

titio in that process, yet being called *incidenter* for proving of an allegiance, by the certification foresaid, he became party therein; and as when an incident diligence is raised against a haver of writs, for proving of an allegiance, and the having thereof is referred to the oath of the defender in the incident; if he be held as confessed, though the allegiance be not proved, the pursuer of the incident will have execution against him as haver, and for the damage and interest sustained through his contumacy; so it ought to be in this case.

THE LORDS, though the Earl of Lothian's presumptive confession (being held as confessed, as said is) be a convincing evidence, that the said money was paid to him; yet they had that respect to him both as to his quality and integrity, that they would have reponed him, if he had compeared himself, or had written to the Lords, that he desired to be reponed, and did intimate as much to his procurators; and to that effect did give some time, but no return being made, they proceeded, and sustained the pursuit at the instance of the Town of Edinburgh, upon the medium foresaid.

Clerk, *Monro.*

Dirleton, No 217. p. 101.

No 15.

1675. January 13. GLENDINNING against The EARL of NITHSDALE.

THIS cause having been debated upon the 6th day of January current, No 371. p. 12226, *voce* PROCESS, it was then represented as containing a transference of a former process at the pursuer's instance, against the late Earl of Nithsdale, where-in probation was led, and the cause concluded, and in respect of the state of that process, the LORDS refused to admit a defence upon a writ suspected, being registered 70 years after its date, and never produced before, and many presumptions of falsehood alleged against it. But now having considered the process for advising the probation, there was found no transference in it, but a process at the pursuer's instance against this Earl of Nithsdale, as heir to Robert Earl of Nithsdale, father to the last Earl, who was obliged to pay the half of the worth of the lands of Dolphington, and till then to pay the half of the rents; where-upon this question arose to the LORDS, whether the depositions of the witnesses taken in the process against the late Earl of Nithsdale were receivable against this Earl of Nithsdale; and they found, that seeing the process was not transferred against this Earl, that there was no instruction that he was heir to the late Earl, and therefore the probation against the late Earl was as *inter alios acta*, and was not receivable against this Earl; for albeit probation against a party at the instance of one pursuer is sometimes receivable against that same party at the instance of another pursuer, as often occurs in the probation of passive titles; yet the defender against whom the probation is used is always the same person, or representing the person against whom the former probation

No 16.

Probation of witnesses ad-
duced against
a defunct not
probative a-
gainst a per-
son who re-
presented the
defunct's fa-
ther.

No 16.

was used. And likewise, the LORDS found, That seeing this was not now a concluded cause, that the defence formerly repelled, in regard of the state of the process, should be received when the defender insisted therein.

Fol. Dic. v. 2. p. 346. Stair, v. 2. p. 305.

* * * Dirleton reports this case :

WILLIAM GLENDINNING having pursued the now Earl of Nithsdale, as heir to Robert the late Earl of Nithsdale, his father, for fulfilling a minute betwixt the said Robert Earl of Nithsdale and William Glendinning of Lagan, from whom the pursuer had right ; and for payment of the half of the duty of the lands of Dolphington, conform to the said minute ; and litiscontestation was made in the cause ; and, for proving the rent of the said lands of Dolphington, it was craved, that the depositions of witnesses that had been adduced in the like process, intented against the said Earl, as representing his father, for implement of the said minute, should be received in this process ; but the LORDS having considered, that the said Earl did not represent his father *active*, but was pursued only upon the passive titles ; and that this process against the now Earl, is not against him as representing the last Earl ; neither was it alleged, that he represents him ; Therefore they found, that the said depositions could not be repeated in this process, seeing *res was inter alios acta*, and *acta in una judicio non probant in alio, nisi inter easdem personas*, or those who represent them.

Dirleton, No 219. p. 102.

A. against B.

No 17.

IN a reduction upon the head of death-bed, the pursuer repeting a probation of death-bed led in another process, because the witnesses were now dead, and could not be adduced in this ; the LORDS found, That the depositions transmitted from the one proces to the other could not be used as probative here, because *res inter alios acta, et testibus non testimoniis credendum est*. See APPENDIX.

Fol. Dic. v. 2. p. 346. Fountainhall, MS.

1707. July 23.

JAMES KIDZEW, Taylor in Edinburgh, *against* DAVID HARDIE, Cordiner there.

No 18.

The pursuer
of a furth-
coming,
wherein the

DAVID HARDIE being charged at the instance of James Kidzew, to make payment of the sum of L. 732 : 2 : 10 of principal, with a certain penalty and annualrent contained in a bond, granted by him to umquhile James Smeiton,