1630. *December* 22. Shaw *against* Sauchie.

No 261.

In an incident for recovery of writs, diverse persons being summoned as havers of the said writs, after litiscontestation, the pursuer of the incident passes from some of the persons who were summoned as havers, and summons them as witnesses. It was *alleged*, That after litiscontestation they could not be used as witnesses, who were first summoned as principal parties in the incident. The Lords found they might be passed from and used as witnesses.

Auchinleck, MS. p. 101.

1631. *January* 20. Gordon of Grange *against* E. Galloway.

No 262.
Found that after sentence given *in foro contentioso*, the party then compearing ought not to be heard to reduce that sentence, upon the reason of instruments and writs newly come to his knowledge.

A decreet for payment of rental bolls obtained by the Earl against Grange, *in foro contradictorio*, the defender compearing, and proponing his defences, whereof some were admitted, and some others elided by replies, being desired to be reduced by the defender, upon this reason, that he had recovered some writs, newly come to his knowledge since the sentence, whereupon he was ready, and offered to make faith, and which he *alleged* would have elided that pursuit, if he had known thereof, and timeously had proponed his defences thereon, and which he *alleged* ought now to be received, albeit after sentence, the writs being made by the pursuer's self, who now was defender in the reduction, and subscribed by him, and done betwixt him and another party, whereby the party, now pursuer, his ignorance thereof is probable and excusable, being *in facto alieno*; and the defender *alleging*, That *post rem judicatam*, after sentence so given against the pursuer then compearing, this reason ought not to be received; for it were a dangerous practique to reduce a sentence *super instrumentis noviter repertis*, which should make all pleas endless. The Lords found, that after sentence so given *in foro contentioso*, the party being then compearing, ought not to be heard, to reduce that sentence, upon the foresaid reason of instruments and writs, newly come to his knowledge, and therefore assoilzied from that reason and pursuit. This is agreeable to the civil law, ' L. Sub specie Cod. De re judicata, & L. sub prætextu Cod. De transactionib. & L. Imperatores, D. De re judicata; & quamvis L. Admonendi, D. De jurejurando dicat, ex instrumentis novis repertis sententiam latam ex juramento retractari posse, tamen hoc obtinet quando sententia lata est, ex juramento suppletorio et necessario, viz. quando ob defectum plenariæ probationis judex defert rem juramento partis, non vero sic in juramento judiciali et voluntario, quod parti ab adversario defertur; sed non capio rationem differentiæ, viz. cur leges negent restitutionem adversus rem judicatam ob nova instrumenta reperta, et tamen propter eadem reperta concedunt restitutionem adversus judicatum, ex juramento suppletorio, cum videatur magis esse negandam restitutionem, ubi intervenit

juramentum;' but in this case the exception was sustained, 'for not admitting of the reason upon the writs newly come to knowledge, seeing it was much questioned and doubted, if the same being proponed before sentence, would have been relevant or not. And if the same might have been now received, the writs should have been more clear to have produced the pursuer's intention than these were, so that here they were not admitted. Vide L. Unicam Tit. 9. Lib. 10. Cod. De sententiis adversus fiscum latis retractandis, quæ lex dicit has sententias intra triennium retractari posse, et post id tempus ex prævaricatione et fraude, sed hoc in fisco.

No 262.

Act. *Nicolson & Gilmore.* Alt. *Stuart & Neilson.* Clerk, *Gibson.*

Fol. Dic. v. 2. p. 200. Durie, p. 556.

1631. *July* 22.

SIR ARCHIBALD ACHESON *against* JOHN MURRAY of Broughton.

No 263.
Although the mode of probation had been fixed by the act of litiscontestation to be *scripto*, the defender was ordained to give his oath in supplement of the probation.

SIR ARCHIBALD ACHESON pursued John Murray of Broughton for a debt as heir to his father. Litiscontestation being made in absence of parties, at the first term the pursuer produced some writs to verify the defender to be heir to his father, and, among others, an indenture between the Earl of Annandale and the defender, which was subscribed only by the Earl of Annandale, for supplying whereof he summoned the defender to give his oath that the counterpawn of the said indenture, subscribed by him, (after the English manner) was in the Earl's hands. The defender compearing, *alleged*, That by the act of litiscontestation, the pursuer having taken him to one manner of probation, he could not now crave the defender's oath upon the same that he had produced writ for, which were to make two litiscontestations. *Replied*, He craved the defender's oath only in supplement of the probation by writ produced, which was lawful and usual to both; as when a party produceth for verifying any allegeance a bond not subscribed by witnesses, but only by the party, and refers to the granter's oath that it is holograph, and subscribed by him. Also was *alleged* a practique not long before, between Mr James Reid and Mr John Sharp, wherein Mr John having produced, for proving an allegeance, an account book of his brother's, Sir William Sharp, withal he produced witnesses for proving that the account book was Sir William's own hand writ, which being excepted against Mr James Reid, by interlocutor the LORDS sustained that the witnesses should be examined upon it. THE LORDS found that he ought to give his oath upon that which was required.

Fol. Dic. v. 2. p. 201. Spottiswood, (LITISCONTESTATION.) *p. 198.*