

No 361.

LORDS would not admit such probation against a clerk or notary, but his own oath or protocol.

Auchinleck, MS. p. 156.

* * * Durie reports this case :

IN an action pursued against the clerk, for delivery to a party, of letters and executions of relaxation of him from the horn, which were given in to be registered, conform to the act of Parliament ; and the clerk exhibiting the letters, and denying that ever any execution, or relaxation, was given in to him ; and he contending, that no other probation by witnesses could be received against him, upon that summons, but his oath only, and that it ought not otherwise to be admitted to be proved, in respect of the dangerous consequence which might otherwise ensue against public officers, if the like pursuits were sustained to be proved otherwise than by oath ; for *contra notarios negantes* no probation is admissable, but their own oaths, and their protocols, therefore the like ought to be in this case, especially where there have three full years intervened betwixt the alleged time of the delivery of the letters, and the intenting of this pursuit, during the whole intervening time, the party never seeking his letters, nor enquiring therefor, as he ought to have done. THE LORDS found, that they would examine the clerk, he being present, *ex officio*, in presence of the witnesses whom the pursuer intended to use in this matter, before they would determine whether it was probable by witnesses or not.

Act. Hay.

Alt. Baird.

Clerk, Hay.

Durie, p. 482.

1631. January 18. HOME against LORD RENTON.

No 362.

IN a pursuit against a Sheriff for disobeying a charge to take a rebel, and the messenger's execution being produced *per modum probationis*, bearing, that the rebel was sitting by the Sheriff when the charge was given, and was pointed out to him by the messenger, which was offered to be adminiculated by the instrumentary witnesses ; the LORDS, notwithstanding, preferred the defender, offering to prove, by most famous witnesses, that the rebel was gone before the charge was given, unless the pursuer would cendescend upon as famous witnesses, the instrumentary witnesses being the pursuer's near relations ; for they respected not the execution, which bore, that the messenger pointed out the rebel, as being no part of his duty, which was only to give a charge, and not to insert an extraneous narrative. But if the question had been, Whether a charge was *de*

facto given or not; no witnesses would have been receivable, but the instrumentary witnesses only.

No 362.

Fol. Dic. v. 2. p. 242. Spottiswood.

* * * This case is No 362. p. 12496.

1642. *January 24.* SMITH *against* WILLIAMSON.

No 363.

IN a subsidiary action against a Magistrate for suffering a prisoner to escape, the messenger's execution was found not, *per se*, probative, that the rebel was warded by command of the defender, but the instrumentary witnesses, or other habile witnesses, were allowed to be adduced.

Fol. Dic. v. 2. p. 242. Durie.

* * * This case is No 33. p. 11705. *voce* PRISONER.

1666. *December 19.* WILLIAM LUNDIE *against* WILLIAM AUCHINLECK.

No 364.

WILLIAM LUNDIE intends action of spuilzie against William Auchinleck, for spuilzing and away-taking his plough, upon the 10th March last, in the time of labouring, whereby he was prejudged exceedingly, his lands lying partly-untilled, and what was not tilled was not sown. It was *alleged* by the defender, *Absolvitor*, because he offered him to prove, that the pursuer had sold the goods libelled, long before the alleged spuilzies; *2do*, The goods were lawfully pointed; to which it was *replied*, The allegiance ought to be repelled, unless it were alleged that the goods had not only been sold, but likewise delivered, seeing *traditione sola transfertur dominium*, and *emptione* the defender could have only *jus ad rem*, which would only be an action of delivery of the goods, but had no real right in the goods, and therefore could not break the public peace, to seize upon the said goods, *brevi manu*, without a sentence of a judge; *2do*, The foresaid allegiance ought to be repelled, because the goods libelled were plough-goods, actually ploughing upon the 10th March, which was the time at which the same could not have been pointed, unless there had been no other moveables upon the ground of the lands belonging to the pursuer; but so it is, the pursuer offers him to prove, that there were corns in the barn-yard, and corns in the barn, and horse, nolt and sheep, far exceeding the value of the sums alleged pointed for, besides utensils, and therefore the defender must be liable for a spuilzie, having maliciously, contrary to the laws of the kingdom, pointed the pursuer's plough-goods, whereas, within the pointer's view, there were far more moveables than would have satisfied the debt. To which it was *duplicated*, by the defender, That he offered him to prove, that the of

Process of spuilzie of labouring goods was sustained, the pursuer positively proving that there were other pointable goods in view, and the messenger's execution to the contrary was disregarded.