

1672. February 16. LORD MAXWELL *against* TENANTS of DUNCOW.

FOUND, That the defence upon the Acts _____ against those who, during the dependence of process, invade or wound the adverse party; (who, by the said Acts, tynne the cause, and forfault their interest in question;) being in effect penance, and founded upon delinquency, may be proven even before the Lords *prout de jure*, as to order and ratihibition: which was alleged could not be proven by witnesses to import the loss of heritage.

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1672. February 23. BLAIR *against* BLAIR.

WITNESSES being examined before answer *ex officio* :

It was desired, That, seeing *ex facto oritur jus* ; and the Lords being unclear to decide, *in jure*, before the point of fact were cleared by probation ; and the point of law, and ground of their decision, is to arise out of the probation ; and therefore they may see and debate upon the same : which was refused ; seeing *publicatio testimoniorum*, by our law, is allowed in no case but in improbations *ex questione falsi*.

M'Kenzie. *Alteri*, Lockhart, &c.

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1674. June 2. [Anent the Admission of LORDS of SESSION.]

THE King's Majesty having, by two letters to the Lords of Session, presented Mr David Balfour of Forret, and Mr Thomas Murray, both advocates, to be Lords of the Session ; it was moved by one of the Lords, That seeing, by the law and Acts of Parliament, these who are to be admitted to be Lords of Session, should be tried ; therefore, the trial should be such as is intended by the law ; the very notion of trial importing, at least a serious, if not a strict and exact way of trial.

This was moved, because the way of trial had become of late so perfunctorious, and *dicis causa*, that it was ridiculous ; and in effect a mock trial : some of the Lords being appointed to examine these who were named by the King, and after they had asked some trivial questions, having made report that they found them qualified ; albeit it was not only known to the examiners, but to all the Lords, and notorious to the world, that they were altogether ignorant both of law and practice ; and did acknowledge it themselves, not daring to expose themselves to sit in the Outer-House as Ordinaries ; they prevailing with others of the Lords to go out and officiate for them as curates.

1. It was urged, That the Estates had considered the interest of the kingdom, (all estates being concerned in that judicatory,) that the Lords should be persons of great ability and integrity ; seeing their lands and fortunes, and greatest

interests, are the subject of their jurisdiction and decisions : And therefore it was provided, by divers Statutes and Acts of Parliament, they should be qualified persons ; and found upon trial to be such.

2. His Majesty's letter required that the persons now named should be examined effectually.

3. By divers Acts of Sederunt, and, in special, one upon the King's letter for the time, the way of trial is prescribed, which is most exact.

4. The oath of admission, that the Lords should be faithful, has, and ought to have influence upon all their actions, as Lords of the Session, that they should be done faithfully : and the trial of Lords, for the reasons foresaid, being an important act of duty, ought to be done faithfully and sincerely ; and cannot be done otherwise, without breach of oath.

5. To pretend to obey the law, and the King's letter, (which requireth an effectual trial,) in a way which is superfiary, and evidently ineffectual, it is a cheat and *circumventio legis* : which in others is hateful ; but in judges, who are *antistites juris*, is abominable ; and inconsistent with the honour and integrity that should be expected from the judicatory.

6. If there were no trial at all the Lords would be passive, if persons not qualified should be named : but being enjoined to try effectually, if they receive them without an effectual trial, they are not free of blame ; and are accountable to God, and his Majesty, and to the Parliament.

To all these reasons it was ANSWERED, That at this time, the way of trial that had been for a long time, should be continued at this time ; and that the motion was upon some design.

The mover did purge himself, upon oath that he had no design, but to do duty : and did attest the president, that before this occasion they had spoken often to that purpose : and did represent, that this is the fit time to put the law and statutes in execution ; the persons named being advocates, and persons presumed to be able to undergo the trial ; so that it cannot be thought that there is any thing of design against their persons. That it cannot be denied but the late way is abusive ; and *antiquitas erroris*, or *abusus*, cannot be thought and pleaded to be custom. That in the year 1629, the Lords, by an Act of Sederunt, had renewed and ratified all the former statutes anent the trial and admission of the Lords ; and ordained them to be observed : That since that time the troubles intervened and continued long ; so that prescription cannot be pretended for an abuse which had occasioned so great prejudice and clamour.

It was CARRIED, That the examination should be as it has been of late. And upon the report of Gosford and Craigie, (appointed to examine them,) they were admitted. Gosford was of opinion that there should be another way of trial.

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1674. June 6.

ACT OF SEDERUNT.

THE Lords thought fit to make an Act of Sederunt, and to intimate it to the advocates, to the purpose following, *viz.* :—That when an allegiance is not admitted, but a joint probation is allowed before answer ; if there be any other al-