

No 216. alleged by the other party, That he was in possession before the warning; so the question was anent the priority of probation. There was *alleged* for the pursuer a practick of before, 22d November 1580, between Allan Coutts younger and Patrick G———, (See APPENDIX), where the exception was proponed and repelled. It was *alleged*, That the practicks were not alike, for Allan Coutts libelled possession before warning, and so took away the exception, which was not contained in this libel. THE LORDS pronounced by interlocutor, after the matter had been sufficiently reasoned and heard over again, under the pain of amand, that the reply should be admitted, and repelled the exception; licet nonnulli dominorum in contraria fuerunt opinione, that an exception being a relevant exception to have stopped a warning, should also have stopped the succeeding in the vice; and the decret of removing was given *parte non comparente*.

In the same action, it was *excepted* by the defender, That he ought not to have been decerned to have succeeded in the vice, because the pursuer promised to let him sit still for the space of a year. The exception being found relevant by the Lords, the question was, whether the same should be admitted to be proved by writ or witnesses. THE LORDS found by interlocutor, that it being an allegiance of the promise of an year, the same might be proved by witnesses, or *prout de jure*.

Fol. Dic. v. 2. p. 231. Colvil, MS. p. 313.

* * Similar decisions were pronounced, May 1582, Monteith against Tenants, No 2. p. 8397, *voce* LOCUS POENITENTIAE, and 20th March 1629, Affleck against Mathie, No 7. p. 5409, *voce* HEREZELD.—There is a case likewise to the same effect in Erskine MS. 13th January 1592, Binning against Douglas. That MS. is not in the Advocates' Library. See APPENDIX.

1609. *January.*

MIDDLEMAS *against* FORD.

No 217.

In an action pursued by Middlemas against Hector Ford for the price of an horse, exceeding L. 100, the LORDS found it might be proved by witnesses, and prescribed not, albeit it was not pursued within three years.

Fol. Dic. v. 2. p. 229. Haddington, MS. No 1533.

1609. *November 23.*

MONRO *against* MONRO.

No 218.

Found in conformity with the above.

HUCHEON MONRO, son to Monro of Tarlachie, and Monro his assignee, pursued the relict of Hucheon Ross to deliver to him twelve great cows and a bull, which the said Hucheon Ross had disposed to him, and in token thereof had

delivered to him one of the cows, reserving the profits of the said cows to himself during his lifetime, and after his decease the said cows and profits to pertain to the said Hucheon Monro. It was *alleged*, That the pursuer's title could give him no action, being a disposition subscribed by one notary, where the party could write. THE LORDS considering that the disposition of so many cows might have been proved by witnesses, they sustained the summons for the cows and bull, but not for any profits preceding this decret.

No 218.

Fol. Dic. v. 2. p. 229. Haddington, MS. No 1650.

1616. December 11.

A. against B.

A COMMAND to do service after a warning, which implied passing from the warning, found not relevant to be proved by witnesses.

No 219.

Fol. Dic. v. 2. p. 231. Kerse.

*** This case is No 59. p. 12303.

1618. December 17.

WILKIES against GORDON.

ACTION for payment of L. 20 Sterling, for the price of deals bought by his bond. *Alleged*, He promised never to seek the price, if he sold any more of his deals which he then had in his ship within the bounds of Strathnaver, whereby the defender might be prejudged in the sale of his deals; and true it is, that he sold 1000 deals in the town and about to others. THE LORDS found the allegiance relevant to be proved, the condition *scripto*, and the selling *prout de jure*. Term circumduced, and decerned.

No 220.

Clerk, Hay.

Fol. Dic. v. 2. p. 230. Nicolson, MS. No 465. p. 321.

1627. January 16. DAWLING'S BAIRNS against LO. BALMERINOCHE.

IN an action betwixt the Bairns of Robert Dawling and Lord Balmerinoch, for payment of 400 merks, for the yearly mail of a dwelling-house set to the Lord Balmerinoch, pertaining to the said Robert and his bairns, and possessed by the said defender; the LORDS found, that the condition anent the payment of that yearly duty of 400 merks, for the mail of the said land, ought to be proved by writ or oath of party, and was not admissible to be proved by witnesses, being in a matter above L. 100.

No 221.

Act. Belshes.

Alt. Lermont.

Clerk, Gibson.

Fol. Dic. v. 2. p. 231. Durie, p. 256.