

other witnesses above exception, that Fullerton was incarcerated upon the two debts in question, and also by the decret against M'Calla at the instance of Kennedy. It was *replied*, That the decret against M'Calla was *inter alios actum*, and witnesses could not be received to prove any executions, but only the execution itself, for which there is a special act of Parliament 1579, cap. 94.

THE LORDS refused to sustain the incarceration upon the bonds in question by witnesses, but either by the executions of the caption, bearing, That the party in prison was put in prison by virtue of the caption, or was arrested in prison, or at least that he was booked in the jailor's book in the tolbooth for the said bonds.

Stair, v. 2. p. 716.

1687. July. COUNCIL OF ABERDEEN *against* THOMSON.

THE LORDS sustained a decret, fining one in L. 50 for opprobrious expressions, upon an extrajudicial acknowledgment to a Bailie, without any other probation, though the suspender denied the same, in respect of the custom of the burgh of Aberdeen: But ordained the Magistrates to rectify that custom in time coming.

Harcarse, (PROBATION.) No 801. p. 225.

1708. February 28. The CREDITORS of COLQUHOUN of Kenmuir competing.

IN the ranking, Wardrobe of Dalmarnock, Lockhart of Cleghorn, and Winram of Wiston, objecting against one another's rights, it was *alleged* for Wiston, I must be preferred, because, though our sasines were all registered in one day, yet I offer to prove, mine was offered to the register two hours before theirs were presented; and so, by the 13th act 1693, it is clearly preferable, which makes the date of the registration to be the standard of the preference; and the 14th act, same Parliament, ordains a minute-book to be kept, expressing the day and hour when the sasine is presented to be registered; and by the 18th act 1696, the booking and registration are made to be the only rule. *Answered*, The fundamental act for registration of sasines is in 1617; and all that it requires is, to express the year, month, and day, so that the least distance of time that can be allowed, in preferring one sasine to another, is the space of a day; and how easy it is for a clerk to mistake in the matter of some hours, and even to prevaricate so far, as to gratify one before another, which was presented after me; so, wherever they are registered in one day, they ought to come in *pari passu*. *Replied, Leges posteriores derogant prioribus*; and so the acts in 1693 enlarge and explain that in 1617; so that by the express letter of the law, the difference of hours is to be considered, as is done in two arrest-

No 532.

No 533.

No 534.

Found in conformity to Wishart against Davidson, No 530. p. 12630.

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.