

No 28. liberty to re-examine such of the witnesses contained in the foresaid proofs as were yet living.

Reporter, *Elchies.* Act. *R. Craigie.* Alt. *H. Home.* Clerk, *Kirkpatrick.*
D. Falconer, v. 2. No 2. p. 2.

1767. February 24. M'HARGES against CAMPBELL.

No 29.

THE sentence of a court-martial, finding a man guilty of murder, found a sufficient ground for an action of assythment in the Court of Session.

Fol. Dic. v. 4. p. 235. Fac. Col.

* * This case is No 429. p. 12541. *voce* PROOF.

SECT. II.

Res Judicata.

1543. March 20. CAMPBELL against LAIRD of GRANGE.

No 30.

A forfeiture being reduced *per modum justitiæ*, all dispositions granted by the donatar, of parts of the land, were found to fall in consequence.

SIR JOHN CAMPBELL of Lundie asked the Laird of Grange's infestment of certain lands holden by him of my Lord Glamis, and become in the King's hands by reason of my Lord Glamis's forfeiture, and therefore given by the King to the said Grange, to be reduced, because the said forfeiture was reduced by Parliament, holden by my Lord Governor, after the King's decease, wherefore all the said Lord Glamis's free tenants ought to be put in the same place they were in before the said forfeiture. The Laird of Grange *replied*, That his infestment should not be reduced for the cause foresaid, because both before and after the reduction of the said forfeiture, and in the time thereof, in judgment, the said Lord Glamis consented that that infestment should not be reduced, but should stand and be of effect, sicklike as if the forfeiture were not reduced, and that the reduction thereof should not be prejudicial to the said infestment. The said Sir John *duplied*, That since the said forfeiture was reduced and decerned to be null, from the beginning, and in all time coming, with all that followed thereupon; and that the said Sir John's right, as free tenant to the said Lord Glamis, was tint by the forfeiture; and that the said Lord might not have taken from the said Sir John his land without his consent; and that so he might not consent that the forfeiture, being reduced and declared null from the beginning, that it should be of no avail anent the escheat of the said Sir John Camp-

bell's lands. Et ita Domini Consilii decreverunt definitive, reducing the said Laird's infeftment, and reponing the said Sir John in his heritage and state he was in before the forfeiture.

No 30.

Fol. Dic. v. 2. p. 350. Sinclair, MS. p. 58.

1610. February 2.

ELDER *against* FERGUSSON, and LORD CHANCELLOR *against* SHERIFF OF MORRAY.

THE infeftment of lands being reduced against the proprietor thereof, the reducer using warning against the possessors, it will neither be necessary to him to warn the party whose infeftment was reduced, if he had not possession, neither will the subaltern infeftments, granted by him whose right is reduced, defend in the removing, those to whom they were granted, albeit they were not called in the reduction.

No 31.

In this case was remembered a practick passed between my Lord Chancellor and the Sheriff of Murray, wherein the Sheriff's infeftment being reduced upon a clause irritant, and the Chancellor warned Coliburne, son to Andrew Coliburne, who defending himself by infeftment granted to him by his father, who was infeft by the Sheriff, his allegiance was repelled, in respect of the reduction of the Sheriff's infeftment, albeit Andrew Coliburne, who was heritably infeft, and in possession, was not called thereto.

Fol. Dic. v. 2. p. 350. Haddington, MS. No 1780.

*** Similar cases were decided, 4th June 1611, Bishop of St Andrews *contra* His Vassals, No 137. p. 6714, *voce* IMPROBATION, and 13th July 1613, Laird of Polwarth, No 5. p. 9057. *voce* MINOR NON TENETUR.

1623. March 4.

WOOD *against* WOOD.

WOOD of Craig having obtained a decret against the Executors of one Ker, who was his debtor, and having put them to the horn, thereafter pursues one James Wood, who was cautioner for the executors in the confirmed testament, to make the goods confirmed forthcoming, for satisfaction of the debt contained in his sentence. The defender, who was cautioner, compearing, proponed an exception, that the whole goods of the testament were exhausted by lawful sentences, recovered *debito tempore* by true creditors. THE LORDS found this exception could not be received, being now proponed by the cautioner, seeing, in the action whereupon the pursuers had recovered sentence against the executors, the same was proponed by them, and admitted to their.

No 32.

A cautioner for an executor was not allowed to propone exhausting, the principal having proponed it and succumbed.