No 640. suspected, according thereto the Lords would decern: And it was found, that the pursuer might lawfully use the Laird of Blauns to be witness for him, albeit he had sold the lands controverted to the pursuer, and was subject in warrandice thereof, seeing the same was sold under reversion, to which reversion he had made the defender and his authors assignees.

Act. *Nicolson*; Alt. *Stuart*.. Clerk, *Gibson*.

Durie, p. 561.

1631. *July* 22. AITCHISON *against* MURRAY.

No 641.
Effect where the counter part of an indenture, respecting lands, was in the opponent's hands.

IN an action pursued by Sir Archibald Aitchison against John Murray of Broughton, as heir, at least behaving himself, to his umquhile father, George, viz. by selling certain lands which pertained to his father in Ireland, to the Earl of Annandale, litiscontestation is made in the cause. The defender being absent *in termino probatorio*, Sir Archibald produces, by other writs, an indenture subscribed by the Earl, anent the said lands, annailzied to him by the defender, and because the other half of the indenture, subscribed by the defender, was in the Earl's hands, for shortening process, in raising incidents, Sir Archibald referred to the defender's oath of verity, that his indenture, produced, was the true double of that part which was subscribed; but the defender referred it to his oath; after which production, compeared his Advocate, Sir Thomas Hope, and *alleged*, The defender could not, by any form of process, be compelled to give his oath, seeing the pursuer had referred nothing to his oath by the libel, and seeing he had produced writs to prove his libel, he would not use probation of that same member by oath of party also. To which it was *answered*, That the pursuer used his oath in supplement of the objection, which might be made against the inventory produced, viz. that it would not prove, because it was not subscribed by the defender; and if this had been objected, the pursuer might have replied, that he referred the verity of the deed to the defender's oath; so it might be sustained *hoc loco*; which the LORDS sustained.

Auchinleck, MS. p. 158.

1663. *January* 24. SYDSERF of Ruchlaw *against* WOOD.

No 642.
In a case of contravention of marches, where proof had been taken, a new proof, before answer, was ordered.

THERE being mutual contraventions betwixt Ruchlaw and Wood, both relating to a piece of ground, upon the marches of their lands, which Ruchlaw alleged to be his property, and that Wood had contravened by needful pasturage thereon, himself being present, when he was desired to remove his goods off the same; and the other alleging commonty, and that Ruchlaw had contravened, by wilful debarring him from his commonty;

No 642.

THE LORDS, before answer, granted commission to examine witnesses *hinc inde*, concerning their possession of property and commonty; and having advised the testimonies, found that the matter was not so clear as to be the ground of a contravention; and, therefore, assoilzied both parties; but declared it should be free to them both, or either of them, to turn their libel into a molestation, and to reform the same accordingly thereanent. They granted again commission before answer, to examine witnesses *hinc inde*, anent either's possession, and the endurance thereof, which was not cleared by the former commission.

Stair, v. 1. p. 162.

1668. *June* 13. Sir JOHN GIBSON *against* JAMES OSWALD.

No 643.
Commonty foundinferred, on mutual declarators of property of ground lying on the marches of two estates, wherein both parties proved 40 years possession, and mutual interruptions.

SIR JOHN GIBSON and James Oswald having mutual declarators of property of a piece of controverted ground, lying on the march between two gairs, or bentish stripes of ground, through a moor; equal number of witnesses being examined for either party, one witness for either side proved 40 years constant possession of the party adducer, and that they did interrupt the other party, and turned away their cattle when they came over: Some of the witnesses did prove either party to have had possession above 40 years since; but did not prove that they knew the same constantly so bruiked, neither did they know any thing to the contrary; and many witnesses, on either side, proved not only that the meiths libelled by the party who adduced them were holden and reputed the true marches for a very long time, but did not express how long, but some of them deponed, that stones in the meiths were commonly holden and reputed to be march-stones; and so the testimonies were contrary; and if there had not been mutual probation, either party would have proved sufficiently; and neither party having bounding charters, the question arose, Whether the pregnantest probation should be preferred, to give the property to that party, and exclude the other; or if both parties, proving so long possession, and mutual interruptions, the probation should infer a promiscuous possession and right of the controverted piece of land, and so resolve into a commonty, albeit neither party claimed nor libelled commonty?

THE LORDS found the testimonies of the witnesses to infer a commonty to either party of the ground in controversy; albeit they found that Sir John Gibson's witnesses were more pregnant, yet not so far as to exclude the others; but declared, that if either party desired that piece to be divided, they would grant commission for dividing the same, and setting down of march-stones.

Fol. Dic. v. 2. p. 270. Stair, v. 1. p. 540.