

No 208. 1663. *January 8.* MURRAY *against* HUNTER.

A PRECEPT of poinding being unwarrantably executed *extra territorium*, it was not found sufficient to infer a spuilzie against the employer, unless it were proved by the oaths of the messenger and defender's servants, employed by him to go along with the messenger as assistants, that they had express command so to do.

Fol. Dic. v. 2. p. 229. Stair.

*** This case is No 281. p. 11611. *voce* PRESUMPTION.

No 209.

A party put a horse into a stable, with orders to feed him in a certain manner in stable. He was put to grass, and lost. The order found probable *prout de jure*.

1667. *January 29.* HERCULES SCOTT *against* JOHN GIBB.

IN July last the said Hercules Scott did put in a horse in the said John Gibb's stable, in Burntisland, being a common stable, and did order the said John that he should not suffer his horse to go out to the grass, but that he should keep him in at the hard meat until he should return from Edinburgh. Notwithstanding whereof, the said John did put out the said horse to the grass, with his head and foot tied together, and did put him to pasture on the Craigs of Burntisland, where he fell and broke his neck. The said Hercules intents action against the said John Gibbs, for delivery of the said horse price, extending to 300 merks. That which was in question most was the order, the defender alleging the same was only probable *scripto*. But the LORDS found otherwise, that his order, *in hoc casu*, was probable *prout de jure*, but reserved modification to themselves at the advising of the cause.

Fol. Dic. v. 2. p. 229. Newbyth, MS. p. 89.

*** Stair reports this case :

HERCULES SCOTT having given his horse to John Gibb, stabler in Burntisland, to be kept, pursues Gibb for the price of his horse. The defender *alleged* absolutor, because he having put out the horse to the grass, it being in the month of July, the horse fell over a rock and broke his neck, and the defender is not liable *pro casu fortuito*. It was *answered*, That the accident was by the defender's fault, because he put the horse to grassing above the Craigs of Burntisland, and caused tie his head and feet together. *2do*, It is offered to be proved by witnesses, that the pursuer directed him to keep the horse in the stable at hard meat, and not to put him out to grass. The defender *answered*, That he was not *in culpa*, because he had put out the horse in a place where ordinarily other horses were put out, and had tied him no other way than the rest of the horses.

2do, The command to keep, is only relevant to be proved, *scripto vel juramento*, and the emission of words without any fact is not otherwise probable.

No 209.

THE LORDS found the defence and duply relevant to elide the summons, but found the reply and triply relevant to elide the same; and found it probable by witnesses, in respect it was a part of the bargain betwixt the pursuer and the stabler.

Stair, v. I. p. 431.

1668. July 21. ROBERT THOMSON *against* Earl of GLENCAIRN.

ROBERT THOMSON having pursued the Earl of Glencairn for a count of wright work, wherein he was employed by the late Earl for his lodging and yards, when he dwelt in my Lord Oxford's house; it was *alleged* for the Earl, That the employment being a direction was only probable *scripto vel juramento*.

No 210.

Witnesses admitted to prove that a tradesman was employed by a person deceased.

THE LORDS, before answer, having ordained witnesses to be examined, and their testimonies being clear and pregnant, that the late Earl did employ the pursuer in this work, and called for him frequently, and ordered the work from time to time, they sustained the witnesses in the probation, and found it proved. It did not appear that this pursuit was within three years of the work, but the defender did not insist in any defence thereupon.

Fol. Dic. v. 2. p. 228. Stair, v. I. p. 555.

1671. June 22. Duke of BUCCLEUGH *against* PARISHIONERS OF HASSENDEIN.

THE MINISTER of Hassendein having obtained the designation of a glebe out of the Duke's land, who *alleged*, That the Minister having a glebe before, extending at least to two acres, the Earl upon this designation had gotten possession thereof, and could only seek relief for the surplus. It was *answered*, That these two acres had never been designed as a glebe, but the pursuer's predecessors were infest therein, and in possession thereof before the ministers, and any possession they had was but by their sufferance and connivance. It was *answered*, That *decennalis et triennalis possessor non tenetur docere de titulo*, and the Minister was not only in possession thirteen years, but thirty years. It was *answered*, That albeit possession may be a title, yet it may be elided by the pursuer's right, which cannot be taken away but by prescription; whereupon the question arose, how the tolerance or sufferance of the Minister's possession was probable, whether by witnesses or not, seeing tolerances are not ordinarily so proved.

No 211.

Witnesses admitted to prove a minister's possession of lands to be by tolerance of an heir, and not to be a glebe belonging to the kirk.

THE LORDS found that if the Minister's possession were alleged to have been forty years, as belonging to the kirk, that the Duke's tolerance could only be