1672. *February* 6. BAILLIE HALL *against* ANDREW SPREUL.

No 139.
In a process for payment of furnishings made to a defender, he succumbing in the relevancy of the proof of a peremptory exception, was not thereafter allowed to deny the libel.

IN a reduction of a disposition made by one Baillie to the said Spreul, at the instance of Baillie Hall and his co-partners, *ex capite inhibitionis*, it was *answered*, That the inhibition was served upon a dependence; and albeit decreet followed thereupon against Baillie, the common debtor, yet the decreet was null, and did not constitute Baillie debtor in any liquid sum; in so far as the libel, being for the price of merchant goods, and for damage and interest, there was nothing proved; and the decreet was pronounced without any probation whatever.—It was *replied*, That the decreet was opponed, bearing that the price of the goods and the value of the damage were particularly libelled; but the defender proponing a peremptory defence, without denying the quantities or prices libelled, did thereby liberate the pursuer from probation; and the term being circumduced against him for not proving the defence, the decreet was valid, and the inhibition served upon the dependence.

THE LORDS did sustain the reduction, notwithstanding of the answers made to the reasons; and found, that there was no necessity to the pursuer to prove the quantity and prices libelled, seeing the defender did noways deny the same, when he proponed his peremptory defence; but if the prices were exorbitant which were libelled, they reserved to the defender to intent action for modification thereof to the true avail.

Fol. Dic. v. 2. *p.* 187. *Gosford, MS. No* 465. *p.* 241.

1674. *July* 23. JAMISON *against* HAY.

No 140.
A decree of certification *in foro* not reducible upon improbation of the execution.

DOCTOR HAY having apprised the lands of Artrochie from Patrick Con for L. 1000, which his father paid as cautioner for Con, he thereupon raised improbation and reduction against George Stuart, who before had apprised the same lands for payment of a bond of L. 500, and a bond of 100 merks; and against Marjory Jamison, who now had right by progress to that apprising; who having compeared, took terms to produce, and at last obtained decreet of certification against the two bonds foresaid, and thereupon did reduce George Stuart's apprising, as being without warrant, and all that followed thereupon. The said Marjory Jamison hath now raised improbation and reduction of the Doctor's decreet, and insists, in the first place, for improbation of the executions of the citation alleged, given against her, to have compeared in that decreet, to the effect that the whole decreet might fall in consequence. The defender *alleged*, Absolvitor; because the said Marjory did compear in the Doctor's decreet, and took terms to produce, and so *suscepit judicium*, without making any allegeance against the verity of the executions; and, therefore, she cannot, in the

No 140. second instance, quarrel the decreet, either upon the nullity or improbation of the executions; for, albeit when decreets are in absence, the improbations of the executions may reduce the same; or, if parties compearing object against the verity of the executions, the same will be sustained by defence, if proponed *peremptorie, sub periculo causæ;* or otherwise, if it be proponed but *dilatorie ad excludendam sententiam*, if the pursuer do not admit thereof, the same will be repelled, but will be reserved by way of action of improbation; in which case, the pursuer must be careful of the preservation of the executions; but, if no objection be made by parties compearing, and decreet *in foro* follow, the defender is presumed to acknowledge the executions, and the obtainer of the decreet is sure forever as to any question thereanent; and if this were not a secure ground in law, all decreets *in foro*, which are the chief securities of the people, might be drawn in question any time within 40 years after, though the rights had passed *per mille manus*, to the great insecurity and disquiet of the whole lieges, which our custom hath never allowed; for, albeit this be a general ground against all decreets, yet never any decreet *in foro* was reduced thereupon, which shows the common acquiescence therein.—It was *answered* for the pursuer, That it is an unquestionable foundation, that all sentences are bottomed upon the citations of parties, and must fall therewith; and albeit they may object against the verity of the executions by exception, yet they are not obliged to propone improbation by exception; but whatever is competent by exception, is much more competent by action; and though in the case of improbation of executions after a long time, the Lords have refused to take them away by certification upon not production, they being *in publica custodia*, and small papers are easily lost; yet where they are produced, there is no ground to refuse to improve them as forged, and that the party drawn thereby in judgement, who, it may be, had no ground to make out the falsehood at that time, may, in the second instance, *recenter* insist in the improbation of the executions, that the decreet may fall, especially where the executions are at the party's dwelling-house, which cannot be truly known whether given or not, till the witnesses be spoken with. *2do*, Whatever might be alleged against the simple annulling of a decreet, upon the quarrelling of the executions, yet where that is only used to repone a party against the rigour of a certification, when the writs then called for are now actually produced, it is most just and necessary that this pursuer be reponed.

The Lords found, that this pursuer having compeared in the first instance, and not having objected against the executions, but having taken terms to produce, and having gotten the full terms, that the decreet could not be questioned, in the second instance, upon improbation of the executions, nor the pursuer reponed against the certification, albeit the writs were now produced; for many times decreets proceed against parties not cited, but compearing for their interests, *qui suscipiunt judicium;* and here the rigour of a certification was maintain-

ed against the rigour of an expired apprising upon small sums, no way adequate to the worth of the land. No 140.

Fol. Dic. v. 2. p. 186. Stair, v. 2. p. 279.

1674. *December* 10. AUCHINTOUL *against* INNES.

No 141.

THE LORDS found, That a person being pursued as representing his father, or other predecessors, and denying the passive titles, the same ought to be proved; and that the defender, by proponing a defence *in jure*, as in the case in question, that annuities were discharged by the late proclamation, does not confess the passive titles; but if he should propone a defence founded upon a right in the person of his predecessor, it would conclude him; so that he could not pretend that the passive titles should be proved.

Reporter, *Newbyth.*

Fol. Dic. v. 2. p. 187. Dirleton, No 199. p. 88.

1675. *February* 6. BURNET *against* M'CLELLAN.

No 142.
Consequence where a defence has been *dolose* omitted.

BURNET having pursued M'Clellan for payment of a debt of his son's, as behaving himself as heir to his son, by intromission with the duties of the lands, wherein his son died infeft, and litiscontestation being made, and the cause come to be advised; the defender *alleged*, That he could not be decerned as heir to his son, because he instantly verified, that he had another son, who is now instantly at the Bar, who did exclude him.—It was *answered*, That this defence is not competent in this state of the process, though it be instantly verified, because it cannot be pretended new come to his knowledge, seeing the father could not be ignorant that he had another son; so it was *dolose* omitted, to postpone the pursuer, who hath run a course of probation by witnesses. And the cause being now concluded,

THE LORDS, before answer, having proponed to the son, whether he would *suscipere judicium*, and answer in this process, as if he had been cited, which he having undertaken, the LORDS assoilzied the father, and allowed the pursuer to insist against the son upon the passive titles, and him to make his answer thereto.

Stair, v. 2. p. 318.

*** Dirleton reports this case:

A FATHER being pursued, as behaving himself as heir to his son, and litiscontestation being made, and witnesses adduced; the time of the advising, it was *alleged*, That the father could not represent his son as behaving, because