danger and infamy of perjury: And it was farther *reasoned*, That if any one of the defenders allegiances was proved, it would elide the whole pursuit; and, therefore, desired the oath to be delayed, while the other parties' probation by writ were concluded and advised. To this was *answered*, That, in the mean time, the party might die, and so the probation by writ might perish, and that the defenders being several parties for several interests, their probations would not be confounded, nor any thing proved or not proved by the one would concern the other. In respect whereof, the LORDS found, that both the probations might proceed.

Haddington, MS. No 3034.

1626. December 5.

SHAW against BALFOUR.

No 3.

A suspender exhibited a discharge, in which the charger alleged there had been clauses inserted by the suspender, who had written it, without the knowledge of the subscriber. The suspender was found obliged to depone as to this upon reference.

IN a suspension at the instance of Shaw of Knockhill against Balfour, wherein a reason being founded upon a discharge, the charger *alleged*, That the said discharge could not be respected, nor could make faith to prove the reason; because that clause therein inserted, and whereon the reason was founded, was never communed upon, nor spoken to the party subscriber; neither at the time of the subscription of the discharge, nor at any time before, but was cautiously inserted therein by the suspender, the time of the writing thereof, being all written by himself, and omitted to be read by him, he having read all the rest of the clauses thereof to the defender, and the defender being then overtaken with drink before he subscribed it, and that clause reserved unread, which he referred to the suspender's oath. This was found relevant in this same order of suspension, to be proved, as said is; albeit the LORDS thought that this was a matter of improbation, and that it ought to be quarrelled as false, by particularly proponing the allegiance of improbation; likeas others thought it of a dangerous preparative to take away writs, albeit clauses were inserted therein which were not read at the subscribing thereof, nor then communed; because he who subscribed the writ should have read and considered the contents

thereof, before he had set his hand thereto, he being then major, *et rei sue providus*, and not doing that, it might be presumed, that he had allowed whatever was therein inserted, and consented that the maker should insert therein whatsoever he pleased: Which was repelled, and the allegiance against the discharge sustained to be proved by the parties oath, as said is.

No 3.

Act. *Kinross.*

Alt. ———

Clerk, *Scot.**Fol. Dic. v. 2. p. 13. Durie, p. 241.*1627. *March 13.*OLIPHANT *against* KERR.

AN executor-testamentar takes another assignee to a certain debt owing to the defunct. The assignee pursues the assignee's debtor, and refers the verity to the defender's oath. The defender refers the same back again to the pursuer's oath, who being but assignee, gave oath, according to his knowledge, the debt was true; which the LORDS would not allow; but ordained the defender's oath to be taken.

No 4.

*Auchinleck, MS. p. 143.*1627. *June 25.*LAIRD OF TORRIE *against* MR DAVID WARDLAW.

A SUMMONS being referred to a defender's oath, and he giving in a qualified oath, the pursuer resiles and takes up the process, being content that the defender took protestation against him.—THE LORDS ordained the pursuer either to take the defender's oath presently, or, otherways they declared he should not be holden to give his oath in this cause hereafter.

No 5.

*Auchinleck, MS. p. 143.*1628. *March 20.*HUNTER *against* CAIRNS.

A SPUIZIE of a horse being pursued, the defender *alleged*, That the horse was restored to the pursuer; which being referred to his probation, he did not prove it clearly, *sed per simplicem probationem*; yet the LORDS having consideration of the matter, and the persons of the parties, ordained the defender to give his oath on his exception.

No 6.

Auchinleck, MS. p. 144.