

No 634.

session, as pertinents, the LORDS found, that witnesses should be examined for either of the parties, to prove how they and their authors possessed these rooms controverted, whether as pertinents of the pursuer's lands, contained in his decret of removing, or as the defender's proper lands; and, after the witnesses were examined for either party, they would consider what was expedient.— This was thereafter altered.

Aet. Hope.

Aet. Nicolson.

Clerk, Gibson.

Durie, p. 53.

* * * Haddington reports this case :

THE Master of Jedburgh pursued Gilbert Elliot for the violent profits of certain lands, as parts and pertinents of the pursuer's lands of Fernlie. The defender *alleged*, That they were parts and pertinents of lands wherein he was infeft, and in possession these 30 or 40 years. The defender *replied*, That Hector Turnbull of Stanlege, to whose right he succeeded, had wadset the lands to the defender, before which wadset, Stanlege, and his authors, had been in possession of the lands controverted 30 or 40 years, which possession, he who had received the wadset could not invert; and, therefore, the possession being equally qualified by both parties, the pursuer should have the prerogation of probation; which desire the Lords would not grant; but appointed both the parties to have equal number of witnesses, whereof the most part should be landed Gentlemen.

Haddington, MS. No 2789.

1626. December 15.

L. FOULIS against LO. LOVAT.

No 635.

That an infestment was granted for a particular cause, must be proved *scripto vel iuramento*.

In a declarator of the Laird of Foulis's liferent, pursued to the behoof of his Lady, compeared the Lord Lovat, as being infeft by a public infestment in the lands, whereof the mails and duties were acclaimed by the donatar, in this action of special declarator; and, in respect thereof, *alleged*, That he ought to be preferred to the donatar. This allegiance was repelled, in respect of this underwritten reply, viz. That the pursuer offered to prove, that that infestment was granted to the Lord Lovat, to the effect, that thereby he might relieve himself of certain debts, wherein he was obliged to the Creditors of the Laird of Foulis; so that he ought to have intromitted, conform to his right, with the farms of the said lands, and profits thereof, and thereby satisfied the Creditors to whom he was bound, as said is, and which he might have done, if he had intromitted, (the said farms being of that avail, which would have defrayed the same;) whereas, by the contrary, he suffered the Laird of Foulis to retain and keep the possession of the said lands, and to uplift all the duties thereof;

and he did no diligence upon his infeftment to recover the same, and to apply the same to the use foresaid ; so that he had prejudged himself in the right of the said infeftment, and the King and his donatar ought to be preferred to the same. This reply, seeing it was not proponed by a creditor of the Laird of Foulis, but only being proponed by the donatar to his liferent, was only found relevant for the years since the Laird of Foulis was denounced rebel, and no other preceding years ; in the which the Laird of Foulis intromitted with the profits of the lands since the right foresaid made to the Lord Lovat ; for, before the rebellion, the Lord Lovat might have suffered the Laird of Foulis, or any person, to meddle with the said lands, which would not have derogated from the strength of his infeftment in any sort ; for thereby no person was prejudged, his said author that space not being rebel, and no creditor opposing the same : But since his rebellion, the LORDS found, that the intromission had by the Laird of Foulis, and the not doing of diligence by the Lord Lovat, to recover the same, did prejudice him ; that he could not cloath himself therewith, for relief of so much of the debt addebted to the Laird of Foulis's Creditors, as the quantity of the farms intromitted with by the Laird of Foulis would extend to proportionally, since the time foresaid of his rebellion allenary, whereof the Lord Lovat had prejudged himself, as said is ; and if any creditor had proponed this reply, the LORDS would have found the same relevant for all the years of Laird Foulis's intromission, since the time he was constituted debtor to the creditor, who had proponed it ; but that the infeftment was granted for the cause foresaid, the LORDS found that ought to be proved by writ, or by the oath of the Lord Lovat ; and that the Laird of Foulis intromitted, and the quantity whereto his intromission extended, the LORDS found that might be proved by witnesses, and was not of necessity to be proved by writ or oath of party.

Act. Russell.

Alt. Lawrie.

Clerk, Gibson.

Du ric, p. 247.

1627. January 20.

Ross against FLEMING.

No 636.

IN an action at the instance of Gavin Ross against Fleming, for payment of the farms and duties of certain lands to this pursuer, as heir to his father, and which rested owing to his father, who had right to the lands, and the duties thereof were owing for certain years bygone, by the space of 28 or 30 years since the decease of his said umquhile father, and were now acclaimed by the pursuer, as heir to him, by virtue of a tack of the lands set to his umquhile father, and whereto he had right, as heir foresaid to him ; the LORDS found, that the action for the farms and duties foresaid come not under the act of prescription, viz. the 83d act, Parliament 6th, James VI. 1579 ; but that the pursuer