

1675. June 25. ————— against —————.

UPON a report made to the Lords, concerning a decret of the commissaries, which was questioned upon iniquity ; because, it being urged that caution should be found in an improbation, the commissary did not order the party to find caution ; it was debated amongst the Lords, Whether caution should be found or money should be consigned, as well in actions as upon exceptions in improbations : And some were of the opinion, that caution, or consignment should be in all questions of improbation, whether by way of exception or action ; conform to the Act of Parliament, Q. Mary, 7 Par. cap. 62. And some of the Lords were of the opinion, that, the law being clear to that purpose, consignment should be wherever such questions fall out, either by way of action or exception. But the contrary was asserted by others ; and they pretended custom : but nothing was instanced to verify the custom ; and, though it were, it ought not to derogate to so clear a law upon so good grounds.

The Lords did not decide this point at this time.

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1675. November 26. FORBES of CULLODEN against ROBERT ROSS and OTHERS.

A DECREET, at the instance of Forbes of Culloden against Robert Ross and others, before the commissary of Ross, being questioned upon that ground,—That the said commissary had committed iniquity in repelling relevant declinatures ; whereof one was upon the account of his relation to the pursuer, being the commissary's uncle ; and another was upon account of the nature of the action, alleged not to be consistorial : and the subject of the process, though it had been proper otherwise, yet being far above the sum of 200 merks, was such, as by the regulation, the commissary could not be judge in. And likewise, in respect that the commissary did assume to himself a power to modify a great sum, extending to above £6000, for the charges the pursuer had been at in prosecuting a plea by warrant of the defenders ; and wherein he and they were concerned : and the said modification was upon no other probation but the pursuer's oath ; and, that the modifying of so large a sum did belong, *ex nobili officio*, to the Lords of Session *privativè* :—

Some of the Lords were of the opinion, that the commissary, notwithstanding of the relation foresaid, could not be declined ; seeing there is no statute that judges may be declined upon that account. And, by the Act of Parliament (212 K. Ja. VI. his 14 Par.) “ Anent the Declining of the Lords of Session,” there is no other relation that can be a ground of declinator, but where the judge is related to either of the parties, as father, brother, or son. And yet others were of the opinion, that a nephew, being of so near relation, may and ought to be declined ; in respect, by the common law, persons of that relation are most suspected, and cannot be judges. And, by the said law, a judge may be declined upon any ground that may decline a witness : and there is more reason to decline judges than witnesses ; seeing there may be penury of witnesses ; and they may be so necessary, though related to the parties, that others cannot be found.

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