

## S E C T. VI.

## Defences.

1547. June 6. & 16. JOHN CULTAR *against* JOHN LOGAN.

No 122.

IN actiounis of spuilzie or ejectioun, gif the defendar use and propone ane peremptour exceptioun, that he intromettit with the landis, gudis and geir alledgit spuilzeit be him, be ane just richt and titill, and it happin the samin exceptioun to be repellit be the Judge, the avail and quantitie of the spuilzie may be referrit to the persewar's aith; because the defendar, be proponing of that exceptioun, grantit the committing of the spuilzie and ejectioun.

*Fol. Dic. v. 2. p. 187. Balfour, (OF SPUIZIE AND EJECTIOUN.) No 30. p. 473.*

\* \* \* See No 2. p. 5407. *voce* HEREZELD.

1554. April 28. STEWART *against* ———

No 123.

ANENT the action pursued by J. Stewart against ——— for violent ejection of him forth of certain lands, he having tacks to run, and being in possession, and produced his tack for his title, and certain witnesses to prove his possession. The other party *excepted* peremptorily, and took in hand to improve the tack, which was the said James's title. The said James *alleged*, That he was not obliged to produce any witnesses in the matter, in respect of the peremptory exception proponed by his party of improbation, and protested for a condemnator, in case the party improved not, which was admitted.

*Fol. Dic. v. 2. p. 188. Maitland, MS. p. 119.*

1573. March 20. Lord OLIPHANT *against* OLIPHANT.

No 124.

THE Lord Oliphant, assignee to umquhile N. Oliphant of Kellie, pursued Andrew and Peter Oliphants, heirs of tailzie to the said Laird of Kellie, for to give him a reversion, which the said Andrew obliged him to do to the said Laird of Kellie, his heirs and assignees, for redemption of certain lands analized by the said Laird to the said Andrew. For verification of the said promise, the said Lord produced an instrument. The defenders offered them to unprove the said instrument, *omni modo quo de jure*, as false and feigned, but, at

Found, that one proponing improbation had passed from all other defences.

No 124.

the day assigned for improbation, they found no cautioner, nor would not, but passed from the probation, and so the pursuer protested for circumduction of the term. Thereafter the defenders *alleged*, That although the instrument, and every point thereof, were of verity, yet it was not sufficient to compel them to give a reversion, in respect of the act of Parliament, that all reversions, and bonds of reversion, should be sealed and subscribed by the party maker and promiser thereof; or if it be under form of instrument, the same should have been registered in the books of some ordinary judge, or else to have no faith; and by reason this instrument was not registered, it was not sufficient to prove their intent. The pursuer *alleged*, They should not be heard to use that allegiance, because in the term assigned to them to unprove the instrument, they passed from the same, and therefore they affirmed the instrument to be true in itself, and every point thereof; and it is of truth, that the said instrument bore the said promise, and, in respect of the pursuer's allegiance, the defenders should not be heard to allege invalidity of the said instrument; and yet, notwithstanding, if they should unprove as of before, they should yet be heard, but not otherways; which allegiance of the pursuer the Lords found relevant, and repelled the defenders allegiance.

*Fol. Dic. v. 2. p. 188. Colvil, MS. p. 237.*

1583.

Lady ESSILMONTH *against* Earl of ERROL.

No 125.

The Lords refused to allow a party to propone an exception *rei judicatæ* after *litis contestatione*.

THE Lady Essilmonth, sometime Countess of Errol, having warned certain tenants to flit and remove from certain lands pertaining to her in liferent, they *excepted*, That she had given a back-bond to her husband; that although she was infest in the said lands in liferent, yet if she, after his decease, intromitted with any of his goods, she should renounce that infestment, and it should be null. And they offered to prove, that she had intromitted with 1000 merks worth of his gear. This exception being admitted to probation, and in termino probatorio, witnesses being produced, her advocates *alleged*, That no process should be received, because the thing to be proved was her intromission with her husband's goods and gear, which was taken away by the testament lawfully confirmed, wherein there rested no free gear but only L. 6. Likeas also she being charged by this Earl of Errol before the Commissary of St Andrews, to make count and reckoning of her husband's gear, she was exonerated and discharged of all intromission therewith, except only L. 6. And so two judicial sentences standing, given by the said Commissary, *obstabat perpetua rei judicatæ exceptio*, and so the witnesses could not be received. *Answered*, The party could not be heard to propone that, *post statutum terminum probationis, et litem contestatam*, as is the ordinary practick. *Replied*, The exception made was *exceptio rei judicatæ; et dicuntur hæ exceptiones rei judicatæ, jurisjurandi, et transactionis, exceptiones perpetuæ; quæ in quacunq; litis parte*