

contrary is found, it is only in this sense, that the duty of a year's tack may be proved by witnesses, when the tacksman enters to possession.

No 230.

Fol. Dic. v. 2. p. 231. Fountainball, MS.

* * A similar decision was pronounced, 26th November 1628, Bruce against Bruce, No 7. p. 3610, *voce EJECTION.*

1687. July.

A. against B.

No 231.

THIS allegiance, that the defender having heard a merchant-count, under L. 100, read over to him, did acknowledge the whole to be right and true, was found probable by witnesses, to exoner the pursuer from proving the delivery of the goods.

Fol. Dic. v. 2. p. 230. Harcarst, (PROBATION.) No 80. p. 225.

1696. February 26. MR MATTHEW COUPAR against EARL of ROXBURGH.

THE LORDS advised the cause between Mr Matthew Coupar, late minister at Lilliesleaff, *alias* Lilsly, against the Earl of Roxburgh, patron of the said church, for his stipend, who gave him an allocation on sundry broken tenants, and in very small parcels. *Alleged*, He was not bound to accept it, because, by the law of this kingdom, stipends are a burden affecting the teinds, and if it be not localled, the minister may betake himself to the heritor intromitting, or any possessor he pleases, as far as their teind will reach; as was found the 3d of December 1664, Earl of Cassillis against Hutchison, *voce* STIPEND. THE LORDS found, where ministers pursued before the commission for plantation of kirks for a locality, there the patron might make an allocation; but in this process before the Session it was not receivable; but the minister might distress any to the value of their teinds, ay till his stipend were settled. See STIPEND.

No 232.
Found, that the declaration of a patron's chamberlain was not probative against his constituent of the yearly quantity of stipend; neither could it be proved by witnesses.

1697. July 2.—MERSINGTON reported Mr Matthew Coupar, late minister at Lilliesleaff, *alias* Lilsley, and Sir John Riddle his assignee, against the Earl of Roxburgh and his Curators. The pursuit was for several years' stipend he had served the cure at that kirk. The defence was, *1mo*, Whereas he libelled 1200 merks yearly, they denied that to be the true quota of the stipend; *2do*, He claimed the whole year 1694, whereas he deserted them at the Whitsunday, and so can have right to no more but the first half of that year. *Answered to the first*, He proved the yearly stipend to be 1200 merks, by a declaration under my Lord Roxburgh's chamberlain's hand, acknowledging the same; and, if need be, offers to prove it by the oath of the last incumbent, and present minister; and for the *second*, *Esto* it were true, non-residence is the ground of a church-censure, but does not take away his right to the stipend till he be deprived; and wherever the *animus possidendi* appears, it can never be held *pro*

No 232.

derelicto. Replied to the first, No chamberlain's declaration can bind a debt upon his constituent, unless you prove *scripto vel juramento* that he had a warrant; and the former and subsequent minister cannot be adduced to prove the quota of the stipend, because no sum above L. 100 Scots can be proved by witnesses. Delivery of victual-stipend may be so proved indeed; but, in order to constitute and fix what is the quota of a stipend, it is not probable by witnesses; 2do, If he founds on the chamberlain's declaration, he must take it *intoto* and not divide it; whereas it was truly an offer of two years' stipend at the rate of 1200 merks yearly, providing he pass from that half year controverted, which my Lord Roxburgh, as patron, had disposed upon to a pious use as vacant, and so *nequit idem approbare et reprobare*; and the offer never being accepted by the minister, but still rejected as claiming that half year, he can never found on that paper. THE LORDS found the chamberlain's declaration not probative of the yearly quantity of the stipend; neither would they allow it to be proved by witnesses, but only *scripto*, by the decret of locality, or discharges; but found the minister had right to the last half year 1694, and that it was not vacant, both in respect of the Presbytery's testificate, and of his admission to the kirk of Ochiltry, which was not till after the Michaelmas that year.

Fol. Dic. v. 2. p. 231. Fountainball, v. 1. p. 716. & 781.

1698. January 13.

HAMILTON against RICHARD.

No 233.

A bargain of victual sustained to be proved by witnesses against the seller's representative, though nothing had been done in consequence of the bargain.

GILBERT HAMILTON pursues Katharine Richard, relict of Adam Gairdner baxter in Maybole, before the bailie of Carrick, on this ground; that your husband; within these twelve months, sold me ten bolls of bear, for which I was to pay him L. 9 the boll; and he failing to deliver the victual, I was damnified in L. 7 *per* boll, I could have made by retailing it in malt: And her husband being since dead, he offered to prove the bargain completed betwixt them by witnesses; which the judge having sustained, she advocates the cause, and insists on this ground of iniquity, that nothing ever followed on this pretended bargain, neither victual delivered, nor any part of the price paid; and one of the parties being *medio tempore* deceased, it ought not to be proved now otherwise than *scripto*; because the common discourse of country-folk when they meet is ordinarily in relation to bargains, without design to engage themselves; and witnesses may easily mistake such rambling discourses; and therefore the Roman law did not sustain such loose communings as *nuda pacta*, without the formality of a stipulation likewise intervened; and with us, promises and naked emission of words, are only probable *scripto vel juramento*; because the witnesses altering the very position of words and expressions may cause a great variation in the sense. Answered, The bailie committed no iniquity; for though the victual was not delivered, that was your husband's fault, and there was *res intervenus* by his accepting of arles; and all bargains anent moveables, by act of Parliament 1669, prescribe *quoad modum probandi* in five years, if not pursued; ergo, they are probable by witnesses, if insisted for within that time;