

1672. February 16. LORD MAXWELL *against* TENANTS of DUNCOW.

FOUND, That the defence upon the Acts _____ against those who, during the dependence of process, invade or wound the adverse party; (who, by the said Acts, tye the cause, and forfault their interest in question;) being in effect penance, and founded upon delinquency, may be proven even before the Lords *prout de jure*, as to order and ratihibition: which was alleged could not be proven by witnesses to import the loss of heritage.

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1672. February 23. BLAIR *against* BLAIR.

WITNESSES being examined before answer *ex officio* :

It was desired, That, seeing *ex facto oritur jus* ; and the Lords being unclear to decide, *in jure*, before the point of fact were cleared by probation ; and the point of law, and ground of their decision, is to arise out of the probation ; and therefore they may see and debate upon the same : which was refused ; seeing *publicatio testimoniorum*, by our law, is allowed in no case but in improbations *ex questione falsi*.

M'Kenzie. *Alteri*, Lockhart, &c.

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1674. June 2. [Anent the Admission of LORDS of SESSION.]

THE King's Majesty having, by two letters to the Lords of Session, presented Mr David Balfour of Forret, and Mr Thomas Murray, both advocates, to be Lords of the Session ; it was moved by one of the Lords, That seeing, by the law and Acts of Parliament, these who are to be admitted to be Lords of Session, should be tried ; therefore, the trial should be such as is intended by the law ; the very notion of trial importing, at least a serious, if not a strict and exact way of trial.

This was moved, because the way of trial had become of late so perfunctorious, and *dicis causa*, that it was ridiculous ; and in effect a mock trial : some of the Lords being appointed to examine these who were named by the King, and after they had asked some trivial questions, having made report that they found them qualified ; albeit it was not only known to the examiners, but to all the Lords, and notorious to the world, that they were altogether ignorant both of law and practice ; and did acknowledge it themselves, not daring to expose themselves to sit in the Outer-House as Ordinaries ; they prevailing with others of the Lords to go out and officiate for them as curates.

1. It was urged, That the Estates had considered the interest of the kingdom, (all estates being concerned in that judicatory,) that the Lords should be persons of great ability and integrity ; seeing their lands and fortunes, and greatest