

1630. December 22. SHAW against SAUCHIE.

No 261.

IN an incident for recovery of writs, diverse persons being summoned as havers of the said writs, after litiſcontestation, the pursuer of the incident passes from some of the persons who were summoned as havers, and summons them as witnesses. It was *alleged*, That after litiſcontestation they could not be used as witnesses, who were first summoned as principal parties in the incident. THE LORDS found they might be passed from and used as witnesses.

*Auchinleck, MS. p. 101.*

1631. January 20. GORDON of Grange against E. GALLOWAY.

No 262.

Found that after sentence given *in foro contentioso*, the party then compearing ought not to be heard to reduce that sentence, upon the reason of instruments and writs newly come to his knowledge.

A DECRET for payment of rental bolls obtained by the Earl against Grange, *in foro contradictorio*, the defender compearing, and proponing his defences, whereof some were admitted, and some others elided by replies, being desired to be reduced by the defender, upon this reason, that he had recovered some writs, newly come to his knowledge since the sentence, whereupon he was ready, and offered to make faith, and which he *alleged* would have elided that pursuit, if he had known thereof, and timeously had proponed his defences thereon, and which he *alleged* ought now to be received, albeit after sentence, the writs being made by the pursuer's self, who now was defender in the reduction, and subscribed by him, and done betwixt him and another party, whereby the party, now pursuer, his ignorance thereof is probable and excusable, being *in facto alieno*; and the defender *alleging*, That *post rem judicatam*, after sentence so given against the pursuer then compearing, this reason ought not to be received; for it were a dangerous practise to reduce a sentence *super instrumentis noviter repertis*, which should make all pleas endless. THE LORDS found, that after sentence so given *in foro contentioso*, the party being then compearing, ought not to be heard, to reduce that sentence, upon the foresaid reason of instruments and writs, newly come to his knowledge, and therefore assoilzied from that reason and pursuit. This is agreeable to the civil law, ' L. Sub specie Cod. De re judicata, & L. sub prætextu Cod. De transactionib. & L. Imperatores, D. De re judicata; & quamvis L. Admonendi, D. De jurejurando dicat, ex instrumentis novis repertis sententiam latam ex juramento retractari posse, tamen hoc obtinet quando sententia lata est, ex juramento suppletorio et necessario, viz. quando ob defectum plenariæ probationis judex defert rem juramento partis, non vero sic in juramento judiciali et voluntario, quod parti ab adversario defertur; sed non capio rationem differentiæ, viz. cur leges negent restitutionem adversus rem judicatam ob nova instrumenta reperta, et tamen propter eadem reperta concedunt restitutionem adversus judicatum, ex juramento suppletorio, cum videatur magis esse negandam restitutionem, ubi intervenit