

No 6.

1622. July 19.

A. against B.

THE LORDS found, that a decret obtained before the Commissary of Aberdeen, as heir upon probation, by production of his sasine, would not prove him heir before the Lords, unless he produced his sasine or retour.

Fol. Dic. v. 2. p. 346. Haddington, MS. No 2652.

* * * Durie reports this case :

IN an action pursued by ——— against ———, which was intended by the pursuer, as heir to his predecessor, and for instructing of him to be heir, he produced a decret recovered at his own instance, before the Commissaries of Aberdeen, as heir to that same predecessor, verified in that judgment: Which sentence the LORDS found was not sufficient to prove him heir in this process, except he produced some other sufficient writ in this same process, then pursued before the Lords, which should be sustained to make him heir, by and beside that decret: Either the defender therein might have suffered the same to proceed in the pursuer's favours, or might have omitted to propone any argument against the writ then used to prove, which the defender in this process might competently propone, if the same writ were produced, as they found it should be in this same process.

Act. *Cheyn.*

Alt. ———.

Durie, p. 31.

No 7.

1628. January 16.

FINLAYSON against LOOKUP.

A PEREMPTORY proponed and proved before an inferior Judge, in a cause thereafter pursued before the Lords, the decret of the said inferior judge is found sufficient for proving of the same *peremptorie* before the Lords.

Fol. Dic. v. 2. p. 348. Auchinleck, MS. p. 152.

* * * Durie reports this case :

IN an action for payment of house-mails betwixt Finlayson and Lookup, the defender *alleging*, That he being pursued before the Town-court of Edinburgh, at the same pursuer's instance, for the double mail of the house, he there proponed an exception, that he had delivered the keys in August after the sentence of removing at the pursuer's instance against him, which keys were then received by the pursuer's wife, which exception in that judgment was found re-

levant and proved, and in respect thereof absolvitor was given, which decreet standing he alleged ought to produce absolvitor from this pursuit;—the LORDS found this exception noways relevant to meet this pursuit, for the single mail of the house libelled, for the term intervening betwixt the Whitsunday and the Martinmas subsequent, in the midst of the which term the keys were alleged to be delivered to the pursuer's wife; seeing the delivery of the keys in August was not sufficient to liberate him from the single mail the term foresaid, albeit it was found relevant before the Town-court to elide the pursuit made there for the double mail; but the same was sufficient to elide this pursuit, for all the rest of the terms acclaimed, except that one term; and the LORDS found, that that decreet was enough to produce this absolvitor, and that the defender needed not to prove his exception in this judgment *de novo* again, viz. anent the receipt of the keys, but found it sufficiently proved by that other decreet; albeit the pursuer contended, that it ought *de novo* to be proved in this judgment, *quia deducta coram uno iudice non probant coram alio*, specially in an inferior court, and where the case also differs, that pursuit being made upon violence for double mail, and this pursuit for single mail, whereby the actions differed; which was repelled, and the decreet found sufficient.

Act. Lawtie.

Alt. Aiton.

Clerk, Gibson.

Durie, p. 327.

* * * Spottiswood also reports this case :

ROBERT FINLAYSON having pursued John Lookup for the violent profits of a house in Leith, before the Sheriff of Lothian, the defender was assoilzied upon the exception, that within seven days after the decreet of removing, obtained by Robert against him, he left the house void and redd, and delivered the keys thereof to the pursuer. Afterwards Robert assigneth the same decreet of removing to John Finlayson, who intented action against the said John Lookup before the Lords, for the ordinary profits and mails. *Alleged*, That he being pursued by the pursuer's cedent for the same, he was assoilzied, and so could not be called in question again for the same thing. *Replied*, That the first action was for the violent profits; this for the ordinary. THE LORDS sustained the action, but found his former exception proponed before the Sheriff, and now reiterated, relevant and proved; so that the excipient was not forced to prove his exception over again, in respect that he had done it in another judgment.

Spottiswood, (PROBATION.), p. 242.