

No 248. defender's probable ignorance, whereby he could not have known this exception of before, when litiscontestation was made, viz. that it was *in facto alieno*, being anent his unquhile predecessor's cautionry for another person, and the exception being conceived upon satisfaction granted by the principal party, by selling of land to the creditor, whereof by the law, as he might be presumed, and was excusably ignorant, so he made faith by his oath in presence of the LORDS, that he never knew thereof but since the term of the act; as also, the LORDS took his declaration upon the probability of his knowledge, and after what manner he got notice thereof since the term, viz. he declared by his oath, that the principal party had given him sinsyne inspection of the writ, whereupon the exception foresaid was founded: In respect of the which oath and trial, anent both the probability of his ignorance and also of his knowledge had since the term of the act, the LORDS received the exception now come to the defender's knowledge; but the LORDS would not grant incident to prove the exception foresaid, but assigned a long term to prove, at which term they declared they would conclude the cause without further diets, and in the mean time, that the defender might use that diligence by incident or otherwise, as he pleased, but to be concluded against the term foresaid.

Act. *Nicolson & Miller.*

Alt. *Mowat & Scot.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 200. Durie, p. 296.

1627. June 25. M'MILLAN against MASTER of GORDON.

No 249.

A PARTY having taken a day to give his oath, before the giving thereof suffered by the LORDS to propone a peremptory exception, and verify the same *instantanter*, but if the witnesses be received, and have proponed, no peremptory cannot thereafter be received.

Auchinleck, MS. p. 167.

* * * Durie's report of this case is No 81. p. 7018. *voce* INHIBITION.

1627. July 18. M'LELLAND against VASSALS of MONKLAND.

No 250.

IN an action for astricted multures, the defender *alleged*, That the pursuer cannot have process upon this summons, because, in another summons for astricted multures of other years, defences were produced, and litiscontestation was made, and until that process be first discussed, he cannot insist by another summons. THE LORDS permit the pursuer to pass from the said first process and act of litiscontestation, and ordain the defenders to propone all their defences in this pursuit which they proponed in the first.

Fol. Dic. v. 2. p. 196. Auchinleck, MS. p. 117.