

creet should only be given for the profit to the time of the legatar's marriage, there being no profit sought, as said is, upon any other ground *ob moram*, in not paying thereof then; and this was found might and ought so to be done by the Judge, albeit it was not proponed by the party, and albeit of the failzie to prove *ut supra*.

No 246.

Fol. Dic. v. 2. p. 199. Durie, p. 254.

* * * It must be kept in view, with regard to the pursuer, he is not barred by litiscontestation from making new allegiances, and insisting upon new *media concludendi*; for if a decree does not exclude him, far less an act of litiscontestation.

1627. March 16. WALTER HAY against MARK KER.

No 247.

WALTER HAY pursued Mark Ker for ejecting him and his tenants out of the lands of Catcume, albeit the action was prescribed by the act of Parliament 1579. *Answered*, That he restricted his summons to intrusion, and to the ordinary profits. The defender *contended*, That he could not turn his libel of ejection into intrusion, seeing that he was *tutus* from his ejection *præscriptione trium annorum*, and so was not obliged to answer to any new made up libel, until he were of new summoned: Yet the LORDS sustained the reply, as they had done not fourteen days before betwixt James Mowat and Mr Thomas Davidson, who was convened by James for ejecting him out of the Procurator-Fiscalship of Aberdeen, to whom was permitted likewise to turn over his libel into intrusion.

Fol. Dic. v. 2. p. 198. Spottiswood, (EJECTION.) p. 92.

* * * Durie's report of this case is No 265. p. 11069, *voce* PRESCRIPTION.

1627. June 8. CRAWFORD against CUNNINGHAME.

No 248.

In an action betwixt Crawford and Cunninghame, where Cunninghame was convened as heir to his predecessor, who was cautioner for the Laird of Lesnories for payment of L. 400, which the defender's predecessors were obliged to pay, as said is; in the which action, an exception being admitted to the defender's probation, and a term assigned to prove the same, and the act being called by the pursuer, who sought protestation thereon, the defenders desired to be heard to propone another peremptor, whereupon he was ready to make faith, that it was *noviter veniens ad notitiam* since the term of the act; and the pursuer contesting, that it ought not to be granted to him, in respect of his compareance in the act and the state of the process, and that the same had depended almost two years; the LORDS found, seeing this was desired to be proponed by the defender at the first term of the act, that the said exception might be proponed and received; but first they took consideration of the de-

No 248. fender's probable ignorance, whereby he could not have known this exception of before, when litiscontestation was made, viz. that it was *in facto alieno*, being anent his unquhile predecessor's cautionry for another person, and the exception being conceived upon satisfaction granted by the principal party, by selling of land to the creditor, whereof by the law, as he might be presumed, and was excusably ignorant, so he made faith by his oath in presence of the LORDS, that he never knew thereof but since the term of the act; as also, the LORDS took his declaration upon the probability of his knowledge, and after what manner he got notice thereof since the term, viz. he declared by his oath, that the principal party had given him sinsyne inspection of the writ, whereupon the exception foresaid was founded: In respect of the which oath and trial, anent both the probability of his ignorance and also of his knowledge had since the term of the act, the LORDS received the exception now come to the defender's knowledge; but the LORDS would not grant incident to prove the exception foresaid, but assigned a long term to prove, at which term they declared they would conclude the cause without further diets, and in the mean time, that the defender might use that diligence by incident or otherwise, as he pleased, but to be concluded against the term foresaid.

Act. *Nicolson & Miller.*

Alt. *Mowat & Scot.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 200. Durie, p. 296.

1627. June 25. M'MILLAN against MASTER of GORDON.

No 249.

A PARTY having taken a day to give his oath, before the giving thereof suffered by the LORDS to propone a peremptory exception, and verify the same *instante*, but if the witnesses be received, and have proponed, no peremptory cannot thereafter be received.

Auchinleck, MS. p. 167.

* * * Durie's report of this case is No 81. p. 7018. *voce* INHIBITION.

1627. July 18. M'LELLAND against VASSALS of MONKLAND.

No 250.

IN an action for astricted multures, the defender *alleged*, That the pursuer cannot have process upon this summons, because, in another summons for astricted multures of other years, defences were produced, and litiscontestation was made, and until that process be first discussed, he cannot insist by another summons. THE LORDS permit the pursuer to pass from the said first process and act of litiscontestation, and ordain the defenders to propone all their defences in this pursuit which they proponed in the first.

Fol. Dic. v. 2. p. 196. Auchinleck, MS. p. 117.