No 24.

1628. *June* 26. CUNNINGHAM-HEAD *against* TOWN of LANARK.

THERE was a bond made by the tenants of Eastmonplaire to the Town of Lanark, whereby they obliged themselves to pay 20 bolls of victual to the Town for their thirled multures to Mousemill, which bond had a clause alleged inserted in the margin, binding them to this only during the minority of Cunningham-head their master. It happened that the margin with this clause was cut away, and the bond was put in the register so cutted and mangled. Cunningham-head intented a reduction of this bond, in respect of that clause which was contained before in the margin, wherein diverse witnesses being examined *ex officio*, both as many as were inserted in the bond, and others. At last it was reduced *in toto*, notwithstanding that it was much debated, whether or not the tenor of that marginal clause could be proved by witnesses.

Spottiswood, (PROBATION.) *p.* 240.

No 25.
A defunct in his testament ordained his relict to bruik all, only giving her son a plenished room. Found, that homologation of the testament, by receiving the furniture, ought to be proved by writ or oath, not by witnesses.

1632. *June* 29. STRATON *against* His MOTHER.

THE son pursuing the mother to remove from lands, and she *excepting*, That her husband by his testament had ordained her to bruik all his lands, and to give to the pursuer their son a room plenished sufficiently; which testament the pursuer has homologated, by receiving from the defender, by virtue and conform to the said testament, the said room well plenished by the defender; and so the testament being thus approved by the pursuer, he cannot come against the same, nor seek the defender to be removed from the lands libelled, which the defunct has willed her to bruik during her lifetime, and which the pursuer has ratified by acceptation of the condition thereof, as said is;—this exception being found relevant by consent of the party pursuer, the LORDS found the homologation of the testament so qualified, as the exception bears, viz. the receiving of the room plenished, for implement of the testament, and by virtue thereof, ought to be proved by writ only or oath of party; and found it not to be admissible to be proved by witnesses, as the defender alleged it ought and might be proved, consisting *in facto*, viz. in delivering of a room with the plenishing thereof, which was laboured, received, and kept by the pursuer; seeing the Lords found it should be proved by writ or oath of party, that it was received by the pursuer for implement, and by virtue of this testament, which in that part was not probable by witnesses.

Act. *Gibson.* Alt. ——. Clerk, *Scot.*

Fol. Dic. v. 2. *p.* 216. *Durie*, *p.* 638.

*** Auchinleck reports this case:

No 25.

ARTHUR STRATON pursues his mother Robertson, for removing from the lands of Kirkside. It is *excepted*, By his father's testament it was appointed, that his mother should bruik the whole heritage during her lifetime, and that if they could not agree in household, that she plenish a little room called Scotston, and he should give to his sister the half of the tocher, and to dispone to them the heritable title of a tenement in Montrose; conform to which the defender had plenished and delivered to her the said room, whereby he had fulfilled the said testament. To which it was *answered*, That his father could not make any such reversion by way of testament; and as to the fulfilling, it could not be proved by the alleged accepting of the plenished room, but must be proved *scripto vel juramento partis*; which the LORDS sustained.

Auchinleck, MS. p. 148.

1636. *February* 5. HECTOR ACHESON *against* EUPHAME HERRING.

No 26.

UMQUHILE Thomas Hamilton in Leith, and Euphame Herring his spouse, gave bond to Hector Acheson in the Pans, for payment to him of L. 120 for some ale that the said Hector had furnished to them. After Thomas's death, Hector pursues his relict to make payment conform to her bond. *Alleged*, The bond was null *quoad eam*, as being given by her *stante matrimonio*. *Replied*, He offered to prove, that she had promised to pay the same since her husband's decease. The defender *contended*, That her promise was only probable by writ or oath, the matter being of importance, above L. 100, and likewise tending to make a bond null in law effectual against her. THE LORDS notwithstanding found it probable *prout de jure*.

Fol. Dic. v. 2. *p.* 216. *Spottiswood*, (PROBATION.) *p.* 244.

1665. *June* 21. CHRISTIAN BRAIDIE *against* LAIRD of FAIRNY.

No 27.
A holograph writ proves not *quoad datam*, but the date may be proved by witnesses of unquestionable character.

CHRISTIAN BRAIDIE, relict of James Sword, having inhibited George Glasford upon his bond, pursues a reduction of a disposition, granted by George to the Laird of Fairny, of certain lands, as being done after her inhibition. Fairny having produced the disposition, it bears to be holograph, whereupon it was *alleged*, That it was null by the act of Parliament, requiring all writs of importance to be subscribed before witnesses, and this disposition wanted witnesses. The defender offered to prove it was holograph. The pursuer *replied*, That the question being *de data*, not that it was subscribed, but when it was subscribed, whether prior or posterior to the inhibition, witnesses could not be received,