

1699. June 21. SIR JOHN PRESTON *against* MR ROBERT RUEE.

SIR JOHN PRESTON having obtained a decret before the Sheriff of Fife, against the Lady Kinglassy, pursues Mr Robert Rule, as executor to her, for payment.

It was *alleged*; That the decret against the defunct was in absence, holding the Lady as confessed and pronounced by the pursuer's uncle, who could not be Judge in his cause; and therefore the defender ought yet to be reponed against the decret, and the debt instructed.

It was *answered*; The relation of the Judge was a ground of declinature; but is no nullity of the sentence; because the 13th act, Parl. 1681, expressly provides, that Judges in that degree of relation be declined; but doth not provide, that the sentence shall be void, which might have many bad consequences; for, by the same reason, decreets of the Lords might be annulled after the course of many years, and diligences founded upon them, if it could be alleged, that one or two of the quorum were nearly related to the party, which would render men's rights, and the effect of decreets, uncertain; and, in this case, the mean of probation having failed by the Lady's death, if the decret fall, the debt is lost.

It was *replied*; The act of Parliament doth not only provide, that Judges in that degree may be declined, but that they shall not sit or vote in the cause of their near relations. And though, for the favour of commerce, such decreets may stand good to sustain legal diligence upon them, in so far as they can afterwards be astructed or made up; yet it were against all reason, that such decreets should be unquarrellable, or sustained to instruct a debt. It imports nothing, that the mean of probation is now failed, if the defender be reponed; because it was the pursuer's fault, to pursue before an incompetent Judge. *2da*, The Lady who was decerned, did, in her own lifetime, call the decret in question, by suspension and raising reduction. *3tio*, There is no inconveniency to question the decreets of the Lords of Session, or any other judicature, if pronounced by near relations; because, if a decret be upon compearance, *primus actus judicii, est judicis approbatorius*, and the incompetency cannot afterwards be objected; and a decret of the Lords in absence may be called in question by reduction, especially if it be only pronounced by a single Ordinary; of course, as decreets in absence do pass *periculo petentis*.

THE LORDS sustained the defence; and found, That the decret being in absence, and pronounced by the pursuer's uncle, the debt must be otherwise instructed, than by holding the defunct as confessed.'

NO II.

A decree being in absence and pronounced by the pursuer's uncle, it was found, that the debt must be otherwise instructed than by holding the defender (who was now dead), as confessed.