

1624. July 21. JAMES STRATON *against* LORD BALMERINOCHE, DAVID LITTLE,
and PATRICK SOMERVEL.

IN an action, pursued by James Straton, writer, *against* my Lord Balmerinoch and David Little, and *against* Patrick Somervel, for his interest, for making of money furthcoming, addebted to the said Patrick by the said Lord and David, in satisfaction of a debt owing to the pursuer by the said Patrick Somervel; —the said David Little compearing, and alleging that Patrick Somervel was denuded of his right of the sums addebted to him by them, for the which they were convened to another person, to whom they had paid the same before the arrestment libelled, and a term being assigned to them to prove this exception, the principal debtor, *viz.* Patrick Somervel, not compearing in this process,—the Lords found that it was necessary to summon the said Patrick, to the term assigned for probation, without which the diligence could not be sustained, but that the term ought to be circumduced, he not being warned thereto.

Act. Mowat. *Alt.* Lermonth. Scot, *Clerk.*

Page 140.

1624. November 13. CHEIN *against* ANDREW MELDRUM.

IN actions of spuilyie, where the defender compears and propones an exception, for a partial quantity of the goods libelled, *pro tanto*, the summons being admitted to the pursuer's probation for the rest of the quantity not elided by the exception; if the defender succumb, in probation of the exception, either in whole, or for any part of the quantity contained in his exception, albeit the pursuer prove no super-plus, as is ordained by the act of litiscontestation, yet the Lords find that the pursuer ought to have *juramentum in litem*, upon the whole quantity libelled; the benefit whereof becomes competent to him, by reason of the defender's succumbing to prove any part of the quantity whereupon he excepted; the proponing whereof is a confession of the libel; and having succumbed, produceth that same effect as if the pursuer had proven that quantity whereupon the defender excepted, and which is not proven by him; in which case of probation of any quantity, *juramentum in litem* is not refused. This was done this day in an action of spuilyie, pursued by Chein *against* Andrew Meldrum: which appears to have some doubt, seeing the succumbing in an exception should import no more but *condemnator* in that which the exception elides; and seeing it elides but that part, it ought only to produce sentence for that for which it is proponed, and cannot be further extended; even as if he had proven it *pro tanto*, he would had no more absolvitor, but from that for which it was proponed, although the probation would have elided the whole libel, if it had been so alleged.

Scot, Clerk.

Page 146.