1678. *June.*

JOHN BAXTER *against* BRAITHWOOD, and REPRESENTATIVES of HUGH BOYD.

No. 23.

The Lords found, where a party compearing for his interest in a process dies, there is no need of transferring.—See 13th November, 1634, Moody against Leighton, No. 98. p. 2229.

Fountainhall MS.

1715. *June* 16.

NISBET of Dean *against* WATSON of Sauchton, and Others.

No. 24.

One of the creditors in a ranking having died, and the decree having been thereafter extracted, without calling his heirs, found, that it could not have the effect of a *res judicata* against the heir.

During the dependence of a process of ranking of the creditors of Dalmahoy, Henry Nisbet of Dean, who was one of them, having deceased, the decree of ranking is thereafter extracted, without calling his son, nor is there any procurator named as compearing for him; whereupon Dean having given in a complaint,

It was answered for the other creditors; that young Dean was perfectly apprised of this process, and his father's interest; and that his father was cited, compeared, produced his interest, deponed upon the verity of his debt, &c.; and even young Dean, though not cited, yet *liti sese obtulit*, in so far as he is marked compearing by an advocate; and though the advocate's name be not inserted, that is not material, for both young Dean and his doers did often push the hastening of the ranking, had seen the minutes and scheme, &c. as was instructed by witnesses.

Replied for Dean: 1*mo*, That as the private knowledge of a debtor does not supply the necessity of an intimation in an assignation, because it is a form required, so neither young Dean's private knowledge of his father's interest produced, and who died during the dependence, will supply his want of compearance, for which it was necessary he should be cited, or else that he should make a judicial compearance. And as to what was alleged anent young Dean and his doers, answered, That no legal compearance can be made up by witnesses; for though a citation be not necessary when a party voluntarily sists himself, yet when he does so, it must be so marked judicially, and contained in the extracted sentence; and if it be not, a witness cannot supply it; for these being *actus solennes*, just as in executions of horning and inhibitions, non quæritur quid actum erat, sed quid instrumento comprehensum est; which holds much stronger in judicial sentences; for nothing is there understood to be done, but what remains on record under the hand of the Clerk of Court. 2*do*, Seeing legal compearance must be by a procurator, the procurator ought to be named, especially that the compearance here is not marked personally.