

No 138.

1624. July 15.

NISBET *against* SHORT in Leith.

IN an action pursued by one Nisbet against Short in Leith, for payment of some little sums addebted by the defender to ——— Millar, the pursuer's umquhile husband, to whom she was executrix; the defender *alleged*, That the sums contained in the bonds were paid, and offered to prove the same by witnesses. THE LORDS found, That this allegeance of payment could not be proved but by writ or oath of party, and refused to admit the same to be proved by witnesses, albeit that the sum contained in each bond was within L. 40; seeing writ could not be taken away nor destroyed by witnesses.

Act. *Oliphant.*Alt. *Balbes.*Clerk, *Hay.*

The same was found in an action betwixt Maxwell and Aikenhead, albeit the sum was offered to be proved paid per testes omni exceptione majores.

Act. *Aikenhead.*

Alt. ———.

Clerk, *Gibson.**Fol. Dic. v. 2. p. 223. Durie, p. 138.*

1624. November 25.

BISSET *against* BISSET.

No 139.
Found in conformity with
No 134. p.
12356.

JOHN BISSET, executor to George Bisset, pursues Mr Robert Bisset, son-natural to the said George, for delivery to him of a discharge of eight chalders of victual yearly, which the said umquhile George, in the said Mr Robert's contract of marriage, was obliged to pay yearly to him during the said George's lifetime, and which victual the said pursuer affirmed in his summons was paid by the defunct to the said defender all these years, for the which the pursuer, as executor to the defunct, craved the said discharge. It being *alleged* by the defender, That the payment of the victual yearly, as was libelled, ought to be proved by writ or oath of party, and was not probable by witnesses, in respect it was a matter of great importance, and tended to evacuate and destroy the condition of payment obliged in a contract of marriage, which cannot be taken away but after such manner as it is obliged. THE LORDS repelled the allegeance, and found that it might be proved by witnesses, seeing it was the delivery of victual, and it was not necessary to prove the delivery thereof by writ or oath of party.

The same executor pursuing in another summons, the same defender, for intromitting with 2000 merks of money of the defunct's after the defunct's decease, the LORDS found that he ought to prove that intromission either by writ or oath of the defender, and would not admit the same to be proved by witnesses.

Act. *Burnet.*Alt. *McGill.*Clerk, *Scot.*

1626. *March*.—The like *de novo* was found betwixt Ker and Robison, in a matter of L. 200, whereto Scot was clerk, viz. that it should not be proved by witnesses. Likeas, in an action pursued by Claud Hamilton, as executor to a defunct against Hamilton for his intromission with money lying beside the defunct, and with his corns and bestial, the LORDS found that the intromission might be proved by witnesses, but that the quantity, so far as concerned the money, should only be proved by his oath.

Fol. Dic. v. 2. p. 224. Durie, p. 152.

No 319.

1626. *July 1.*

HAY against ———.

IN a spuilzie pursued by one Hay in Haddington *contra* ———, an exception of pointing being proponed, it was *replied*, That the annual rent of a term after the pointing was paid by the pursuer to the excipient for that sum for the which the pointing was deduced, whereby he could not point for the principal sum before that term, for the which the annual was paid; and which the pursuer offered to prove by witnesses, and *contended*, That the same was probable by witnesses, seeing the matter was of small importance; for the principal sum, whereupon the pointing was deduced, was only 100 merks, and the term's profit received was allenary five merks, and so was very admissible to be proved by witnesses. THE LORDS nevertheless found, That that payment was only probable by writ or oath of party, seeing it tended to take away the pointing, and frustrate the execution of the obligation whereupon the pointing was used, and to make the excipient a spuilzier; and would not sustain the payment to be proved by witnesses.

Act. *Cockburn.*

Alt. ———.

Clerk, *Hay.**Fol. Dic. v. 2. p. 223. Durie, p. 207.*

* * A similar decision was pronounced, 4th July 1632, Dalrymple against Closeburn, No 174. p. 9856. *voce* PASSIVE TITLE.

No 140.

An alleged payment of 5 merks in name of annual rent, found only probable by writ or oath of party, because it tended to invalidate a pointing and frustrate the execution of an obligation upon which the pointing was founded.

1626. *December 16.* FINLASON against EXECUTORS of LAUDER.

PATRICK FINLASON, as executor to his father, pursues the Executors of umquhile William Lauder, for payment of the sum of L. 300, and of the price of a pipe of sack and a tun of beer, which the said umquhile William Lauder by his ticket subscribed with his hand, granted him to be addebted to the pursuer's father. The defender *alleging* the same to be paid to the defunct in his own time, the LORDS found the payment of the money contained in the ticket ought to be proved by writ or oath of party, but that the payment of the price of the butt of sack and tun of beer might be proved by witnesses, albeit all was contained in one ticket,

Clerk, *Gibson.**Fol. Dic. v. 2. p. 223. Durie, p. 248.*

No 141.