

1665. *January 27.*SCOT *against* FLETCHER.

No 227.

WITNESSES sustained to prove a *commodatum* though the defunct had possessed the subject lent for eight or nine years, which his representatives pleaded did presume property, which was redargued by the pursuer's proving *quomodo desiit possidere*.  
Stair.

\* \* This case is No 287. p. 11616. *voce* PRESUMPTION.

\* \* A similar decision pronounced 28th July 1680, Wilson *against* Tweedie and Towris, No 287. p. 11090. *voce* PRESCRIPTION.

No 228.

1671. *February 7.*HOME *against* SCOT.

A VERBAL submission and decree-arbitral may be thus proved, by the party's oath, that he did submit, and by the arbiters, that they did determine.

*Fol. Dic. v. 2. p. 230. Stair.*

\* \* This case is No 11. p. 8402, *voce* LOCUS POENITENTIAE.

1672. *November 28.*The PROCURATOR-FISCAL of the Sheriffdom of ROXBURGH *against* JOHN KER.

No 229.

Where march stones were set upon an alleged verbal submission, it was sustained to be proved by witnesses, that the party was *de facto* present when the stones were set.

JOHN KER being decerned by the Sheriff to pay 1000 merks for removing of the march-stone, which he himself had consented and submitted to be placed by Patrick Don and Robert Pringle, did suspend and intent reduction of that decree, upon this reason, That his consent and submission was not probable by witnesses, but *scripto vel juramento*; which was not sustained by the Sheriff. It was *replied*, That the submission being verbal, and the actual putting in of march-stones having immediately followed thereupon, the same was probable by witnesses, it not being usual to put such consents in writ.

THE LORDS did find the reason relevant, unless it were offered to be proved by the suspender's oath, that he did not consent to the arbiters' power of placing the march-stones, or that it were offered to be proved by witnesses, that he was not actually upon the place.

*Fol. Dic. v. 2. p. 230. Gosford, MS. p. 281.*

1678. *July 17.*LORD PITSLIGO *against* PATON.

No 230.

THE LORDS, after two terms for proving the libel, admitted this poor man to a defence, and found this defence relevant, that not so much as a tack for a year could be proved by witnesses, because it was a promise; and where the

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*