1630. *June* 17. Earl of Wigtoun *against* Earl of Cassillis.

No 128.
Found in conformity with the above.

In an improbation and reduction of a sasine produced by the Earl of Wigtoun, granted to one of his predecessors, to instruct his interest in that pursuit moved by him, for improving of the writs of the lands libelled, made to the E. of Cassillis by that person seased, or his predecessors, this sasine was sustained, albeit it bore not, that the sasine was given by tradition of earth and stone, or by such symbols as are usual in giving of sasines, but only proported, that the bailie gave actual, real, and corporal possession of the lands, but no other mention of any further tradition, which was sustained; the party seased, the bailie and notary being all deceased, long before this time, when it was quarrelled. *Item*, Another sasine of these lands controverted, granted to the pursuer, being a transumpt, transumed since the intenting of this cause, the said transumpt was sustained, albeit this defender, who was pursued for improving and reducing of his right of the same lands, contained in the same sasine, by the same parties whose right was transumed, long before the intenting of the action of transuming, was not summoned to the said transuming. *Item*, It was found, that the pursuer, whose pursuit to improve the defender's right of certain particular lands libelled, was founded upon his right and interest of a barony, of the which barony the lands controverted (the defender's right whereof was quarrelled) were libelled to be part and pertinent; that the pursuer in *ingressu litis*, and before the reasoning of the cause, was not holden to prove nor qualify, that these lands were part of that barony, wherein he libelled and shewed himself to be infeft; especially seeing the defender proponed no exception tending to deny the same, and which might urge him to prove the same *in ingressu*.

Act. *Advocatus, Stuart*, et *Robertson*. Alt. *Nicolson, Aiton*, et *Craig*. Clerk, *Gibson*.
Fol. Dic. v. 1. *p.* 143. *Durie, p.* 518.

No 129.
In a pursuit against an heritor for teinds, a transumpt of a tack and a decree of prorogation of it, to which the defender's authors had not been called, were found no sufficient title, since the original term of the tack was not expired.

1699. *December* 13. Telfer *against* Dalziel.

Lord Rankeilor reported John Telfer, late Bailie of Leith, against Sir Thomas Dalziel of Binns. The teinds of the parishes of Kinneil and Carriden, belonging to the convent of Holy Cross, or Halyryndehouse, there is a tack of them set by the Commendator to Hamilton of Grange, and three of his heirs *successive*, and for nineteen years thereafter, for L. 77 Scots of tack-duty; the ministers pursuing an augmentation in 1618, they get large and competent stipends allocated to them out of these teinds, over and above the tack-duty; for which the Commission for plantation of churches grants Grange, the tacksman, a prorogation for 202 years after the expiration of his tack. Grange's estate being now adjudged, and the right of them conveyed to Bailie Telfer, he pursues Sir Thomas Dalziell of Binns for the teinds of his lands lying in Carri-

den parish. *Alleged* for him, I am in possession by virtue of a title from the Bishop of Edinburgh, and you produce no sufficient interest to claim my teinds, in so far as you do not produce the tack set by the Abbot to the Hamiltons of Grange, but only a decreet of prorogation of that tack, which being only a relative writ, *non creditur referenti nisi constet de relato ;* and as to the transumpt of the tack produced, it is null *quoad* me, and no more than a copy, because my authors are not cited thereto, nor yet the titular of the teinds. *Answered*, *In re tam antiqua* as eighty years ago, the decreet of prorogation must be a sufficient probation, seeing it mentions the tack was then produced, which is *probatio probata ;* and as for the decreet of transumpt, you have homologate it by your predecessor's giving a bond to Grange, the tacksman, to pay the teind, if the same should be liquidate by a decreet. *Replied*, If the years of the tack were expired, and the prorogation begun to run, the production of the decreet of prorogation would be a sufficient title in this pursuit; but seeing the nineteen years adjected to the liferents in the tack are not yet expired, it can be no title for bygones till the tack itself be produced; and the bond given by Binns' predecessor cannot support the tack, seeing it relates to what shall be constitute by decreet. Now, that is not yet done, nor can be, till a valid title to the teinds be produced. THE LORDS found the decreet of prorogation and transumpt not a sufficient title, unless the tack had been expired, and the years of the prorogation commenced; though these would be good adminicles if the tenor of the tack were to be proven. No 129.

Fol. Dic. v. 1. *p.* 143. *Fountainhall, v.* 2. *p.* 72.

SECT. XXIX.

Citation in Process of Proving the Tenor.

1628. *March* 5. HAMMERMEN in GLASGOW *against* CRAWFURD.

No 130.
Action of proving the tenor cannot proceed against the heir of a defunct, without calling the executor.

In an action for proving of the tenor of a bond betwixt the Hammermen in Glasgow and Crawfurd, who was convened as heir to his father, for proving of the tenor of the bond made by his father to the pursuers, the LORDS found, that no process ought to be granted for proving of such tenors of obligations, after the decease of the debtor, except the executors of the defunct were specially called to these pursuits; because the same tends to make up obligations, whereupon the executors may be distrest, either by the principal creditor, or by the debtor's heir who is convened; which heir thereupon might seek relief against