

1633. *January.* WALLACE of CRAIGIE *against* MAXWELL of PETERNILL.

No. 62.

If witnesses summoned to depone be at the horn, upon supplication the Lords use to give them protection for some few days that they may depone.

*Auchinleck MS. p. 256.*

1642. *February 2.* MURRAY *against* MERCHISTON.

No. 63.

In a process at the instance of an executor-creditor against a debtor of the defunct's, it was alleged for the defender, That by the defunct's order, he had made payment of the sum to taylors, baxters, &c. to whom the defunct was owing; this order was not found probable by their oaths to whom the payments were made, seeing they had an interest in the cause.

*Durie.*

\* \* This case is No. 205. p. 12398. *voce* PROOF.

1662. *February 24.* HALBERT IRVINE *against* MACKERTNAY.

No. 64.

This day, in a spuilzie betwixt Halbert Irvine and Mackertnay, the defender principally called, having proponed a defense, upon a disposition and delivery of the goods in question, and craving to prove the same, by others of the defenders, called as accessory, as necessary witnesses, alleging, that the pursuer had called all that were present upon the ground, as accessories, that thereby he should get no witnesses;

In a spuilzie many persons being called as accessories, the Lords declared that they would ordain the pursuer to insist against the accessories first, that such of them as were assoilzied might be witnesses.

The Lords ordained the pursuer in the spuilzie, to declare whether he would insist against these others, as accessory, or as applying any of the goods to their own behoof, or if he would not, allowed them to be received as witnesses; and if he did insist against them, ordained the process against the principal party to sist till the accessions were discussed, that such of them as were assoilzied might be used as witnesses.

*Stair, v. 1. p. 104.*

1664. *July 8.* EARL of AIRLY *against* JOHN M'INTOSH.

No. 65.

The Earl of Airly pursues John M'Intosh for contravention, and libels these deeds, that the defender's herds had been found pasturing several times far within his ground, for a considerable time; which ground was without all controversy, the pursuer's.

No. 65. The Lords sustained the libel, it being always proved, that the herd herded by his master's command, or rathabition, and referred to themselves, at their conclusion of the cause, to consider, whether they would sustain the several times of herding, as several deeds *toties quoties*, or if only as one deed made up of all, and how far the witnesses should be received, as to command, or direction of the defender.

*Stair, v. 1. p. 212.*

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No. 66. 1666. November 7. HAY *against* MAGISTRATES of ELGIN.

In the case Colin Hay against the Magistrates of Elgin, improbation being proponed against the executions of the messenger, bearing that he had intimated to the Magistrates, that he had arrested a prisoner at the instance of the said Colin; and the Magistrates and witnesses compearing and urging to be examined; it was alleged for Colin, that they should not be examined; because the messenger who was also cited was not present; and that if he were present he might condescend upon circumstances, and remember the witnesses that they had been witnesses; it being otherwise incident to them to have forgotten, though they had been truly witnesses to the execution. It was answered for the Magistrates, that they had cited both witnesses and messenger; that they had done all that was incumbent to them; and his not appearance ought neither to prejudice them nor the witnesses; and that having come in obedience to the citation, they should not be troubled to come here again, the residence being at such a distance.

The Lords indulged so far to Colin, as to delay the examination of the witnesses until further diligence should be done to bring here the messenger, *me refragante*; but ordained Colin to pay the expenses: And if it had been desired, that if the witnesses should die, they should be holden as improving; the Lords would have granted the desire.

*Dirleton, No. 42. p. 17.*

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No. 67. 1666. December 19. JANET THOMSON *against* STEVINSON.

In the reduction on minority, at the instance of Janet Thomson against Stevinson, *voce* MINOR No. 104. p. 8982;

The Lords ordained the pursuer's mother to be received witness of her age, *cum nota*, there being a testificate already produced, and there being 30 or 40 years since the pursuer's birth; after which time, it was not likely that others would remember; but she was ordained to depone who were witnesses at the birth and baptism, and these to be examined.

*Stair, v. 1. p. 614.*