

1764. July 24.

TASSIE against M'LINTOCK.

A MAN'S son was apprehended by a messenger for payment of a debt of L.50 sterling, and he was let go upon an alleged promise of the father to pay the debt; and it carried, only by the President's casting vote, that this promise was not proveable by witnesses;—*dissent*. Alemore and Auchinleck. There appears to be a little nicety to make the distinction what promises, by our law, are proveable by witnesses and what not. A mere gratuitous promise to pay a sum of money by way of donation, is clearly not proveable by witnesses; but of promises for valuable considerations some are so proveable and some are not; for example, a promise to pay money for a horse or any other moveable is certainly proveable by witnesses; but, on the other hand, a promise to pay a sum of money which a man had borrowed is certainly not proveable by witnesses; and it was decided in two cases, *Donaldson* against *Harrower*, 3d July 1668, and *Deuchar* against *Brown*, 19th January 1762, that a promise to be cautioner could not be proved by witnesses, though, in the last case, the cautionary obligation was an accessory to a bargain of sale of a web of no greater value than L.47 Scots. Where then is the distinction? It is this, in my apprehension,—that only the contracts which, among the Roman lawyers, are called consensual contracts, such as *emptio venditio*, *locatio conductio*, &c. can be proved by witnesses; but the contract of *mutuum*, a stipulation, or a fideijussion, or any other contract among the Romans, which required something more than naked consent, cannot with us be proved by witnesses; among which number are all the innominate contracts, *do ut des, facio ut facias*, &c.

1764. July 27.

M'VICAR against ———.

[*Fac. Coll. III. No. 144.*]

A QUESTION here was concerning steelbow, whether it would be affected by the diligence of the creditors of the tenant, in prejudice of the master?—And the Lords were much divided in opinion. My Lord Coalston thought that the property of the *universitas* was in the master, but the tenant had the free administration, and could bring to market and sell particular things; and he compared it to a right which is very well known by the country people, viz. a right of liferent which a tenant leaves to his widow of his tack and stocking: in such case the widow may sell particular things, but must keep up the stocking. Lord Kaimes said it was impossible, without doing the greatest violence to the words of the contract, as well as to the general sense and opinion of the country, to find that this steelbow was the property of the tenant; for, by the tack, it was set to him in assedation as much as the lands, and, in the country, nothing was better understood than that it was the property of the master. On the other hand, several of the Judges thought that the property belonged to the tenant, because it consisted, in part, of fungibles, such as straw, which are consumed by using, and which are the worse for being kept any considerable time;