

1630. February 11. RAE against ———.

No. 56.

James Rae being infeft in an annual-rent of 400 merks out of certain lands pertaining to Sir John Ker, whereof he had but a base infeftment, pursues for the same: It is alleged by one who has comprised the lands, and was infeft holden of the superior, that his base infeftment could give no right except he proved possession and payment made to him of the said annual-rent by witnesses. It was contended, by the compriser, that the payment was only proveable by writ. The Lords found the contrary.

*Auchinleck MS. p. 255.*

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1630. July 2. MURRAY against VASSALS OF INCHFEE.

No. 57.

In a libel containing divers heads, for proving of ilk head the pursuer may have liberty to use as many witnesses, as if any head were contained in the summons, *quia quot capita tot. libelli.*

*Auchinleck MS. p. 256.*

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1630. July 24. EARL OF MARR against HIS VASSALS.

No. 58.

In a libel where three terms are due to the pursuer, to use witnesses for proving of the libel, he ought to condescend at ilk term, what witnesses he will use; and if any of them be out of the country, he ought to give his oath that they are necessary witnesses for him. In which case, he will get warrant to summon them upon sixty days, either at the first term, second, or third term.

*Auchinleck MS. p. 256.*

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1630. December 21. L. JOHNSTON against EARL ANNANDALE.

No. 59.

The Lords found that witnesses, which *ex officio* were ordained to be examined before the Lords, *ad informandum animum judicis*, might be received and examined, albeit there were lawful objections proponed by the party, which might have repelled them *a testimonio*, if they had been produced as ordinary witnesses in the cause, to prove against the other party; but the Lords declared that after they were examined, they would consider what their depositions should work *in causa*, in respect of the just cause to decline them.

Act. Stuart.

Alt. Advocatus.

Clerk, Scot.

*Durie, p. 550.*

- No. 59. \* \* \* This same was done the same month before, in an action betwixt the Earl of Cassilis and Alexander Barclay, wherein witnesses were ordained to be examined *ex officio*, at the desire of the Earl of Cassilis, albeit there were lawful objections otherwise to decline them. In which process also a woman was found might be examined *ex officio*, viz. Alexander Barclay the pursuer's wife.

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1632. December 11 E. of HADDINGTON against L. LAMINGTON.

- No. 60. Witnesses being produced to prove a contravention at the Earl of Haddington's instance, and it being alleged against them, that some of the witnesses were sub-tenants to the Earl of Haddington's removeable tenants, and some others were sons to these removeable; the objection was repelled, and found that both the sons and sub-tenants to the master's removeable tenants, might be witnesses to the master of these tenants in his cause.

Act. Stuart.

Alt. Gilmore.

Clerk, Scot.

Durie, p. 658.

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1632. March 15.

A. against B.

- No. 61. In an ejection wherein an exception being admitted of a voluntary removing, and found proveable by witnesses, at the term of probation, a witness being produced at the fourth term after caption, and it being objected, that he was not a competent witness, being tenant to Robert Gibson, which Robert had set the lands libelled, for which ejection was pursued, to the defender, who entered by his setting, as tenant to him, and so who in law was thereby obliged to warrant these defenders from this action of ejection; and it being answered, that the witness was become Robert Gibson's tenant in other lands than the lands libelled, and that only since the last term of caption, and had a three years tack of him, so that he was not tenant removeable; and albeit he were, yet not being declineable, but who might have been a lawful witness, when he was first summoned, and all the terms since his now becoming tenant ought not to prejudge him *ex post facto*; attour, Robert Gibson will not be subject in warrandice to the defenders; the Lords found, that albeit the witness could not have been declined, if he had compeared at any time before this term, yet seeing he was at the time and term of his compearance such a person, as legally could not be then witness, as becoming then tenant or servant to the party, albeit he was not so before, that therefore he ought not to be admitted witness; but in this instance, because it was not declared nor found, that the said Robert Gibson his master was in law holden to warrant the defenders, therefore he was received as a witness, and the objection repelled, but he was received *cum nota ob penuriam testium*.

Alt. Gilmore.

Clerk, Hay.

Durie, p. 620.