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 *in toto* 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 decreet 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. *Fountainhall, 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 jaramento*; 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 *rei interventus* 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;

and there is no hazard of mistaking here, for these were not *verba jactantia*, but expressed *animo contrahendi et se obligandi;* and Stair, lib. 4. tit. 43. OF PROBATION BY WITNESSES, is clear that all such bargains are so probable. THE LORDS found this of the nature of a bargain, and probable *prout de jure;* but in regard he libelled L. 7 of profit for each boll he wanted, the Lords only considered this as his *lucrum cessans*, and too exorbitant; and therefore remitted it to the bailie, with this direction, that he should not exceed L. 4 *per* boll at most. *Fol. Dic. v. 2. p. 230. Fountainhall, v. 1. p. 812.*

No 233.

1705. *January* 20.
CHARLES JACKSON, Merchant in Edinburgh, *against* WIDOW GRAHAM.

No 234. Found, that although a set for a year unconditional might be proved by witnesses, it was otherwise where the condition of finding caution was alleged.

CHARLES having set a house and cellar to the said Mrs Graham, he warns her before Whitsunday 1704 to remove, and thereon pursues. She *alleges*, I cannot remove, because I offer to prove, that, subsequent to the warning, there was an express agreement betwixt us, whereby he acquiesced to let her continue in the possession for another year, on her finding caution to pay her rent; and that she had accordingly offered a cautioner, whom he had, without any just reason, refused; and this she offered to prove by witnesses present at the agreement, it being a paction and transaction falling under the sense of witnesses, and not a formal promise, which use not to be proved by witnesses, but *contractus locationis*, a set or tack of lands, which for a year has always been sustained probable *prout de jure*, as Durie remarks, 20th March 1629, Affleck, No 7. p. 5409, that a promise not to remove for a year was allowed to be proved by witnesses, to defend against removing for that year. *Answered*, The defence is relevant if it were true, but the manner of probation could not be allowed, for it resolves into a promise, which being *nuda verborum emissio* has never been sustained as so probable, nothing being more easily mistaken than the position of words with their true import and meaning; and our law has shunned to rely on the lubric memory of witnesses, unless there be *rei interventus* to fix it; and so it was found on the 19th of January 1672, Deuchar *contra* Brown, No 192. p. 12386, that gratuitous promises, though within L. 100, were only probable *scripto vel juramento*, because the party who might interpose writ and did it not seemed wholly to rely on the veracity of the promiser: And the Lords declared they had so decided, after balancing all the former decisions; and so it had been found, 29th January 1630, Laury *contra* Keir, that a promise to set some acres of land, for payment of a certain duty agreed on, was not probable by witnesses. (See APPENDIX.) THE LORDS thought a simple tack or set of lands, either in town or country, for a year, might be proved by witnesses; but this being qualified and conditional on her finding sufficient caution, they refused to find it so probable, and only sustained it *scripto vel juramento* of Jackson, the setter and pursuer of the removing, especially considering the cautioner she offered was already bound to him for the violent profits, and so he had no addition nor accession of farther security more than what he had before. *Fol. Dic. v. 2. p. 231. Fountainhall, v. 2. p. 259.*