

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

No 636.

had action therefor, and might prove the same, otherways than by writ or oath of party, notwithstanding of that act of Parliament.

Clerk, Scot.

Durie, p. 260.

1628. July 11.

ARBUTHNOT *against* LIGHTON.

No 637.

What proof,
whether land
had been let
stock and
teind.

IN a spuilzie, Arbuthnot of Findourie against Lighton, the LORDS sustained the action, (the same being restricted by the pursuer to wrongous intromission against the defender, who was convened therefor,) in respect he had uplifted from the tenants, possessors of the lands, a certain duty, both for stock and teind of the corns of that crop, for which the action was pursued; which receipt of that year they found sufficient to make him answerable for the true avail of the teinds of that year; albeit it was not libelled, that he had set the lands so for stock and teind, any other year before the year libelled, but one year allenarly; and albeit it was *replied*, That the defender's author, who was heritor of the lands the years preceding this year libelled, had been in use to set the same to tenants, for a duty promiscuously paid for stock and teind, which was probable by witnesses; albeit the defender *contended*, That it ought only to be proved by writ, or by his oath; and that the pursuer ought to prove, that the land were in use so to be set the years preceding the year controverted; which was repelled.

Act. Gibson.

Alt. Mowat.

Clerk, Gibson.

Durie, p. 386.

1630. January 29.

LAURIE *against* KEIR.

No 638.

IN a reduction of a decret, recovered before the Town of Stirling, by Laurie *contra* Keir, whereby Keir was decerned to subscribe a contract, conform to a verbal paction, whereby Laurie set to him some acres of land for seven years, for payment of the duty convened on, and according whereto Keir had possessed the lands a year, the reason of reduction was, because it was found proved by witnesses, albeit such pactions could not be proved but by writ or oath of party; which reason was found relevant, and the reducer's oath ordained to be taken, and the decret reduced; albeit also the party reducer was holden as confessed by his oath *de calumnia* in that process, and the decret bore the same.

Durie, p. 487.