

wise proved than by the messenger's execution, which was found not probative. No 358.

Fol. Dic. v. 2. p. 242. Durie.

* * * This case is No 17. p. 11694. *voce* PRISONER.

1628. June 20. Mr SIMEON RAMSAY *against* PILRIG.

No 359.

PILRIG craved an inhibition, used at the instance of Mr Simeon Ramsay against him, to be reduced, in respect the same was neither used against him personally, nor at his dwelling-house; for in so far as the executions bore to be done at his dwelling-house at Pilrig, he offered to prove that he had his actual residence, for the space of a quarter of a year before, immediately preceding, in Glendovan, he and his family. *Alleged*, That the defender should be assolzie'd from the reason of reduction, because he offered to prove, that the pursuer had his dwelling in Pilrig, with his family, for the space of forty days, immediately preceding the inhibition. THE LORDS preferred the excipient in the probation, in respect that his allegiance tended to make a lawful act subsist, which the other sought to invalidate.

Spottiswood, (PROBATION.) p. 239.

1628. November 7. ROBERT BRUCE *against* PATRICK BRUCE.

No 360.

Ante conclusum in causa, the defender, although he has used no diligence to prove his exception, will be heard to refer it to the pursuer's oath of verity. Conform hereunto, in an action pursued by Mr Robert Bruce against Patrick Bruce, the defender having offered to improve the executions, and having done no diligence at the term, was suffered to refer it to the pursuer's oath of credulity, *non enim erat ejus proprium factum*.

Spottiswood, (PROBATION.) p. 241.

1630. January 19. STEWART *against* SHARP.

No 361.

MR WILLIAM SHARP, Sheriff-clerk of Brechin, pursued by one Stewart, for exhibition of letters of relaxation, with the executions thereof, which were alleged delivered to the said clerk, to be registered *anno* 1616, the clerk produced the letters, but denied that ever he saw the executions. The pursuer offered him to prove the delivery of the executions to the clerk, by witnesses. THE

No 361.

LORDS would not admit such probation against a clerk or notary, but his own oath or protocol.

Auchinleck, MS. p. 156.

* * * Durie reports this case :

IN an action pursued against the clerk, for delivery to a party, of letters and executions of relaxation of him from the horn, which were given in to be registered, conform to the act of Parliament ; and the clerk exhibiting the letters, and denying that ever any execution, or relaxation, was given in to him ; and he contending, that no other probation by witnesses could be received against him, upon that summons, but his oath only, and that it ought not otherwise to be admitted to be proved, in respect of the dangerous consequence which might otherwise ensue against public officers, if the like pursuits were sustained to be proved otherwise than by oath ; for *contra notarios negantes* no probation is admissable, but their own oaths, and their protocols, therefore the like ought to be in this case, especially where there have three full years intervened betwixt the alleged time of the delivery of the letters, and the intenting of this pursuit, during the whole intervening time, the party never seeking his letters, nor enquiring therefor, as he ought to have done. THE LORDS found, that they would examine the clerk, he being present, *ex officio*, in presence of the witnesses whom the pursuer intended to use in this matter, before they would determine whether it was probable by witnesses or not.

Act. Hay.

Alt. Baird.

Clerk, Hay.

Durie, p. 482.

1631. January 18. HOME against LORD RENTON.

No 362.

IN a pursuit against a Sheriff for disobeying a charge to take a rebel, and the messenger's execution being produced *per modum probationis*, bearing, that the rebel was sitting by the Sheriff when the charge was given, and was pointed out to him by the messenger, which was offered to be adminiculated by the instrumentary witnesses ; the LORDS, notwithstanding, preferred the defender, offering to prove, by most famous witnesses, that the rebel was gone before the charge was given, unless the pursuer would cendescend upon as famous witnesses, the instrumentary witnesses being the pursuer's near relations ; for they respected not the execution, which bore, that the messenger pointed out the rebel, as being no part of his duty, which was only to give a charge, and not to insert an extraneous narrative. But if the question had been, Whether a charge was *de*