

No 167.

1629. January 30. Captain CRAWFORD against L. LAMINGTON.

IN an action of exhibition of a contract, the LORDS found, That in this and the like actions for exhibition of writs, the pursuer ought to libel and prove, that the defenders called as havers either had the writs the time of the citation, or had the same since, which was found probable by witnesses; or if he insist that he had the same at some time before the summons, that he ought therewith to conjoin, that he had fraudulently put the same away, which part of his fraudulent away-putting, viz. *quod dolo desitit possidere*, the LORDS found only probable by writ, or oath of party.

Act. Cunninghame.

Alt. *Advocatus* S. Nicolson.

Clerk, Gibson.

*Fol. Dic. v. 2. p. 226. Durie, p. 420.*

\* \* \* Spottiswood reports this case :

THE Laird of Lamington pursued the Captain of Crawford for exhibition of a contract of marriage, made betwixt the defender and the pursuer's good-sister, wherein the defender was obliged, in case there were no children procreate of that marriage, to deliver back 6000 merks, gotten with her in tocher. *Alleged*, This being a mutual contract, the double whereof should be presumed to be in the pursuer's own hands, he was not obliged to exhibit it, nor yet to have kept it, unless it had been given him *in deposito* by the pursuer's predecessor, especially now after so long a time, viz. two and thirty years; likeas he was content to make faith that he had it not, but had lost it above five and twenty years ago. THE LORDS sustained the summons (bearing *in communi forma*, that he had, has, or fraudulently has put away) to be proved thus, viz. That he has, or had at any time since the intenting of the cause, *prout de jure*; and to that, that he had any time before and fraudulently put away (which they would have conjoined) to be proved *scripto vel juramento partis*.

*Spottiswood, (EXHIBITION.) p. 123.*

No 168.

1629. February 14. FARQUHAR against WALLACE.

THE defender being called for delivery and exhibition of a bond, which was libelled to have been put by the pursuer, and depositated by him in the defender's hands to the pursuer's use; and the defender *alleging*, That the depositation in his hands of the same by the pursuer, to the pursuer's own use, could not be proved but by writ or oath of the party-depositar, who was defender, or by the oath of the party-maker of the bond. This allegiance was repelled, and the summons in that part about the depositating thereof was found pro-