

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 annualrent 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 annualrent, 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 Laudér, 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 Laudé 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.