

bell of Kilberry, who was apparent heir to his goodsire, who stood infest in the said lands. It being REPLIED, That the tolerance was only probable *scripto* ;— It was DUPLIED, That the apparent heir compearing, and owning the defender's possession, there was no necessity of a tolerance.

The Lords found, That there was no necessity of a tolerance to be produced in writ ; seeing the pursuer did not allege that he or his authors had ever been in possession.

Thereafter it was ALLEGED, That the apparent heir of Kilberry could have no interest to defend, because he could not allege that he or his predecessors had been in possession these forty years bygone ; and so the right was prescribed ; especially in this removing, which was a possessory judgment : but he ought to have intended a removing at his own instance. It was ANSWERED, That the pursuer not being able to allege possession, in effect the removing was only *adipiscenda possessione* ; wherein Kilberry having as good right as the pursuer,— *viz.* his predecessor's seisine, which was long prior, and whereupon, in a double pointing, at the tenant's instance, he would be preferred,—he had a good interest to compear and debar the pursuer in this removing.

The Lords, before answer, ordained all parties to produce all rights which they or their predecessors or authors had of the same lands ; and to condescend and prove, if any of them ever had possession in the manner thereof.

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1669. December 3.

THOMSON *against* IRVING.

THOMSON, having obtained a decret before the commissaries of Aberdeen, against Irving, for payment of 100 merks ; as likewise ordaining him to stand barefooted at the parish kirk, and in face of the congregation, to crave pardon for calling him a thief and robber :

The decret was SUSPENDED upon this reason :—That he had pursued Thomson before the sheriff for the same crimes ; and, by the depositions of the witnesses produced, it appeared that the facts were proven. It was ANSWERED, That, notwithstanding of these depositions, Thomson was assoilyed. To which it was REPLIED, That the sheriff's decret was given by collusion ; and the suspender offered yet to prove the said crimes.

The Lords found the letters orderly proceeded for the sum of money decerned ; but did ordain the acknowledgment of the offence to be before the commissary court ; in respect that the sheriff's decret was not quarrelled either by reduction or a summons of error, and refused to receive any new probation.

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1669. December 8. CAMPBELL of ORMSAY *against* The LAIRD of MACNAUGHTAN.

In a spuilie, pursued at Ormsay's instance against this Macnaughtan, as heir
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