

No 255. 1629. *June 2.* ———— *against WAIRDIE.*

ALTHOUGH witnesses be received in absence of the party-defender, and an exception be proponed, before the witnesses be examined, sometimes the Lords, in matters of small importance, will hear the exception, and discuss the same, if the probation thereof consist *in facto*, and will give the defender a term to prove his exception.

Auchinleck, MS. p. 167.

No 256. 1629. *December 11.* LAIRD HERMISTON *against BUTLER.*

A PERSON being summoned in an action of reduction, as one of the principal parties, after two diets, granted in the process for producing of rights called for, the pursuer may make a declaration that he will insist against the said person but for his interest; and thereafter, at the next calling of the cause, the pursuer passes from the declaration, declaring of new that he will insist against the said person, as a principal party, conform to his summons: It was *alleged* by the defender, That he could not alter his declaration, because he prejudged the defender, in using diligence for production of the rights called for to be produced by his new declaration. To which it was *answered*, That the defender was not prejudged, seeing the first declaration was after two diets taken to produce. THE LORDS found that the pursuer might alter his first declaration; and they granted a short day to the defender to produce what he pleased.

Auchinleck, MS. p. 170.

No 257. 1629. *December 18.* ———— *against CARNOUSIE.*

A PARTY-pursuer may take up his process before interlocutor.

Auchinleck, MS. p. 169.

No 258. 1630. *January 9.* GEORGE WATSON *against SMETON HEPBURN.*

IN an action between George Watson and Smeton Hepburn, the pursuer, having offered, by way of reply, to improve an instrument, and a day being assigned unto him for that effect, the pursuer suffered the day to pass over without raising of any diligence; and the defender having extracted the act, and desired the term to be circumduced, the pursuer offered to pass from his improbation, and declared he would insist in a reduction, (raised by him after the term assigned for improving.) THE LORDS would not suffer the pursuer

to pass from his improbation after the term, unless he had done it before judicially; for they thought it a great vexation of the party to allow such a thing.

No 258.

Fol. Dic. v. 2. p. 199. Spottiswood, (IMPROBATION.) p. 168.

1630. *January 21.* DUKE OF LENNOX *against* SIR JAMES CLELAND.

No 259.

IN an incident raised by Sir James Cleland in the action between the Duke of Lennox and him, after three terms were past, one of the witnesses summoned by him for proving of the having of the writs libelled compearing, he offered to pass from that witness, and not to use him at all in the cause. THE LORDS, in respect they perceived his design was to have all the diligences run out, and then at last he would refer it to the party's oath, would not give way to it, but found that he should not be suffered to pass from that witness, unless he would either pass *simpliciter* from proving his incident by witnesses, and refer it presently to the defender's oath; or then that he would declare, that when all his diligences against witnesses were run out, he should not crave the defender's oath. Of these two he chose the former.

Fol. Dic. v. 2. p. 200. Spottiswood, p. 174.

. Auchinleck reports this case:

1630. *January 22.*—IN an incident where a witness is summoned and is sworn, and before he depone, the user of the incident stays the witness to depone, and declares that he will not use the witness, but desires that his incident may run on against other witnesses. THE LORDS would not suffer his incident to run on against other witnesses, to suffer him to refer his allegiance.

Auchinleck, MS. p. 100.

1630. *February 11.* LAIRD OF LAURISTON *against* LAIRD OF CULTER.

No 260.

IN an action of removing, pursued by the Laird of Lauriston against the Laird of Culter, the defender produced a sasine, and the defence proponed thereupon was repelled. The defender takes up his sasine, and the pursuer desires that he might have an instrument of production of the said sasine, containing the whole tenor thereof, seeing the same was produced in judgment, and interlocutor pronounced in the cause. THE LORDS found that the producer of the sasine might take it up, providing that he pass from his process, except the pursuer will take to improve the sasine.

Auchinleck, MS. p. 170.