

1630. June 19. Mr WALTER WHITEFORD *against* L. JOHNSTOUN.

ONE Johnstoun having disposed some lands to Mr Walter Whiteford by contract, whereupon inhibition was served; and having thereafter disposed the same to the Laird of Johnstoun; the said Johnstoun and Mr Walter pursue the Laird of Johnston for the exhibition of the writs of the said lands, made to this disposer and his predecessors; wherein the LORDS found, that neither this disposer nor Mr Walter, by virtue of this contract and inhibition, executed before the acquiring of the Laird of Johnston's right, could have action to seek exhibition of the writs of the lands from the Laird of Johnston, who stood infest therein; albeit this right was acquired from the pursuer after Mr Walter his inhibition; for, he being infest in the land, so long as his infestment stood, he ought to bruik the land, and would not be compelled to produce the evidents at his instance who disposed the same, nor at Mr Walter's instance who was not infest, without prejudice to reduce upon the inhibition, in the which process the defender might be called to produce the same.

Act.* *Lermonth.*

Alt. *Stuart.*

Clerk, *Gibson.*

Durie, p. 519.

1662. November 14. CREDITORS of ANDREW BRYSON *against* His SON.

IN an account and reckoning betwixt the Creditors and Bairns of umquhile Andrew Bryson, the auditor being warranted to call all parties, havers of the said umquhile Andrew his count books before him, his son Mr Andrew being called and examined upon oath, depones, that he neither has them, nor had them since the intending of the cause, but refused to depone upon his having of the same at any time before, or upon his knowledge who had them.

THE LORDS having heard the auditor's report therearent, found that he ought not to be examined upon his knowledge who had them, but that he ought to depone if, at any time before the citation he had the same, and fraudfully put the same away, *quia pro possessore habetur qui dolo desiit possidere.*

Fol. Dic. v. 1. p. 282. Stair, v. 1. p. 140.

1664. December 15. FORK *against* LOUDOUN.

MR HUGH FORK being tutor of law, served to his brother and sister of a second marriage, pursues Mr Gavin Loudoun for exhibition of certain writs belonging to the children. It was *alleged*, That the defender is tutor-dative to the children, at least his brother, from whom he has the trust of the writs as

No 18.

A person infest found not obliged to exhibit to the person who disposed to him, or to an inhibitor.

No 19.

Oath *ex officio* anent having writs, was allowed to be given by a person, if they had been in his possession, and how he had put them away, but not if he knew who had them.

No 20.

A tutor at law found entitled to require exhibition of the pupil's writs,

No 20.
from a tutor-
dative with
whom he was
competing for
the office.

tutor-dative, and concurrerth to the allegiance, That he having the tutory legally established in his person, is not obliged *edere instrumenta*, to any who has not a valid tutory or other interest. It was *answered*, That it is not proper *ante exhibitionem*, to dispute the validity of either of the tutories; and the pursuer, though he were not tutor, but nearest of kin to the children, may have good reason to call for inspection of their writs, wherein they can have no prejudice, but much more, being tutor in law served.

THE LORDS repelled the allegiance *contra exhibitionem*, reserving to the parties to dispute their rights before delivery.

Gilmour, No 115. p. 85.

1666. July 14. FOUNTAIN and BROWN *against* MAXWELL of Nethergate.

No 21.
A person ac-
cused of fraud
in putting a-
way writs, was
found obliged
to show *quo
modo desit
possidere.*

BROWN, as heir to Mr Richard Brown, who was heir to Thomas Brown, pursued for exhibition and delivery of a wadset right, granted in favours of Thomas; wherein the LORDS having sustained witnesses to be admitted to prove, not only the having of the writs since the intending of the cause, but the having them before, and the fraudulent putting them away, which ordinarily is only probable by writ or oath, unless evidences of fraud be condescended on; in respect the matter was ancient, and the pursuer had long lived in England; now, at the advising of the cause, several of the witnesses were found to depone, that the defender, before the intending of the cause, not only had such a wadset right, but was dealing to get the same conveyed in his own person, which importing fraud,

THE LORDS would not absolutely decern him to exhibit, but found that he behoved, *docere quomodo desit possidere*, or otherwise produce, and therefore ordained him to compear that he might be interrogated, and condescend upon the particular writs.

Stair, v. 1. p. 397.

1667. December 5. FOUNTAIN *against* MAXWELL.

No 22.
An intromit-
ter with writs
found answer-
able for them.

ALBEIT the LORDS are tender in exhibition of writs, unless it be proven, that the defenders had the same the time of the intending of the cause; or had fraudfully put the samen away before, which is *difficilis probationis*; yet, in an exhibition at the instance of ——— Fountain against Maxwell of Nethergate, they decerned to exhibit, albeit it was not proven that the defender had the writs, at, or since the intending of the cause; in respect it was proven, the defender had meddled with the writs being in a charter chest, and had offered to transact concerning the same, and so was presumed to have put them away fraudulently; there being a great difference betwixt a transient having of