

No 167.

1629. January 30. Captain CRAWFORD against L. LAMINGTON.

IN an action of exhibition of a contract, the LORDS found, That in this and the like actions for exhibition of writs, the pursuer ought to libel and prove, that the defenders called as havers either had the writs the time of the citation, or had the same since, which was found probable by witnesses; or if he insist that he had the same at some time before the summons, that he ought therewith to conjoin, that he had fraudulently put the same away, which part of his fraudulent away-putting, viz. *quod dolo desitit possidere*, the LORDS found only probable by writ, or oath of party.

Act. Cunninghame.

Alt. *Advocatus* S. Nicolson.

Clerk, Gibson.

*Fol. Dic. v. 2. p. 226. Durie, p. 420.*

\* \* \* Spottiswood reports this case :

THE Laird of Lamington pursued the Captain of Crawford for exhibition of a contract of marriage, made betwixt the defender and the pursuer's good-sister, wherein the defender was obliged, in case there were no children procreate of that marriage, to deliver back 6000 merks, gotten with her in tocher. *Alleged*, This being a mutual contract, the double whereof should be presumed to be in the pursuer's own hands, he was not obliged to exhibit it, nor yet to have kept it, unless it had been given him *in deposito* by the pursuer's predecessor, especially now after so long a time, viz. two and thirty years; likeas he was content to make faith that he had it not, but had lost it above five and twenty years ago. THE LORDS sustained the summons (bearing *in communi forma*, that he had, has, or fraudulently has put away) to be proved thus, viz. That he has, or had at any time since the intenting of the cause, *prout de jure*; and to that, that he had any time before and fraudulently put away (which they would have conjoined) to be proved *scripto vel juramento partis*.

*Spottiswood, (EXHIBITION.) p. 123.*

No 168.

1629. February 14. FARQUHAR against WALLACE.

THE defender being called for delivery and exhibition of a bond, which was libelled to have been put by the pursuer, and depositated by him in the defender's hands to the pursuer's use; and the defender *alleging*, That the depositation in his hands of the same by the pursuer, to the pursuer's own use, could not be proved but by writ or oath of the party-depositar, who was defender, or by the oath of the party-maker of the bond. This allegiance was repelled, and the summons in that part about the depositating thereof was found pro-

bable by witnesses, as the having of the same, or the having of the writs in other such cases are probable by witnesses. No 168.

*Hay, Clerk.*

*Fol: Dic. v. 2. p. 226. Durie, p. 426.*

\*\*\* Spottiswood reports this case:

ROBERT FARQUHAR pursued Robert Wallace for exhibition and delivery to him of a bond made to the pursuer, and which the pursuer put in the defender's hands, to be made forthcoming to the pursuer, whensoever he should crave it. The question was about the probation, that it was put in the defender's hands by the pursuer, which the defender alleged could only be proved *scripta vel juramento parvis*: The pursuer contended it might be proved by witnesses, even as the having of an evident is ordinarily proved by witnesses. THE LORDS sustained it to be proved *prout de jure*.

*Spottiswood, (EXHIBITION.) p. 124.*

1678. July 27.

BROWN against GORDON.

In the action Brown against Gordon, it being controverted, in a pursuit for exhibition of a writ belonging to the pursuer, which the pursuer libelled was delivered to the defender by a third party, whether the said delivery was probable *prout de jure*, or only *scripto et juramento*? This deing taken to interlocutor by Newton, the Lords found it probable by witnesses; 13th December 1626, E. of Rothes, No 22. p. 12273, where the contrary was found.

*Fountainhall.*

1799. January 19. JOHN CADELL against ROBERT PAUL.

In an action of damages brought by John Cadell against John Morthland and John Johnstone, on account of an alleged libel against him, which, in September 1797, had appeared in a newspaper called the Scots Chronicle, of which Johnstone was the printer, and with which Mr Morthland was averred to be responsibly connected, a proof was allowed, partly in order to ascertain the nature of this connection.

According to the deposition of one of the witnesses, Mr Morthland occasionally wrote entries in the books, which, with other material points, it was expected would appear from inspection of them.

They were in possession of Robert Paul, who, on his examination as a witness, was required by the pursuer to produce them, or allow them to be in-

No 169.

No 170.

In an action of damages, on account of an alleged libel published in a newspaper, with which the defender was said to be responsibly connected, the pursuer, with a view to establish this connection, craved a production of...