

his, but was not clear to tell his name. Thereafter, being reëxamined, he acknowledged it was given him by George Ramsay of Gallery ; and, being interrogated what he said to him, declared, That he told him he had got the disposition to deliver to him ; but could not say that he spoke any thing of my Lord Cowpar, or any order from him.

Balmerino *CONTENDED*,—This oath proved his defence, in so far as, *1mo*. He acknowledged he neither got it from Cowpar in his life, nor mentioned any order he had left to deliver it. *2do*. He had industriously concealed the party's name in the first oath, which he reveals in the second ; but then Ramsay was dead : which can admit no other construction but that he refused to name him, lest he had been examined from whom he got it, and how he came by it, as certainly the Lords would have done ; by which the unwarrantable manner of meddling with it, after my Lord Cowpar's death, would have come to light. *3tio*. He confesses Ramsay, at the delivering it up to him, spoke nothing of Cowpar, or any order from him.

*ANSWERED*,—Parties having a writ in their hands have no more to do but to oppose it ; and warrantable delivery is presumed in law till the contrary be proven. And this oath contains nothing but what is fair and honest ; and his concealing the vassal's name was upon no other account but that he might not expose him to his superior Balmerino's resentment and displeasure ; and, if it was an undelivered evident, how came it they did not quarrel it for twenty years together ? and the onerous cause for granting it was very plain.

Some were for reëxamining him ; but the plurality of the Lords found, The oaths did not prove that he warrantably came by the said disposition, or that there was any previous order or warrant from Cowpar to deliver it ; and therefore preferred the Lord Balmerino : and found it an undelivered evident on the presumptions foresaid.

*Vol. II. Page 51.*

1699. *June 20.* PATRICK HALIBURTON *against* JOHN SCOT.

PATRICK Haliburton, Dean of Guild of Edinburgh, being infest in a tenement in Hawick belonging to one Scot, on an adjudication, and pursuing for mails and duties, and removing ; compearance is made for John Scot, son to the debtor, who founds on a disposition he had to that lands prior to the Dean of Guild's adjudication, but whereon he was not infest ; and offered to prove, by receipts produced, that Dean of Guild Haliburton was paid of this debt, either in whole or in part, by intromission with sums belonging to the debtor.

*ANSWERED*,—This was *res hactenus judicata et jurata* ; in so far as, when I was pursuing for an adjudication, Scot the debtor compeared and proponed the same defence of my being paid by intromission ; and it being referred to my oath, I have deponed, that though I got an assignation to some debts, yet I never got any in payment of this, but that it is still resting ; whereupon the adjudication was allowed to proceed, and I assoilyied from that allegiance then, as I must be still ; seeing law and reason signifies that, *postquam juratum est, non amplius quaeritur an debeatur, sed tantum an juratum sit.*

REPLIED,---Neither the decret nor oath could meet him; for, *1mo.* It was *sententia inter alios lata*; and if his father has referred to the Dean of Guild's oath, he is not concerned, because his father was denuded in his favours before that, and so was not the *legitimus contradictor*; and that decret cannot hinder him to prove his intromission by receipts *scripto*. *2do.* Neither can his oath assoilyie him; because the Dean of Guild has ascribed these intromissions to other debts owing to him, for which he had done no diligence; whereas, in law, they must be imputed to the debt of the adjudication, as the *sors durior*; and his misapplication infers no perjury, but gives the Lords a handle to reëxamine him, and cause him condescend upon and instruct those other grounds of debts to which he would ascribe his intromission. And, without proving *aliam et diversam causam debiti*, he ought not to carry away the defender's estate, seeing he acknowledges he got an assignation, and thereby obtained payment: his oath is not definitive till he show these other debts to which he attributes these payments.

DUPLIED,---The Dean of Guild oppones his decret and oath; for he was not to notice a latent disposition by a father to his son and apparent heir; and so it is not *res inter alios acta*, but one and the same person in construction of law; and as to the imputation he has made by his oath, though he had deponed the effects he got were for satisfaction of other debts, yet even, in that case, the quality would have been intrinsic and sustained; as was decided, *28th March 1629, Gall against Exiot*; and *10th July 1632, Lord Fenton against Drummond*.

The Lords demurred, how far the oath would assoilyie him, or liberate from a reëxamination, or condescendence on his other debts; but found he was in the case of *res judicata*: and therefore assoilyied the Dean of Guild on that ground.

*Vol. II. Page 52.*

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1699. *February 23 and June 21.* SIR JOHN PRESTON of PRESTONHALL against ROBERT RULE.

*February 23.*---SIR John Preston of Prestonhall pursues Mr Robert Rule, minister at Stirling, as executor to the old Lady Kinglassie, on this ground, That he had pursued her before the Sheriff of Fife, upon a promise of payment of 2000 merks to him, whereon she, being personally apprehended and not appearing, was holden as confessed, and a decret extracted against her; and during her lifetime, for some years, she never raised reduction thereof. Mr Robert's defence was, Your decret was unwarrantable, being pronounced by your uncle sitting as sheriff-depute, who in law was inhabile to judge in his nephew's cause; and so the holding her as confest can bind no debt on her executor.

ANSWERED,---If she had been on life there might have been ground to repone her; but now, the mean of his probation being perished by her death, the decret must stand: Neither is it a nullity that it was pronounced by his uncle; seeing both the old Act of King James the Sixth, and the late one in 1681, anent declinators, only extend to the case where the declinator is proponed; which was not here.

REPLIED,---The judge in such a case ought not to proceed; but it is *partes*