

might be heard to propone and prove that reply, notwithstanding of his failing to prove her successor; for the LORDS found this a several member, which was now offered to be proved, from that member, whereby she was convened as successor; seeing, to prove her successor, the pursuer behoved to produce where she was infest, and this reply qualified her to behave herself as heir to him, whereby she could not renounce in prejudice of the charge given to her to enter heir; and the same was not alike, as if he had insisted thereby against her as successor; but the LORDS found them distinct members.

No 361.

Act. Hart.

Alt. Trotter.

Clerk, Hay.

Fol. Dic. v. 2. p. 207. Durie, p. 582.

1632. December 20.

KNOX against KNOX.

No 362.

JEAN KNOX having obtained sentence for payment of 1000 merks against her brother, as heir to his father, granter of the bond upon that sum to her; and having also obtained decret against a suspension and reduction intended by her said brother, for reducing of that sentence and bond; thereafter the charges for the said payment being *de novo* suspended, upon this reason, viz. because she was executrix nominate to her father, granter of the bond, and albeit she was not confirmed, yet she had intromitted with as many of the defunct's goods as would extend to that sum, and so she was paid in her own hand, and could not pursue the heir therefor, especially seeing the bond is a moveable bond, and not heritable, which ought to affect the executor, and who ought to relieve the heir thereof; the LORDS would not receive this reason being competent before the first sentence given against the suspender, then compearing, and then known to him, but omitted, and not proponed; and therefore found it not receivable now, especially seeing it was offered only to be proved by witnesses, that she had intromitted, and was not offered to be proved by writ or oath of party; therefore it was not received in this suspension against a written bond and sentence, being omitted of before *ut supra*.

Clerk, Scot.

Fol. Dic. v. 2. p. 208. Durie, p. 661.

1636. July 12.

BURREL against GILGOWER.

No 363.

ONE Burrel obtains decret of removing against Gilgower before the Bailies of Edinburgh, *in foro contradictorio*, which being desired to be suspended upon a reason founded upon a tack of the land controverted, and other opponing his decret given against him compearing; the LORDS found the letters orderly

No 363. proceeded, notwithstanding of the reason, in respect of the said decret given against the suspender compearing; at which time the said defence of the tack was competent, and being omitted to be proponed, they found it should neither be received by suspension nor reduction, except that it were libelled by way of reduction, that it was proponed and unjustly repelled, *quo casu* he might intent ordinary reduction thereon, and no otherways, seeing it must be presumed to have been *dolose* omitted, being competent to him before the sentence.

Act. *Primrose & Dunlop.*

Alt. *Gilmore.*

Clerk, *Hay.*

Fol. Dic. v. 2. p. 209. Durie, p. 813.

1661. December 12. GORDON of Gight against ABERCROMBIE of Birkbog.

No 364.

SIR ALEXANDER ABERCROMBIE of Birkbog having obtained decret of ejection against Sir George Gordon of Gight, for repossessing him in certain lands, and paying the double rent for the violent profits; Gight pursues reduction of the decret, on these reasons; *1mo*, Because there was no law nor practick to make the violent profits of lands, without burgh, to be the double of the rent, which is only competent by custom, *in prædiis urbanis*; *2do*, The ejection was prescribed, not being intended within three years, conform to the act of Parliament; *3tio*, Gight's defence of entering, *in vacuum possessionem*, was only found probable, *scripto vel juramento*, whereas being *facti*, it was probable by witnesses.

THE LORDS repelled the first and second reasons, as competent, and omitted in the decret; and, as to third, the decret did bear the allegiance in the decret, to be Gight's entering into void possession, with consent of party, which consent not being qualified by any palpable fact was not probable by witnesses. See PROOF.

Fol. Dic. v. 2. p. 208. Stair v. 1. p. 68.

1662. February 8. Lord TORPHICHEN against —————

No 365.

IN a reduction of a Sheriff's decret of perambulation, upon this ground, that he did not proceed by an inquest, conform to act of Parliament, but by witnesses; this objection was found competent and omitted.

Fol. Dic. v. 2. p. 209. Stair.

* * * This case is No 47. p. 2199. *voce* CITATION.