

In this process the LORDS found also, That competent and emitted before the Admiral, could not operate against these strangers, *qui utuntur communi jure gentium.*

No 368.

Fol. Dic. v. 2. p. 209. Stair, v. 1. p. 477.

1671. February 4. STRACHAN against JAMES DRYSDALE and JANET HART.

STRACHAN having obtained decret before the Commissaries of Edinburgh, against Drysdale and Hart, as vitious intromitters, upon a bill of suspension presented, the LORDS did hear both parties upon this reason, That the defender having founded a defence upon a disposition made by the defunct, the charger did reply upon further intromission than what was contained in the disposition, and condescended upon an aquavitæ pot; whereupon the decret was given; whereas if the petitioners had been present to inform their procurators, who had no mandate from them, they would have alleged, likeas they now *allege*, and offer to prove, That the said aquavitæ pot did not belong to the defunct, but to another person from whom he had hired the same, and that the petitioners had meddled therewith, upon his order and consent. It was *answered*, That the decret was opposed, being *in foro contradictorio*, wherein that allegiance was never proponed, and could not be now received, which were a dangerous preparative to frustrate lawful creditors after they have done exact diligence; and that it was sufficient that they acknowledged that the aquavitæ pot was in the defunct's possession when he died, *quo casu* they were not *in bona fide* without a title *immiscere se bonis defuncti*; and the charger being a lawful creditor, is not necessitated to dispute the defunct's right, but it is enough to say he possessed. THE LORDS notwithstanding did pass the bill, and found, that the title of vitious intromitter being of so great importance as to make one liable for the whole debt, albeit their intromission was not considerable, that they might be reponed against a defence omitted by a procurator before any inferior court.

No 369.
Competent and omitted in an inferior court, in matters not ordinarily understood there, is not relevant to bar suspension or reduction.

Fol. Dic. v. 2. p. 209. Gosford, MS. No 329. p. 149.

* * Similar decisions were pronounced, 12th November 1664, Neilson against Murray, No 123. p. 5921., *voce* HUSBAND and WIFE, and 31st January 1677, Garden against Pearson, No 73. p. 6664., *voce* IMPROBATION.

1672. February 9. WOOD against ROBERTSON.

THOMAS ROBERTSON having obtained a decret against Thomas Sinclair for L. 93, and L. 5 of expenses of plea, he pursued William Wood before the

No 370.
A promise was found proba-

No 370.
ble by witnesses before the commissaries. Reduction repelled, because the defender had acquiesced in the mode of proof.

Commissaries, as he who promised to see him paid thereof; in which process the Commissaries found the promise probable by witnesses. Whereupon William Wood pursues reduction, because the Commissaries had committed iniquity. It was *answered*, That this pursuer did not propone that allegiance, but, on the contrary, compeared at the diets for receiving the witnesses, without controverting this point; and though the LORDS have now found, that promises are not probable by witnesses, yet that being the ancient custom of the Commissaries, it cannot be thought *partis judicis*, not being proponed by the party.

THE LORDS found the allegiance relevant, that Wood compeared at the receiving of the witnesses, and never reclaimed, to infer his acquiescence.

Fol. Dic. v. 2. p. 209. Stair, v. 2. p. 68.

No 371.
Competent and omitted in suspensions.

1675. January 6. GLENDINNING *against* The Earl of NITHSDALE.

By a minute of excambion *in anno* 1605, Glendinning of Parton did excamb his lands of Glendinning with Johnston of Westraw with his lands of Dolphington, which minute was assigned to Glendinning of Logan, and now is in the person of George Glendinning his son. Glendinning of Logan entered in a contract with the Earl of Nithsdale, and thereby disponed him the right of by the minute, for which the Earl of Nithsdale was obliged to do diligence for recovery of Dolphington, and to pay the price of the half thereof as the same should be determined by Sir Thomas Hope, and in the mean time to pay the half of the duties; whereupon the Earl of Nithsdale pursues the Laird of Westraw for perfecting the minute, and putting him in possession of Dolphington, and obtained decret *in anno* 1613 in absence; which being suspended by Westraw, he obtained two decreets of suspension against him, the last whereof was *in anno* 1638, wherein Westraw suspended upon obedience, and consigned the writs for extension and possession, which were given up to Nithsdale, who proceeded no further to attain possession; whereupon George Glendinning pursued Robert Earl of Nithsdale for the half rents of Dolphington, in which process there was litiscontestation and probation, and the cause concluded; and after Robert Earl of Nithsdale's death, he raised transference against this Earl as representing him; in which process, compearance was made for Johnston of Westraw, who produced an assignation to the minute of excambion by Glendinning of Parton to his eldest son Robert within three days date, and put in the register *in anno* 1673, and likewise a ratification by Robert, disponing all right of Dolphington to Westraw *in anno* 1613; whereupon it was *alleged* that there could be no transference or decret in the principal cause, because long before Parton's right to Logan, he had assigned the minute to his son Robert, who had assigned the same to Westraw, who