

1606. February 8. TENANT against L. TRAQUAIR.

No 130.

MR. JOSEPH TENANT, Minister at Bardrowell, pursued the Lord of Traquair for payment to him of his stipend for two years, extending to 300 merks yearly. It was *alleged*, That he had received a certain quantity of victual, contained in a ticket, given in with the exception, in complete payment of the fore-said hail stipend. The exception was found relevant, of consent of party, and contradicted anent the manner of probation. But the LORDS found, it behoved to be proved by writ or oath of party; because, in effect, it was probation of the payment of 300 merks, which could not be proved by witnesses.

Fol. Dic. v. 2. p. 225. Haddington, MS. No 1005.

1609. January 13. HOME against BROWN.

No 131.

MR. WILLIAM HOME of Gradein being pursued by Brown, the relict of umquhile David Brown, merchant, for payment of the sums contained in two obligations made by him to the said umquhile David, and registered before his dease; he *excepted*, That he should be assoilzied, because, being after the date of both obligations, the defunct had written in his own count-book, that Mr William Home rested owing to him L. 39; likeas, he offered him to prove, by witnesses, that he had made payment of the hail sums contained in both the obligations, except the said L. 39. It was *answered*, That witnesses could not prove the payment, in respect of the quantity of the debt founded upon. Registered obligations and the account-book might stand with the obligations proceeding upon other furnishings and debts, and could not take away the obligations; notwithstanding whereof, the LORDS found, that the exception might be proved by the count-book and witnesses.

Fol. Dic. v. 2. p. 224. Haddington, MS. No 1529.

1609. November 23. LAIRD of ROMANO against NISBET.

No 132.

THE LAIRD of Romano pursued one Nisbet to hear a tack declared null, upon a clause irritant, for not payment of the duty of the tack for two terms running together. It was *excepted*, That he should be assoilzied for the first two terms, because, he offered to prove real offer thereof, *debito tempore*, by famous witnesses, the duty being only five merks at the term, which the pursuer rejected to receive. THE LORDS repelled the exception, unless he would prove it by writ or oath of party. It was farther *excepted*, That the defender should be assoilzied, because, before the beginning thereof, the

In a declarator of irritancy *ob non solutum canonem*, founded on a clause irritant in a deed, payment of the canon was found not relevant to be

No 132.
proved by
witnesses, al-
though the
duty was
small.

pursuer ejected him violently furth of the said room, and possessed the same himself; and so could not crave him for the duty thereof. THE LORDS repelled the exception, and would not receive the said allegiance by way of exception; but prejudice of the pursuer's action of ejection; and found that they would only annul the tack *a tempore motæ litis*.

Fol. Dic. v. 2. p. 224. Haddington, MS. No 1651.

No 133.

1610. March 9.

LOWRIE against HAY.

In a pursuit for 500 merks, in a registered bond transferred, an exception of payment of eight score of pounds, by delivery of a ton of wine of that price, found relevant to be proved by famous witnesses named in judgment, the payment being made before the term of payment of the obligation, and it being done before the act, that witnesses should not prove above an hundred pounds.

A contract of marriage being generally discharged by an ample acquittance, because the tocher conditioned well paid, or employed upon land, as was conditioned, there was action thereafter sustained upon the said contract, to compel the executors of the party discharged to pay, which being bestowed upon land, was uplifted after the discharge.

Fol. Dic. v. 2. p. 225. Haddington, MS. No 1857.

No 134.

Performance
of a written
obligation, by
payment or
delivery of
victual, or
other fungi-
bles, in terms
thereof, prob-
able by wit-
nesses.

1620. January 13.

LITTLE against HILSTONES.

THOMAS DUNCAN suspends his registered bond, made to David Little and his umquhile spouse, of 220 merks, for the price of 20 bolls of bear bought from them, against the said David, and against Hilstones' executors, to David and umquhile spouse, upon these reasons, David was bound in the bond or contract, he and his spouse, to have delivered the bear, which he never did, and is under present horning for it. *Answered, Offers to prove the victual delivered. Admits the allegiance, and ordains letters for summoning of witnesses, and producing of writs, and other probation, and assigns a day. Second reason, The half of the sum is not due to David, who is not executor to his wife, but to Hilstones', (who compeared not.) THE LORDS declare, if David proves the delivery, they will find the letters orderly proceeded for David, he finding caution to warrant the suspender at the wife's executors' hands.*

Clerk, Durie.

Fol. Dic. v. 2. p. 224. Nicolson, MS. No 540. p. 373.