1678. *June.*

JOHN BAXTER *against* BRAITHWOOD, and REPRESENTATIVES of HUGH BOYD.

No. 23.

The Lords found, where a party compearing for his interest in a process dies, there is no need of transferring.—See 13th November, 1634, Moody against Leighton, No. 98. p. 2229.

Fountainhall MS.

1715. *June* 16.

NISBET of Dean *against* WATSON of Sauchton, and Others.

No. 24.

One of the creditors in a ranking having died, and the decree having been thereafter extracted, without calling his heirs, found, that it could not have the effect of a *res judicata* against the heir.

During the dependence of a process of ranking of the creditors of Dalmahoy, Henry Nisbet of Dean, who was one of them, having deceased, the decree of ranking is thereafter extracted, without calling his son, nor is there any procurator named as compearing for him; whereupon Dean having given in a complaint,

It was answered for the other creditors; that young Dean was perfectly apprised of this process, and his father's interest; and that his father was cited, compeared, produced his interest, deponed upon the verity of his debt, &c.; and even young Dean, though not cited, yet *liti sese obtulit*, in so far as he is marked compearing by an advocate; and though the advocate's name be not inserted, that is not material, for both young Dean and his doers did often push the hastening of the ranking, had seen the minutes and scheme, &c. as was instructed by witnesses.

Replied for Dean: 1*mo*, That as the private knowledge of a debtor does not supply the necessity of an intimation in an assignation, because it is a form required, so neither young Dean's private knowledge of his father's interest produced, and who died during the dependence, will supply his want of compearance, for which it was necessary he should be cited, or else that he should make a judicial compearance. And as to what was alleged anent young Dean and his doers, answered, That no legal compearance can be made up by witnesses; for though a citation be not necessary when a party voluntarily sists himself, yet when he does so, it must be so marked judicially, and contained in the extracted sentence; and if it be not, a witness cannot supply it; for these being *actus solennes*, just as in executions of horning and inhibitions, non quæritur quid actum erat, sed quid instrumento comprehensum est; which holds much stronger in judicial sentences; for nothing is there understood to be done, but what remains on record under the hand of the Clerk of Court. 2*do*, Seeing legal compearance must be by a procurator, the procurator ought to be named, especially that the compearance here is not marked personally.

No. 24. The Lords found the decree of ranking could not have the effect of a *res judicata* against Dean, and ordained him yet to be heard upon his interest; but found the decree standing as to the other creditors.

For Dean, *Sir Wal. Pringle.* Alt. *Arch. Hamilton.* Clerk, *Gibson.*

Bruce, v. 1. *No.* 98. *p.* 120.

1747. *February* 18.

LORD FORBES and Others *against* The EARL of KINTORE and Others.

No. 25.

One of many defenders who have a common interest dying, his heir must be called by a summons, not a diligence.

Certain of the inferior heritors on the river of Don, possessing cruives, by agreement, as they said, with the superior heritors, and carrying on their fishing by a joint management, a process was brought against them by the superiors, to have the cruives regulated; during the dependence whereof, Skene of Dyce, one of the defenders, died; and his heir being summoned upon an incident diligence, to which it was objected, That a principal party could not be called by this form of process, and all parties having interest not being called, the process could not go on against any; the Lord Ordinary, 27th January, "Repelled the objection proponed against the calling of Skene of Dyce's representatives by the diligence, in respect that there were many defenders in the process, and that the process was carried on jointly against them all."

Pleaded in a reclaiming bill: That no decree could be given against a man only summoned on an incident diligence; neither in this case could the process go on against the rest, neglecting Dyce, for they were partners in the cruives sought to be regulated, and had not distinct separate cruives.

Answered: Supposing Dyce to have an interest in this case, which did not appear, he was duly brought into the field; for when there were more than one defender, the death of one did not throw the cause out of Court; and there was no need to call his heir by an original summons, as there would be if there were but one, and so the cause entirely out, as was found in an action against the Managers of a public Tack for the Royal Burghs, 20th December, 1704, Anderson against Smollet, No. 13. p. 13258.

In actions of poinding the ground, the deceased heritor's heir was called by a diligence, as heirs also were in processes of ranking and sale.

The Lords sustained the objection to the process.

Act. *Ferguson.* Alt. *H. Home.* Clerk, *Kirkpatrick.*

D. Falconer, v. 1. *No.* 168. *p.* 222.

See ARRESTMENT—ASSIGNATION—CITATION—JURISDICTION—APPENDIX.