

1605. July 26.

CLERKINTON *against* HERDMISTON.

IN a removing betwixt the Laird of Clerkington and Herdmiston, the LORDS found, that a wife could not give her oath, in prejudice of her husband, upon any promise alleged made by her, either before her marriage or after it. In that same cause they found, that my Lord of Cranston could not be Judge; because the defender's exception was founded upon a contract betwixt the parties, which my Lord Cranston had devised and caused form, and therefore could not judge upon it;—and alleged the practie bewixt Innerwick and Coudenknows, wherein my Lord of Thirlestane, chancellor, was declined, because he had devised and caused form the contract betwixt my Lord Home's father and Innerwick's father, whereupon their cause depended.

Fol. Dic. v. 1. p. 230. Haddington, MS. v. 1. No 949.

No 7.
Found that a Lord of Session, who drew up a contract, might be declined, when any cause was intended upon that contract.

1629. January 8.

GEMMIL *against* BOYLE.

IN an advocation, the Procurator-Fiscal of Glasgow, being executor decerned to a defunct, and pursuing the debtors of the defunct for payment before the commissary of Glasgow, and the cause desired to be advocated, because the Procurator-Fiscal was brother to the Commissary, and so, by the act of Parliament 1594, 'A brother could not be Judge in his brother's cause pursued before him';—this reason was sustained and found relevant, and the cause was advocated; for albeit it was *answered*, That the cause was intended at the Procurator-Fiscal's instance, who was brother to the Judge, yet he pursued only *ratione officii*, and the profit would not redound to him, but to the nearest of kin to the defunct; likeas the Procurator-Fiscal declared, by the procurators compearing for him in this advocation, that the pursuit was not to his own behoof, and that he renounced all benefit which he should recover thereby, in favours of the nearest of kin; yet the reason was sustained, seeing he remained still pursuer, and that his brother could not be Judge in a pursuit wherein he might have interest; but he might surrogate one in his place after he was decerned, who confirming, or obtaining licence from the Commissary, or the bishop of the diocese to pursue, might then pursue before that Judge; but the Procurator-Fiscal being brother to the Judge, and being undenuded, if none should seek the gear, as nearest to the defunct, and so thereby the same should remain with the Procurator-Fiscal, it were against the law that the brother were Judge in the brother's cause; and this was also found, albeit the cause desired to be advocated, was referred to the defender's oaths, without further process.

No 8.
Though a procurator-fiscal decerned executor, pursue *ratione officii*, yet if he do not substitute one in his place, the action may be advocated, if the judge be his kinsman.

Act. *M'Gill*.

Alt. _____.

Clerk, *Gibson*.

Fol. Dic. v. 1. p. 231. Durie, p. 412.

* * * Spottiswood reports the same case :

No 8.

JAMES BOYLE, Procurator-Fiscal of Glasgow, being executor decerned to Agnes Mullikin, convened her husband, as intromitter with her goods and gear, for payment of certain sums of money. This action was craved to be advocated from the Commissary of Glasgow, because the pursuer and the Commissary were brethren. *Alleged*, That he pursued only *ratione officii*, being Procurator-Fiscal, and that the benefit would never accresce to the nearest of kin. Likeas, he was content to renounce all benefit that might fall to him there-through; and further, he did refer the verity of the debt to the defender's oath. THE LORDS did advocate the cause, in respect he pursued as executor decerned, and had not surrogate any in his place, notwithstanding of his office.

Spottiswood, (ADVOCATION.) p. 11.

1682. *March.* HUGH MAXWELL *against* LORD NEWTON.

No 9.

FOUND, that by the late act of Parliament*, the degrees of affinity reached only to that of father, son, and brother; and not to nephew, brother's son, &c. seeing properly those in that degree are either consanguineans, or absolute strangers; *e. g.* a brother-in-law's son by my sister is not *affinis*, but *consanguineus* to me; and a brother-in-law's son by another wife than my sister, is not *affinis* to me, but an absolute stranger, seeing *affinitatis nulla affinitas*: it was *pleaded*, That by the said act only the affinity of *socer, levir, gener*, father, brother, and son-in-law, was meant, which arises by a conjunction with a consanguinean, and not the affinity of *vitricus, privignus, &c.* step-father, step-son, &c. But this point was not determined; and it was also debated if a Judge might be as well declined upon his wife's account, as upon his own.

Fol. Dic. v. 1. p. 230. Harcarse, (DECLINATORS.) No 399. p. 106.

1687. *December.* SIR WILLIAM BINNY *against* HOPE.

No 10.

THE LORDS repelled the declinator against my Lord Harcarse, that Sir William Binny the pursuer was brother-in-law to my Lord, by marrying his Lady's sister, and was also uncle-in-law to my Lord's Lady, who was then deceased, but had left a child of the marriage behind her; that relation being only *affinitas affinitatis*, which the act of Parliament extends not to. And the like declinator in another case, against the said Lord Harcarse, that Hugh Wallace and he had married two sisters, was rejected, the Lady being dead. The first declinator was proponed by Sir Thomas Hope of Kerse, and the other by Lord Forrester; the like will hold as to being witness.

Fol. Dic. v. 1. p. 230. Harcarse, (PROBATION.) No 806. p. 226.

* Act 13th Parl. 1681.