cognosced his title as heir of provision; nor that, in virtue of the procuratory, the subjects had been resigned into their hands. John having afterwards disponed them to a natural son of his, Janet Houston, and other heirs at law of George, insisted in a reduction of John's infeftment, as being, from the defects above-mentioned, null and void. No. 5.

Pleaded for the pursuers: Cognition by the bailies of an heir's title, is an indispensable requisite to his entry by hasp and staple, or *more burgi*; and it is likewise necessary that resignation of the heritage should be made into their hands. The only legal evidence of these essential circumstances is the instrument of sasine; but from that in question they do not appear to have taken place; *vid.* Stair, B. 2. Tit. 3.; Bankton, B. 3. Tit. 5.

Answered: It seems needless to have mentioned in the sasine, that cognition had been taken of a fact which must have been notorious to the bailies; and with respect to the resignation, the disponee, who in the instrument is described as holding the disposition in his hand, ought to be viewed in the double character of procurator for the disponer, and of receiver of infeftment.

The Court considered the plea of the defender as tending to annihilate the established feudal forms; and on that ground, (the question relative to the competency of the service not having been agitated,)

The Lord Ordinary having "sustained the reasons of reduction, and objections to the sasine,"

The Lords adhered to that interlocutor.

Lord Ordinary, *Hailes.* Act. *Elphinston.* Alt. *James Grant.* Clerk, *Home.*

S. *Fol. Dic. v.* 4. *p.* 277. *Fac. Coll. No.* 143. *p.* 224.

SECT. II.

Tenor of the Brieve.—Form of proceeding.—Reduction of Service.—Can a Service be stopped by an offer to prove a nearer Heir?

1548. *March* 16. QUEEN'S ADVOCATE *against* ——— No. 6.

AT Linlithgow, in the cause and action of error moved by the Queen's advocate against the Laird of ———, for retreating of his service of the lands of ———, because the retour bore, that these lands were holden of the Lord of St.———, for service of keeping of his castle of St.———, albeit of the law of Scotland, as the Queen's advocate alleged, there was no holding of lands,

No. 6. but either blench, ward, or feu farm; and the assize had not served nor retoured one of these holdings: Nevertheless, the Lords decerned the assize quit of the summons, and to have retoured well, because the said Laird's charter that he had of the Lord of St.————, bore "reddendo nobis et successoribus nostris servitium custodiæ castri nostri de St.————, pro omni alio onere," &c.

Fol. Dic. v. 2. p. 370. Sinclair, MS. p. 81.

1554. *March 5.* DUNNIPACE *against* OLIPHANT.

No. 7.

THE one half of an inquest being of one opinion, and the other half of another, and the Chancellor being *non liquet*, the Lords found that he might be compelled, *remediis prætoriis*, to give his casting vote either for the one or the other side. See APPENDIX.

Fol. Dic. v. 2. p. 371. Balfour.

1583. *April.* GADZEARTH *against* SHERIFF of AYR.

No. 8.
If one of an inquest maliciously absent himself, the rest cannot proceed, and therefore warrant will be granted to appoint another.

THE Laird of Gadzearth having summoned the sheriff of Ayr, and certain other persons, to lie upon an inquest for the apprising of a reversion made to the said sheriff by Gadzearth's father, after that the lands were denounced to be apprised; and that the judges and the inquest had convened to that effect, and the persons being admitted to be upon the inquest before any deliverance, there was a person of the number of the inquest that was called Cathcart, the number being in all 15, he absented himself, as was alleged, maliciously, by the information and solicitation of the other party. The inquest meaned themselves to the Lords, and gave in supplication, and desired letters, to charge the judges appointed to the comprising, to place another in the room of him who was absent, and to summon the party to that effect. Some of the Lords were of opinion, that the desire of the bill ought not to be granted, because that albeit there was one of the number absent, yet there was a number resting sufficient to decide the matter, being 13 or 14 persons, and of the daily practice, the number of them that are absent being admitted to be upon an inquest is never supplied by any other except they be dead, or at the horn, or departed forth of the country. It was reasoned upon the other part by some of the Lords, that in so far as the person who was once admitted, did maliciously absent himself, it could not be to the prejudice of the party, *et de jure, is absens dicitur qui facile inveniri nequit, vide in Authen. C. De Fidejussoribus L. 3.* and therefore, in so far as the said person absented himself maliciously, in such sort that he should in no manner of way be heard of, it was alike as if he had been sick, dead, or forth of the country. The Lords, after long reasoning among themselves, found