

1629. *January 16.* RAGWEL BENNET *against* MATTHEW FOULDEN.

No 142.
Delivery of
corn, &c. by
a tenant in
satisfaction of
rent, may be
proved by
witnesses,
even against
an arrester.

IN an action pursued by Ragwel Bennet against Matthew Foulden, for certain farms addebted by the defender to Walter Turnbull, and arrested in his hands by the pursuer, who was a creditor of Walter's, Ragwell obtained a decret against Matthew for not compearance, whereupon he having charged, Matthew suspended upon this reason, That he had paid his farms to Walter before the arrestment; for verifying whereof, he produced an account of some kine and corn, &c. given by him to Walter. *Answered*, This reason was no-ways verified, seeing that account might be made up by himself, it not being subscribed by Walter. THE LORDS, notwithstanding both of the standing decret, and that the account was not liquid, admitted that reason to be proved by witnesses, and to that effect granted him a term.

Fol. Dic. v. 2. p. 225. Spottiswood, (PROBATION.) p. 243.

1630. *January 26.* JOHN CRICHTON *against* ROBERT MAITLAND.

No 143.

IN an action of poinding of the ground for an annualrent of ten merks, owing many years, pursued by John Crichton against Robert Maitland of Eccles, the defender having proponed an exception of payment for the years libelled, the LORDS found, That as the annual was constituted by writ, so it should be taken away that same way, by discharges only, and not by witnesses.

1632. *July 4.*—The same was found between John Dalrymple of Waterside and the Laird of Closeburn, that an annualrent of a certain sum extending but to L. 44 or thereby yearly, for the space of nine or ten years, which was alleged to be paid, could only be taken away by writ or oath of party, although it was but a mean sum.

Spottiswood, (PROBATION.) p. 247.

* * Durie's report of this last case is No 174. p. 9856. *voce* PASSIVE TITLE.

1631. *February 1.* CALPIE *against* KENNEDY.

No 144.
Found in con-
formity with
No 132. p.
12355.

IN an action of declarator for expiring of a feu, for not payment of a feu-duty, conform to the clause irritant, contained in the charter, the defender proponing payment of all the terms, for failzie whereof declarator was craved, the LORDS found that this payment was not probable by witnesses, as the defender urged that it was, seeing the feu-duty was so small a matter, being L. 18 yearly only, made at sundry times, and therefore, as he alleged, was probable

by witnesses, which the LORDS found ought only to be proved by writ or oath of party; seeing they found, that the setter of the feu having provided himself of that clause by the charter, the receiver ought to have looked to the manner of security which he acquired, which could not be maintained to the defender, nor subverted to the pursuer, but by the pursuer's own deed, which could not be made known but by his writ or oath.

No 144

Clerk, Gibson.

Fol. Dic. v. 2. p. 224. Durie, p. 562.

1631. June 28.

The EXECUTORS of ROBERT FERGUSON against Mr COLIN CAMPBELL.

No 145

THE delivery of victual is always sustained to be proved by witnesses, although the party be obliged by bond for the delivery thereof. But payment of sums extending to L. 100. or above, no otherwise but by writ or oath of party.

Fol. Dic. v. 2. p. 224. Spottiswood, (PROBATION.) p. 240.

* * Auchinleck reports this case :

THE deliverance of victual may be proved by witnesses, although the pursuer have writ obliging the defender for payment of the victual.

Auchinleck, MS. p. 158.

1632. December 11.

PORTEOUS against LO. HERRIES.

No 146

THE Lo. Herries being pursued for 500 merks addebted by his father, conform to his bond, as heir to him, who offering to prove that the pursuer had received yearly as much victual as in price would extend to this sum, which he offered to prove by witnesses; the LORDS found it not probable by witnesses, but only by writ or oath of party, to take away a debt constituted by bond in writ.

Act. ———

Akt. Nicolson.

Clerk, Gibson.

Fol. Dic. v. 2. p. 225. Durie, p. 657.

1633. July 23.

La. ABERZELDIE against Her SON.

No 147.

THE Lady Aberzeldie charging her Son for payment of three chalders of victual addebted to her, conform to a contract betwixt them thereanent, and also

Found in conformity with
No 134. p. 12356.