

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 preve 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