

S E C T. V.

Grounds and Warrants of Decrees.

1680. July 29. STROWAN *against* MARQUISS of ATHOL.

No 28.

CERTIFICATION was refused against a decret of an inferior court, pronounced above eight score of years before, a charter of apprising following thereupon and infeftment being produced, the decret falling to be in the clerk's hands; and though the party ought regularly to condescend upon the date, yet that could not be prequired *post tantum temporis*.

Fol. Dic. v. 1. p. 355. Stair.

* * * See this case, No 27. p. 5195.

1693. February 2.

MR WILLIAM IRVINE of Woodhouse *against* GRAHAME of Mosshow.

No 29.

THE LORDS found a defender, in a reduction and improbation, was not obliged to produce any other grounds and warrants of the decret craved to be reduced, but only such as had been their own proper evidents and writs, and produced by themselves *in modum tituli* or otherwise; as for instance if I obtain a decret on a bond, if that decret be afterwards quarrelled by a reduction, I am bound to produce that bond, else he will get certification against it; but if they be writs by which I proved the passive titles on the defender, or by which I proved he acted as tutor, (as in this case) and which I recovered out of third parties hands, I am not bound to re-produce these, when you call for them in a reduction of the decret. Besides that here, I find Bonshaw is found liable as tutor by the decret, but *non constat* whether it was by a nomination accepted, or by discharges to tenants, or other deeds, that proved his being tutor.

Fol. Dic. v. 1. p. 355. Fountainball, v. 2. p. 553.

1699. February 9. The EARL of NORTHESK *against* PHINEVEN.

No 30.

A bond, found null, was not allowed to be given up to the defender

THE EARL of Northesk pursues a reduction against Phineven, his uncle, of a bond of provision for L. 40,000 Scots given him when he was young, and *in familia*. The reason was, that his father, in Phineven's contract of marriage, had given

him lands to a greater value, *et debitor non præsimitur donare*.—*Answered*, This holds not in provisions from parents, which are ever reputed *distinctæ liberalitates*. But the LORDS found the contrary between the Earl of Lauderdale and Lady Yester, 2d Feb. 1688, *voce* PRESUMPTION; and 12th Nov. 1698, Sydserf of Ruchlaw, *IBIDEM*, conform whereunto the LORDS here reduced Phineven's bond, as implemented by the subsequent provision.

No 30.
in the reduction of it, but ordained to remain in the clerk's hands as a warrant of the process.

June 29.—THE Earl of Northesk having obtained a decret of reduction against his uncle Phineven, (9th February 1699,) of a bond of L. 40,000; he now gives in a bill to the Lords, craving the said bond may be given up to him to be cancelled.—*Answered*, Although a writ be declared null so as not to operate against the party, yet it may have other effects, as here it astructs the onerous cause of the disposition made by his father to him of his lands, and therefore cannot be given up.—THE LORDS considered, where a writ is declared false, there may be reason to order it to be torn and cancelled in their own presence, but where it is only found null, it is enough that it be in the clerk's hands among the warrants of the decret; though the reducer lies under the hazard, that as long as it is extant, he may be quarrelled in a reduction within 40 years. However, the LORDS refused the desire of the bill as extraordinary and unusual, and ordained the clerk to give it to neither, but to keep it among the records and warrants. See PRESUMPTION.

Fol. Dic. v. 1. p. 355. Fountainball, v. 2. p. 42. & 55.

1709. June 10.

JOHN MOIR Merchant in Stirling, *against* The CREDITORS of ALEXANDER JACK.

IN a competition for a debt due by John Moir of Craigarnal to Alexander Jack, betwixt John Moir merchant in Stirling, who had obtained a decret of furthcoming before the Stuart-depute of Monteith against Craigarnal, upon two debts due to him by Jack, and the other creditors of Jack who had assignations to the subject; the assignees repeated a reduction of the said decret upon these grounds, *1mo*, Nothing was produced for instructing the first debt of L. 55, but only a horning and execution of arrestment, proceeding on a decret of the Commissary of Dumblain, and not the decret itself; whereas a horning, tho' it sufficiently warrant arrestment, doth not instruct or constitute the debt, without producing the ground thereof. *2do*, The arrestment for the other debt of 250 merks was unwarrantable, being used upon a bond registered in the Stuart-court books of Monteith, containing a precept in the end thereof in these terms: 'Attour, ordains all necessary execution to pass hereon within six days, in due and competent form as effeirs, next after the charge hereby warranted to be

No 31.
A decree of constitution, obtained in an inferior court, found sufficient to warrant a decree of furthcoming.