

No 528.

1628. July 20.

CUMING *against* CUMING.

THE testimonial of a reader, or minister, concerning the age of any person, is not a sufficient probation, but an adminicle.

Fol. Dic. v. 2. p. 261. Auchinleck, MS. p. 153.

No 529.

Confession to the church, and standing a year, was not found to prove adultery to infer the party's escheat.

1662. January 9.

BAIRD *against* BAIRD.

BAIRD, in St Andrews, having taken the gift of his brother's escheat, upon his adultery, pursues declarator thereupon. The defender *alleged* no process, till the crime were cognosed in the Criminal Court, or at least he were declared fugitive and denounced, for then by the horning his escheat would fall, but there is no law nor statute making the penalty of adultery to be the adulterer's escheat; for Queen Mary's statute anent adultery is only making notour adultery capital, but nothing as to other adulteries. The pursuer *answered*, That custom had made the penalty of adultery to be the single escheat; and for probation of the adultery, in this case, the defender had publicly confessed it, and had stood in sackcloth for it a year, and had taken remission from the King. The defender *answered*, That confession in the kirk was necessary to purge scandal, when such probation was adduced, as churchmen allowed to infer confession, which is but *extrajudicialis confessio*, and cannot prove *ad civiles aut criminales effectus*, neither can the taking of the King's remission instruct these crimes, seeing remissions are frequently taken to prevent accusations or trouble.

THE LORDS found the libel not relevant, and that no declarator could pass, unless the defender had compeared judicially in a criminal court, and there confessed, or had been condemned by probation, but that the confession in the church, or taking remission, was no sufficient probation.

Fol. Dic. v. 2. p. 262. Stair, v. I. p. 77.

No 530.

Certificates & declarations prove nothing unless where they are taken in process and by commission.

1670. January 28. ALEXANDER WISHART *against* Sir WILLIAM DAVIDSON.

ALEXANDER WISHART being employed by Sir William Davidson to be director of his mineral works in Norway, and for alleged malversations having caused imprison him in the town of Drontown, and by a transaction before the Magistrates of the town they having made an agreement, whereby Wishart was discharged of the damage and other things Sir William could lay to his charge; the said Alexander did likewise discharge him of all action or suit whereby he could trouble or molest him, reserving only that he might

have an extract of such articles of the count-books of the minerals wherein he had an interest as a partner. The said Alexander did intent action against Sir William for exhibition of the count-books here, and did produce a certificate under the hands of some of the Magistrates, bearing, That he was wrongously imprisoned, and that he could not have been compelled in law to have made that transaction to which he was forced to agree for fear of Sir William, being there a man of great power, and copartner with the King of Denmark in the public works. THE LORDS would not find themselves judges to reduce that transaction made in Norway so as to repon the pursuer, the certificate produced being impetrated without hearing of parties, and not being a judicial sentence; neither could they ordain Sir William to produce the count-books here, seeing they were necessary to remain with the manager of the public works; but they did ordain the said Sir William to give his oath upon commission to be direct what count-books he had by him, or what books were in Norway, and who had the keeping thereof, and to consent that the pursuer might have inspection thereof, and might have the extracts of such articles wherein he was concerned. Notwithstanding it was *alleged* for the pursuer, That both parties being Scotsmen, and Sir William having an estate here, he should be liable to do all personal actions founded upon any writ, albeit made in a foreign country, according to the law of Scotland.

Fol. Dic. v. 2. p. 261. Gosford, MS. p. 97.

* * Stair reports a similar case, 4th February 1662, Skene against Lumsden, No 513. p. 12618.

1676. January 13. BELL against ROBERTSON.

JAMES BELL finding one James Patts an Englishman, in Jedburgh, arrests him there upon a bargain betwixt them for some cattle, whereupon James Robertson became cautioner *judicio sisti et judicatum solvi*; and thereafter James Bell obtains a decret against him before the Sheriff of Roxburgh: He suspends on this reason, that the Englishman was unwarrantably arrested by the Magistrates of Jedburgh, contrary to the act of Parliament 1672, Declaring the privilege of burghs to arrest to be only for merchandise, meat, drink, &c. and not for bargains of this nature, not being made with a burges, or for any goods within burgh. It was *answered*, That the act of Parliament doth only limit the peculiar privilege of burgh, and bears, That they shall not arrest any subject of this kingdom, which cannot extend to Englishmen residing in England: But the charger founds upon the local custom of the Border, by which he offers to prove, that, past memory, it is the custom on both sides of the Border, that the inhabitants of either side, being found on the other side, upon application to any Magistrate, they are arrested and incarcerated, till they

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Found in conformity with the above.