

as are in the like case, or have been vassals to the lords, who have obtained erection of the benefices after rights made, by virtue of the act of annexation, to others, of lands to be holden of the king; but the doubt remains yet undetermined, for, in this decision, there was a necessity for Sir John to produce, seeing he was called to produce his evidents made to him by the priors, and sensine as false, the pursuer who might do all that the priors might have done, had reason to see if Sir John had right to the lands or not; but, if the writs were produced, it appears yet to remain free and unprejudged to the excipient, to dispute, in its own time and place, that he is not his vassal, but only the king's.

*Vid.* 7th February 1627, John Stuart.

Page 64.

1623. June 11. The KING and the EARL of HUME *against* CRANSTON.

LITISCONTESTATION being made in the action of improbation pursued at the King's instance and the Earl of Hume's against Cranston of Moriston, an incident being raised, only at the Earl of Hume's instance, for proving of such points as, by the act of litiscontestation, were admitted to his probation; which incident was not also raised at the king's advocate's instance;—the Lords, notwithstanding thereof, sustained the incident, because the advocate concurred and declared that he insisted therein with the party.

*Act.* Hope and Belshes. *Alt.* Nicolson and Craig. *Vid.* 10th February 1624, E. Buckcleugh *against* Lord Yester, and the cases there.

Page 64.

1623. June 23. The EARL of MARR *against* LORD ELPHINGSTOUN.

In an improbation pursued by the Earl of Mar, against the Lord Elphingstoun, as use is in such cases, there being a general clause in the summons, whereby the defender was called to produce, by and attour the particular evidents especially set down in the summons, all and whatsoever writs and evidents, made by such or such persons, of the lands libelled, as such summons usually reports; and incident being used by the defenders, for recovering of the same writs specially libelled; in the which incident the defenders, who were thereby called as havers, were also called for having all and sundry other writs, conform to the general clause contained in the summons of improbation: which general clause of the incident being quarrelled by the pursuers of the principal cause of improbation, alleging that that generality could not be sustained in that incident, because no person could be convened as haver, except of some particular designed writ, and not of such generality, whereupon no improbation could be led; and albeit that clause was contained in the principal summons of improbation, yet that could not be a reason to sustain that general clause in the exhibition or incident, seeing, in the improbation, he was not holden to prove any thing, but conceived his libel *negative*, that there were never such evidents, and if any was, the same were false: against the relevancy of the which generality

the party could obtrude no argument; whereas the defender, by his incident, alleges, *positive et affirmative*, that these evidents were false, and that they are in the parties' hands whom he convenes, which of necessity ought to compel the user of the incident to condescend specially what writs these are, which he *positive* affirms to be, and that the same are in the defender's hands, called for by the incident;—the Lords found, that this incident could not be sustained in the general clause, albeit that clause was as general in the principal summons of improbation, except the pursuer and user of the incident were special upon all the particular writs for which the defenders were convened in that incident; and therefore ordained the user to condescend specially upon each particular writ for the which he craved the incident. Which being specially condescended upon, the Lords sustained the incident, but not for the general clause.

*Act.* Hope and Aiton. *Alt.* Nicolson and Stuart. Scot, Clerk.

Page 64.

1623. June 24. LADY WINTON *against* SCOT.

IN an action of spuilie of teinds, the Lady Winton *against* Scot,—the Lords would not, after litiscontestation, sustain an exception, the defender being then compearing, who was absent in the process when litiscontestation was made, albeit it was the first term of probation, and no witnesses then received, when he offered to propone it, though founded upon the Act of Parliament for requiring of teinding, and upon teinding and intromitting, conform thereto. Which exception was not received, albeit at the first term proponed; because some part thereof consisted *in facto*, which could not instantly be verified, albeit the most part was verified instantly.

*Act.* Stuart. *Alt.* Scot. Gibson, Clerk.

Page 65.

1623. June 24. ACT OF SEDERUNT ANENT COMPRISINGS.

A STATUTE was made by the Lords, that all comprisings which should not in time coming be executed upon 15 days free, betwixt the day of the denunciation and comprising, should be found null; and sicklike, all bypast comprisings which had that defect, should also be found null, except only such bypast comprisings whereupon charter and sasine had followed, and which were clad with real possession of that which was comprised:—and that nullity to be received summarily, either by exception or action.

Page 65.

1623. July 3. HUNTER *against* WATSON.

A TRANSFERRING being pursued at the instance of one Hunter, as son and heir to his father, who had contracted with one Watson, and, upon the contract, had charged him for implement thereof; which charges were suspended by Wat-