

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 intended 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.*