

1663. *January 16.* EARL of ROXBURGH *against* A MINISTER.

No 62.
The Court of Session competent to judge of the nullities of a decree of the commission for plantation of kirks.

IN a review of a decret at the instance of a Minister against the Earl of Roxburgh; the point in question was, whether or no the Judges for the time, or now the Lords of Session, were competent to discuss this nullity, of a decret of locality, by the commission for plantation, in that it called the Earl's lands expressly designed, to be his lands, and he was not called.

THE LORDS found, that albeit they would not decide upon the nullities of the decreets of the commission competent by way of reduction; which behoved to be before the commission itself; yet this nullity being palpable and competent by exception, or suspension, that they might thereupon suspend *simpliciter*, the decret of the commission.

Stair, v. I. p. 158.

* * * This case is reported by Gilmour, No 39. p. 2195. *voce* CITATION.

1665. *February 3.* SIR JOHN FLETCHER, Supplicant.

No 63.
The Lords appointed two advocates to be assessors in an apprising.

SIR JOHN FLETCHER having bought the lands of Crainstoun, and finding that there was an apprising to be deduced thereof for his authors debt, which might cost him trouble; he craved assessors to be appointed by the Lords, who, considering the matter amongst themselves, it carried by the plurality of one or two, to name two advocates assessors, but many were on the contrary, conceiving the example of it would be of great inconveniency, seeing apprisings were not with continuation of days, and if parties compeared, and *alleged* they were infest, yet there may be inhibition, anterior reversion, or trust, or nullities in their right; and if these were denied, they behoved to be instructed, and so terms of probation run, while in the mean time the anterior diligence of others, apprisings in the country before the Sheriff would prevent them; and it would hinder any apprisings ever to be deduced at Edinburgh; and it were hard to put creditors, who knew not their debtors charter chest, to dispute their rights as in an executive process.

But the LORDS inclined, that Sir John's infestment should be rather produced, and reserved out of the apprising, than the apprising stopped.

Stair v. I. p. 263.

1666. *November 3.* MERCHANTS in DUNDEE *against* SPRUCE, Englishman.

No 64.

SOME merchants of Dundee having sold a considerable quantity of wines to one Spruce, an Englishman, they pursue him for the price; and because he

disappeared and no body came to receive the wines, they supplicated the Lords, that they would give warrant to them to sell the wines, lest they should perish, and to be liable only for the best price they could get for them; they did also represent, that Spruce had a factor in Edinburgh, who being cited by a macer, did not appear.

No 64.

“THE LORDS refused the supplication, and found, that the day of the appearance of the summons not being come, and the Englisman neither being present, nor obliged to be present, they could do nothing against him, more than if he had not been cited, and so could not sequestrate nor appoint the wines to be sold; but they allowed the party to protest that they had done all diligence that the wines might not perish, whereof the Lords would take consideration in any process that should occur.

Stair, v. 1. p. 403.

1675. January 13.

A. against B.

No 65.

APPLICATION being made to the Lords by a bill given in by a widow, desiring that she may be allowed to intromit with the crop and goods pertaining to the defunct, without hazard of vicious intromission,

THE LORDS thought that such warrants being *voluntariæ jurisdictionis*, and the Commissaries being entrusted for securing the estate of defunct persons to the nearest of kin, and creditors, and other persons having interest; did remit the petitioner to the Commissaries of the place. Sir David Falconer younger was for the petitioner and subscribed the bill.

Fol. Dic. v. 1. p. 496. Dirleton, No 221. p. 103.

1683. March. LORD LIVINGSTON against GORPON of Troquhen.

No 66.

A Gift of forfeiture may be declared before the Court of Session, though it was contended that the Lords of Session are not competent Judges to any nullity or informality of a criminal process.

Fol. Dic. v. 1. p. 495. Harcarse. P. Falconer.

*** This case is reported by Harcarse, No 18. p. 3416, *voce* DECLARATOR, and by P. Falconer, No 41. p. 4714, *voce* FORFEITURE.