

No 534.

ments laid on in one day, and the clerk has given a declaration anent it. THE LORDS considered his testificate as ultroneous, and without regard thereto brought in all the sasines registered that day *pari passu*.

Fol. Dic. v. 2. p. 261. Fountainhall, v. 1. p. 439.

* * * Forbes reports this case :

IN a competition betwixt Allan Lockhart and John Wardrop, Creditors of Colquhoun of Kenmuir, whose sasines were registered on the same day, they were brought in *pari passu*, notwithstanding of a declaration produced under the clerk's hands, that Allan Lockhart's sasine was presented and registered two hours before Dalmarnock's; which the LORDS found not probative, no principal minute-book of the time of presenting being produced to evidence the priority.

Forbes, p. 250.

1708. July 1.

CREDITORS OF CLELAND competing.

No 535.

Extrajudicial declarations that an officer in the army had been killed in battle, emitted by other officers, found probative of the death.

THERE being a ranking of the Creditors of Cleland of that Ilk, in order to a sale of the lands, compearance is made for Mary Hamilton, young Cleland's Lady, who producing her liferent-infestment on her contract of marriage, was found prior in date to all the other creditors, and was preferred conditionally, to take effect on her husband's death; since which time, her husband being in the Confederate army at the battle of Almanza in Spain, in April 1707, he was there mortally wounded, and being taken prisoner, shortly after died of his wounds; and his Lady having obtained a declaration under the hands of sundry officers who were taken with him, bearing, that they were present when he died, and at his burial, it was *objected* by the other Creditors, That this was no sufficient probation of his death, seeing *testibus non testimoniis est credendum*, and she ought to take a commission for examining them upon oath. *Answered*, That all probation was according as the nature of the affair would bear; what if one were drowned at sea, or died in the Indies, what probation could be got there? And these prisoners who have given this testificate being in France, no commission can be directed thither, because of the war; and lately, a paper signed in our colony of Darien was sustained, though defective, because of the vast distance to supply it; and there is not the least vestige or surmise that Cleland is alive, but his place conferred on another; and if they adduced any presumption for it, there might be ground to demur. THE LORDS found the declaration produced sufficient in this circumstantiate case to prove his death, there being nothing adduced to canvel it as suspected, and found she had access to her jointure at Whitsunday 1707.

Fol. Dic. v. 2. p. 262. Fountainhall, v. 2. p. 447.

* * * The Title PROOF is continued in Vol. XXX.