

sale or otherways, that would subject the present possessor to restitution or payment." *Vide* February 3d 1672, Scot of Gorenbery *contra* Elliot, *voce* PROOF.

No 290.

Kilkerran, (PRESUMPTION.) No 4. p. 427.

DIVISION XII.

Presumption, *rite et solenniter actum.*

1586. November. BARCLAY *against* IRVINE.

THERE was one Barclay that pursued Irvine, the goodman of _____, and certain others his colleagues, for the ejection of him forth of house, and spoliation of certain goods and gear. It was *answered* by Irvine, that the pursuer was lawfully denounced rebel, and put to the horn, and the gift of his escheat disposed, and letters passed thereupon, and so, if the defender had any intromission with the said goods, not granting the same, the same was done *auctore pratore*. To this was *answered*, That the horning, with all that followed thereupon, was reduced, by reason that the pursuer was put to the horn for not finding of lawburrows, according to the act of Parliament, to one Peter Craick; and true it was, that the said Peter Craick never made faith that he feared him bodily harm; as the extract of the horning given forth by the Sheriff-clerk made no mention of the offering of faith that he dreaded bodily harm. To which it was *answered*, That the defender was never called to the reduction; and as where the reason of reduction was, that there was no faith made to the officer, the defender offered him to prove, by the principal letters of horning, and executions thereof, and, if need be, by the witnesses insert, that the said Peter Craick made faith, and the principal letters, as the original, ought rather to make faith, than the said extract, which was but exemplum exemplatum et secundum Bartol. in L. Sempronius, D. De legatis, quandocunque est diversitas inter exemplum et originale stabitur originali. To which it was *answered*, That, in so far as the principal letters, and not the extract, were alleged to be the original, it was not of truth in this case; because the words, 'offered to make faith,' were put in the margin, and not in the body of the letters, and were tanquam instrumentum reformatum, et juxta Bald. pulcherrime disputantem in

No 291.

The principal letters of horning having some words added on the margin, and an extract thereof wanting these words, the extract was found to bear more faith than the principal, the presumption being, that the words in question were added *ex post facto*.

No 291. authent. Si quis in aliquo, C. De edendo, si notarius ex proprio originali sumpserit exemplum et authenticat. non dicitur exemplum sed originale; and so the extract given forth by the Sheriff-clerk behaved to be holden as authentic, as the principal letters and executions were margined, the extract was more authentic than the principal letters, and that in consideration of the writ in the margin.

Fol. Dic. v. 2. p. 161. Colwil, MS. p. 410.

1632. December 1. HUNTER against HALYBURTON.

No 292.

By the conception of a submission, an oversman was to be chosen by all the arbiters, in number four. This was presumed to have been done accordingly, though not expressed.

THERE being a submission betwixt these two parties, who were both burgesses of Dundee, to four con-burgesses, with power to them four to choose an oversman, and whatsoever the oversman so chosen, either by himself alone, or with one of the judges chosen for ilk party, should discern, they should abide thereat; whereupon decret being pronounced by an oversman, and by a judge for each party, but not by the other of the two judges elected by one of the parties; for these two judges elected for each side, and the oversman, should have been chosen by all the four, albeit a judge for each of the parties, with the oversman, so chosen, had power to discern; and the party discerned to pay a sum to the other being charged to do the same, who suspending, That the decret was null, because there was nothing extant to show that the oversman was chosen by all the four judges, as was appointed in the submission; for albeit that the decret bore, 'that he was chosen by the judges,' yet, seeing it was not subscribed by them all four, it could not be reputed lawfully done, and that he was so chosen, and consequently was null; likeas there were neither witnesses named nor inserted, neither in the submission nor decret; these reasons were rejected; and the decret sustained, bearing, 'that the judges had elected 'the oversman;' and there was no necessity for witnesses, seeing the submission was subscribed by both parties, and by the four judges, who accepted the same, and the blank whereon the decret on the back of the submission was inserted, was also subscribed by the parties, and oversman, and three others of the judges, which was sufficient without witnesses, being done amongst con-burgesses, and for a sum of money not exceeding a thousand pounds, and not in an heritable matter. See WRIT.

Act. Stuart & Pitcairn.

Alt. Nicolson & Russel.

Clerk, Gibson.

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Fol. Dic. v. 2. p. 161. Durie, p. 655.