

S E C T. VIII.

Possession.

No 611. 1665. June 24. MONTGOMERY *against* WALLACE.

IN a constitution of thirlage there was an old decreet, *anno* 1569, against the tenants, possession was proved for 28 years backward, no body being found of age enough to prove farther back; the LORDS found, That the probation during memory did presume anterior possession to compleat prescription.

Fel. Dic. v. 2. p. 270. Stair.

. This case is No 120. p. 10857., *voce* PRESCRIPTION.

1670. December 16. MURRAY of Auchtertyre *against* GRAY.

No 612.
Whether an act of contravention, relative to the possession of water, was sufficiently proved.

MURRAY of Auchtertyre having pursued the contravention against Gray upon several deeds, whereof one was, that Auchtertyre having procured liberty from a neighbour heritor to make a cast upon that heritor's ground, wherein some little burns were gathered to a head, and thence were conveyed through Auchtertyre's own ground to his mill lead, and that Gray had broken down that cast, whereby the burns were diverted; Gray having compeared and proponed nothing, the libel was found relevant, and admitted to Auchtertyre's probation, who by several witnesses proved, that the defender had broken down that cast; of whom some deponed simply, but two of them deponed thus, that Gray had broken down the new cast, but that the burns gathered therein in the time of flood, did water Gray's own lands, and that by the new cast they were kept in and could not water the same; whence it arose to the LORDS' consideration, whether that deed of contravention was sufficiently proved, or whether the testimonies of the witnesses, being qualified that the defender had done the deed, but in continuation of his former possession of the watering of the burns, whether respect ought to be had to that qualification; some thought not, because the fact, as it was libelled, was found relevant, and proved, and the qualification ought to have been proponed by way of defence; but it was found, that the testimonies being so qualified, did not sufficiently prove to infer a contravention, for if the contravention had been proved by writ or oath, such a quality either in the writ or oath would hinder the same to prove sufficiently the contravention.

But because the testimonies were not to be considered by the parties, the LORDS ordained the sentence to express the foresaid reason of it; that the pursuer, before extract, might allege any thing thereanent he thought fit.

Stair, v. 1. p. 702.