

SECT. XIV.

Delicts, how relevant to be proved.

1565. April 6. LAIRD OF ROSSIE *against* LORD INNERMEITH'S WITNESSES.

No 253.

GIF witnessis sweir and depone in judgment aganis ony partie, quha thairefter raisis summoundis aganis thame, to heir thame decernit perjure and men-sworn, he may preive the samin be witnessis, and sall not be compellit to the probatioun thair of be writ, or be ane assise.

Balfour, (OF PROBATION BY WITNESSES.) No 29. p. 376.

1626. July 12. ROBERT GUTHRIE *against* L. BARNBARROCH.

No 254.

ROBERT GUTHRIE having transacted with Barnbarroch about a debt of 2000 merks, owing to the said Robert by Mochrum, for payment to him of 1200 merks by Barnbarroch, with provision that the said Laird of Barnbarroch should not be subject to him in payment of that 1200 merks, while he had first recovered it from Mochrum, Barnbarroch being charged, suspends upon that reason of not payment. *Answered*, Offers to prove payment, at least that he having taken Mochrum by virtue of caption, let him go after. This (which in itself would hardly have been found relevant, viz. to infer payment by caption) being admitted to probation with consent; the LORDS found, that his taking behoved to be proved by writ or oath of party, and not by witnesses.

That a man was taken by caption, and dismissed again, to be proved only by writ or oath.

Fol. Dic. v. 2. p. 234. Spottiswood, (CAPTION.) p. 31.

* * Durie reports this case :

RICHARD GUTHRIE, cook in Edinburgh, makes the L. Barnbarroch assignee to a bond of 2000 merks, indebted to him by the L. Mochrum, who gives his bond again to Guthrie, to pay 1200 merks, with provision, that if he got not payment from Mochrum, his bond should be null. Barnbarroch being charged by Guthrie, he suspends upon the foresaid provision, and subsumes according thereto, that he had not received payment from Mochrum; to which it was *answered*, That he had either received payment, or the equivalent, viz. that he having caption against Mochrum, he took him by virtue thereof; so that having taken him, he became full debtor to the charger, as if Mochrum had paid to him the debt assigned. This allegiance being found relevant upon this equivalent, (which I think was hardly done) the LORDS found it ought to be proved by writ, or oath of party; and that the taking of him was not admissable to be

No 254. proved by witnesses, tending in effect both to prove payment to Barnbarroch, of 2000 merks, and to make him debtor for 1200 merks.

Clerk, Hay.

Durie, p. 215.

1628. February 23. KELLO against MACKISON.

No 255.

A MESSENGER being pursued for the debt owing by a party whom he had taken, and, instead of prison, put him in a private house, from whence he made his escape; the libel was found relevant, and that the employment and fact might be proved *prout de jure*.

Fol. Dic. v. 2. p. 234. Durie.

* * * This case is No 2. p. 8887. *voce* MESSENGER.

No 256.

1628. November 28. BORTHWICK against CLERK.

A PARTY having denounced, in order to comprise, and the debtor suspending, and before the suspension was discussed, another creditor having comprised and been infest; the LORDS sustained the objection of collusion, relevant against the appriser infest, that he had procured the suspension by his own labour and expenses; but this was sustained to be proved only by writ or oath of party.

Fol. Dic. v. 2. p. 233. Durie.

* * * This case is No-3. p. 2427. *voce* COLLUSION.

No 257.

1629. March 6. DUKE of LENNOX against HIS CHAMBERLAINS.

IN the action pursued by the Duke of Lennox against his Chamberlains, an exception being proponed, that they were stopped by the pursuer's own servants in the execution of a poinding; it was found that it should not be proved by witnesses, but by the officer's executions, bearing the hindrance made.

Fol. Dic. v. 2. p. 234. Spottiswood, (PROBATION.) p. 243.

No 258.

What proof admitted of knowledge, that a person dealt with was bankrupt?

1630. February 23. RITCHIE against PATERSON.

WILLIAM PATERSON being cautioner, acted in the books of Burrows for Hector Paterson, who was admitted a Flemish factor for Scots merchants, after sentence obtained before the Lords, by John Ritchie, merchant burges of Edin-