

2do, The command to keep, is only relevant to be proved, *scripto vel juramento*, and the emission of words without any fact is not otherwise probable.

No 209.

THE LORDS found the defence and duply relevant to elide the summons, but found the reply and triply relevant to elide the same; and found it probable by witnesses, in respect it was a part of the bargain betwixt the pursuer and the stabler.

Stair, v. I. p. 431.

1668. July 21. ROBERT THOMSON *against* Earl of GLENCAIRN.

ROBERT THOMSON having pursued the Earl of Glencairn for a count of wright work, wherein he was employed by the late Earl for his lodging and yards, when he dwelt in my Lord Oxford's house; it was *alleged* for the Earl, That the employment being a direction was only probable *scripto vel juramento*.

No 210.

Witnesses admitted to prove that a tradesman was employed by a person deceased.

THE LORDS, before answer, having ordained witnesses to be examined, and their testimonies being clear and pregnant, that the late Earl did employ the pursuer in this work, and called for him frequently, and ordered the work from time to time, they sustained the witnesses in the probation, and found it proved. It did not appear that this pursuit was within three years of the work, but the defender did not insist in any defence thereupon.

Fol. Dic. v. 2. p. 228. Stair, v. I. p. 555.

1671. June 22. Duke of BUCCLEUGH *against* PARISHIONERS OF HASSENDEIN.

THE MINISTER of Hassendein having obtained the designation of a glebe out of the Duke's land, who *alleged*, That the Minister having a glebe before, extending at least to two acres, the Earl upon this designation had gotten possession thereof, and could only seek relief for the surplus. It was *answered*, That these two acres had never been designed as a glebe, but the pursuer's predecessors were infest therein, and in possession thereof before the ministers, and any possession they had was but by their sufferance and connivance. It was *answered*, That *decennalis et triennalis possessor non tenetur docere de titulo*, and the Minister was not only in possession thirteen years, but thirty years. It was *answered*, That albeit possession may be a title, yet it may be elided by the pursuer's right, which cannot be taken away but by prescription; whereupon the question arose, how the tolerance or sufferance of the Minister's possession was probable, whether by witnesses or not, seeing tolerances are not ordinarily so proved.

No 211.

Witnesses admitted to prove a minister's possession of lands to be by tolerance of an heir, and not to be a glebe belonging to the kirk.

THE LORDS found that if the Minister's possession were alleged to have been forty years, as belonging to the kirk, that the Duke's tolerance could only be

No 211. proved by writ, to elide the same, but if for fewer years, they found the tolerance or sufferance probable by witnesses.

Fol. Dic. v. 2. p. 228. Stair, v. 1. p. 739.

* * * Gosford reports this case :

THE Minister of the parish having divided a glebe of four acres of lands, on a designation, out of the Dutchess of Buccleugh's estate, the Duke and Dutchess did pursue an action of relief against the Heritors of the parish for their proportions effeiring to their respective estates. It was *alleged* for the Heritors, That they could not be obliged for relief of an acre and a half of the said four acres, because the Minister had been in possession of so much before the designation by the space of twenty years, the same falls into the pursuer, who, by his designation, is to possess no other four acres as his glebe, and so that acre and an half relieves the pursuer *pro tanto*. It was *replied*, That any possession the Minister had of that acre and an half was only out of sufferance and favour, because he had no glebe designed; and a naked possession, without a title, could not take away the pursuer's right of property, unless it could be alleged, that the said acre and an half was either mortified or kirk-land, in which case *decennalis triennalis possessio habetur pro titulo*; whereas it is offered to be proved, that the pursuer and his predecessors were infeft in the said lands as their own property, and were in possession thereof past the memory of man before the Minister's entry thereto, which was only by sufferance, he having neither decret nor designation. THE LORDS did repel the defence in respect of the reply, and sustained the relief of the whole four acres divided amongst the heritors *pro rata*.

Gosford, MS. No 358. p. 174.

No 212.

1668. June 15.

LAIGUE against VAUSE.

AUCHENTOULE, Lord Probationer, reported the case between Laigue, merchant in London, and Mr John Vause, late keeper of Edinburgh tolbooth, for letting Charles Scott of Bonnington escape. The defence was, he did it by allowance of Robert Innes, his factor; which was offered to be proved by the comuners present. *Answered*, A command, mandate, or order, is probable only *scripto vel juramento*, which the LORDS, on his report, found.

Fol. Dic. v. 2. p. 229. Fountainhall, v. 1. p. 506.