

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.

No 31.

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.

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.

No 32. probation, and the term circumduced against them for not proving thereof; and, therefore, that the same ought not to be admitted again to the cautioner's probation; and this was found, albeit the cautioners were not called, nor compared in that process, where the same was proponed by the Executors; and albeit he *alleged*, That what was done there ought not to prejudice him, he not being then party, and that their omission ought to burden none but themselves, and ought not to take the benefit of this lawful defence from him; which was repelled, as said is.

Act. *Nairn and Mowat.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 351. Durie, p. 54.

* * * Haddington reports this case :

ARCHIBALD WOOD of Craig having obtained a decret against the executors of his debtor Carre, because they having proponed an exception of exoneration, suffered the term to be circumduced, Craig pursued Mr James Wood, cautioner for the executors in Wood's testament, to pay the sum contained in the decret, obtained against the executors for whom he was caution. He comparing, proponed the exception of exoneration, which the executors had proponed, and failed to prove, and he offered to verify the same. THE LORDS repelled the allegiance, because the admitting of it would have made the decret against the executors null, and frustrate Craig of all his decret and action, whereas Mr James Wood had his action of relief against the executors.

Haddington, MS. No 2709.

1623. March 8. KING'S ADVOCATE against MORISON.

No 33.
One who had stipulated more than legal interest, had obtained decree for payment. Afterwards sued for usury, the decree was not held to be *res judicata* so as to protect him.

IN a pursuit at the King's Advocate's instance, against one Morison in Dumblain, to hear him decerned to be punished as an usurer, for taking of more than ten for the hundred, conform to the act of Parliament; because the contract, which was given to the defender, for the security of his money, which was lent by him to Douglas of Mains, who provided him to a victual annualrent, and prices therein liquidated, far exceeding ten for ilk hundred, which was recovered by Morison, and payment made thereof to him by Mains; this pursuit was sustained, and the defender found to have incurred the pain statuted against usurers; notwithstanding that it was *alleged* for him, that what he had received, and was paid to him of the victual, and price thereof, the same was decerned in his favours by decret and sentence given *in foro* against the Laird of Mains his debtor, whereby the LORDS found his letters orderly proceeded against this party, for payment of the prices of the victual conditioned in his decret; so that he having a decret of the Sovereign Judge for his warrant, the same should