

No 236.

1584. *January.* LORD GRAY *against* The CONSTABLE OF DUNDEE.

THE Lord Gray wakened an action against the Constable of Dundee, anent the redemption of the third part of the Mains of Dundee. Compeared Mr Thomas Craig, advocate for the Constable, and *alleged* the Constable to be forth of the nation, and that his evidents and writings could not be had to have inspection for the defence of his cause, and so was content that decret should pass against the Constable for null defence, and that they would pass from the defence of the cause. It was *answered*, That the defender might not now do the same, because he had compeared before sundry times in the said cause, and proponed sundry dilators, which were all repelled, and so now behoved either to insist in the action, or else to renounce *jure liti et causæ*. To this was *answered*, That albeit he had compeared and proponed dilators, yet *lis non fuit contestata et sic potuit tempestive resilire*. THE LORDS found, That he might pass from the defence of the cause.

*Fol. Dic. v. 2. p. 197. Colvil, MS. p. 395.*

1609. *November 25.* AUCHMOUTIE *against* LAIRD OF MAYNE.

No 237.  
An exception of *noviter veniens ad notitiam* was received after conclusion of the cause, the proponer making faith, and the same being referred to the pursuer's oath of verity, being present.

MR ROBERT AUCHMOUTIE pursued a spuilzie of teinds against the Laird of Mayne, Hay, a part of the quantity contained in the summons being elided by an exception referred to the pursuer's oath of verity, and the rest referred to the pursuer's probation *in termino probatorio*. The pursuer, by his oath, declared the exception not to be of verity, and therefore *condemnatur* behoved to be given for that part; for the rest referred to the pursuer's probation. The defender sought circumduction of the term, because no diligence was produced. It was *alleged* by the pursuer, That the term could not be circumduced, because he offered to refer the matter to the defender's oath of verity. It was *answered*, That he could not be heard, because his term was expired without diligence, and so could not be supplied. THE LORDS found by interlocutor, That the term should be circumduced, especially because the rest of the cause was concluded, and the defender was not present in the town; and they would not give letters to summon him, and delay the process, seeing he had done no diligence in the first term. Thereafter, the defender *alleged*, That he had an exception *noviter veniens ad notitiam*, to wit, that the pursuer had promised to Robert Hay, who, in name of the defender, accepted the said promise, that if ever he compeared at the bar in the said cause, he should be content to discharge the defender his hail teinds. It was *answered*, That that exception could not be received, *first*, because the cause was concluded; and *next*, because the promise not being made to the party present, and accepted by himself, it was not obligatory, Notwithstanding whereof, because the pursuer was

present, and defender's procurator offered to make faith, that the said exception was newly come to his knowledge, and offered to refer the verity thereof to the pursuer's oath, they found the exception relevant to be proved by the party's oath, which being sworn, denied the same.

No 237.

*Fol. Dic. v. 2. p. 200. Haddington, MS. No 1657.*

1609. November 28. HENDERSON against GRAHAM.

In an action pursued by Thomas Henderson against Graham, sister to the Laird of Inchbrakie, relict and universal intromissatrix with the goods and gear of umquhile Colonel of Condie, her husband; she *excepted*, That for the utensils and domiciles, she could not be reputed universal intromissatrix, because her intromission was necessary. It was *replied*, That the pursuer offered him to prove, that she had intromitted with others the defunct's goods, by and attour the domiciles, whereof he gave in a particular inventory. In respect whereof, the summons and reply being found relevant, and a term assigned *in termino probatorio*, the pursuer declared, that he would condescend upon farther intromission by the defender with the defunct's goods, to wit, threescore ten pounds of annualrent, which he would refer to her oath of verity, and would make faith, that the same was newly come to his knowledge; notwithstanding whereof, the LORDS, in respect of the state of the process, would not suffer any farther to be proved than was contained in the act of litiscontestation.

No 238.

A pursuer having made litiscontestation upon the defender's intromission, he was not *in termino probatorio* allowed to condescend upon any other particular intromission than was contained in the act, although he offered to refer it to the defender's oath of verity.

*Fol. Dic. v. 2. p. 197. Haddington, MS. No 1658.*

1610. January 16. LAIRD of SMETON against DICK.

HE who after litiscontestation summoned witnesses to prove his libel, after one of the witnesses was received before his examination, was permitted to refer his summons to the defender's oath of verity.

No 239.

*Fol. Dic. v. 2. p. 200. Haddington, MS. No 1736.*

1617. July 5. FINLAYSON against GRAY.

In an action by Margaret Finlayson and John Gray, the LORDS would not suffer the party to refer his reply to her oath after the concluding of the incident.

No 240.

*Fol. Dic. v. 2. p. 200. Kerse, MS. fol. 256.*