

1675. June 16.

GRAY *against* COCKBURN.

No 4.

THE LORDS found, in the case betwixt the Laird of Cockburn and Mr William Gray minister at Duns, That Cockburn, being liable to pay certain bolls of victual betwixt Yule and Candlemas, might have paid the same upon Candlemas day ; and that as he might have paid the same, he might have made offer thereof; but that in all cases of that nature, persons who are liable, and do make such offers, are not thereby liberate as to the greatest prices, unless the party be *in mora* to receive the victual, either the time of the offer, or six days thereafter.

Reporter, *Castlehill*.Clerk, *Monro*.*Fol. Dic. v. 1. p. 207. Dirleton, No 267. p. 129.*

1675. December 14.

LIEUTENANT-COLONEL MERCER *against* LADY ADIE.

No 5.
Action sus-
tained for
damages,
on account
of a breach
of a verbal
treaty of
marriage.

LIEUTENANT-COLONEL MERCER pursues the Lady Adie, *alleging*, That he was invited by her to come to Scotland, in order to a match betwixt his son and her daughter, heretrix of Adie ; who, by the tailzie made by her father, is obliged to marry one of the name of Mercer ; and the pursuer being near to the family, and of the name, when he came to Scotland the Lady communed and agreed with him, that he should go to Ireland and bring over his son, and should provide security for L. 2000 Sterling, to be answered in Scotland, to be contracted, for paying off the debts and portions of the family, and did employ him to go to Ireland to that effect ; which he accordingly performed, and raised the sum that belonged to his son by his mother, and brought bills into Scotland for answering it here, and brought over his son to Scotland, leaving his employment as a merchant at Dublin, and coming in an equipage suitable to the son of Adie, and when he came, the Lady suffered him not to have access and converse with her daughter ; and therefore craving his expenses in this negotiation, in which he was employed by the Lady, and that for proving the same, several of the Lady's servants and friends should be examined *ex officio*.—The defender *alleged*, That the libel is not relevant ; *imo*, Because an invitation, motion, or proposition of a match, could be no ground to oblige the Lady to any damage, in case the match succeeded not ; for albeit the employing of an unconcerned person might infer a mandate, yet a proposition made to a father for his son, of so honourable and profitable a match, cannot be interpreted a mandate, but at most a counsel, which is not obligatory ; and even mandates are gratuitous ; but the expectation or hope of such a match, was a sufficient recompence of all the pains and charges, and so could import no more ; but that if the parties, upon conversation, were satisfied the match

should proceed; yea though the Lady had given assurance, it could import no more. And as to the manner of probation, it is unquestionable by law, that promises and mandates are only probable by writ or oath.—The pursuer *answered*, That albeit he was a father, yet his son was forisfamiliar, and had a several patrimony by his mother; and so was but as another friend employed by the Lady, which must import that it was upon her expenses; neither doth he crave any benefit by gratification, but what he expended and was loser; especially, seeing the Lady, who brought on the match, did most unfairly break it off, by hindering access and converse betwixt the parties, though nothing can be pretended against the person, quality, or means of the pursuer's son, there being few or none of the name of Mercer that could bring in L. 2000 Sterling. And as to the manner of probation, he being a stranger, residenter in Ireland, unacquainted with the municipal laws of Scotland, he ought to have such probation as is competent by the common law of nations, whereby controversies may be proven by unsuspected witnesses; and here the witnesses are the Lady's own friends and servants.—It was *replied*, That in all contracts, *locus contractus* is to be respected, as to the manner of making it effectual, and the pursuer should have taken counsel here how to secure himself; but though there had been an agreement betwixt all parties having interest, yet before it was redacted into writ, there was place to resile.—It was *duplied*, That there was place to resile from the marriage, but not from the mandate or employment, which required no writ, and could not be resiled from after it was performed.

THE LORDS sustained the libel and reply, only in these terms, That the Lady employed the pursuer as is libelled, and gave assurance of his expenses, or that he should not be a loser, or otherwise it was understood as a proposition upon his own hazard; or likewise, that the Lady employed him as is libelled, and did hinder access and converse without a reasonable cause, as an act of fraud to infer damage and interest; and found the libel only proven *scripto vel juramento*, but allowed the Lady to depone in presence of the witnesses, whom the pursuer would have had examined *ex officio*. See PROOF.

Fol. Dic. v. 1. p. 208. Stair, v. 2. p. 381.

* * * Gosford reports the same case: .

THERE being a pursuit raised at the instance of Colonel Mercer, against the Lady, upon this ground, That Sir James Mercer of Adie, having no heirs-male, but only daughters, did dispoise his estate to his eldest daughter; she naming a gentleman of the name of Mercer, who should have reasonable fortune, to pay his debts, and to give reasonable fortunes to his other daughters. The Lady, considering that there was none of that name in Scotland, who had a sufficient fortune for performing of these conditions, did send the deceased Laird of Adie's natural son to Ireland, and engaged Lieutenant-Colonel Mercer to come to Scotland, to treat with the Lady for a marriage betwixt his eldest son, bear-

No 5.

ing that name, and her eldest daughter; and accordingly, the Lieutenant-Colonel having come, and treated with the Lady concerning the said marriage, she did agree with him that he should return to Ireland, and bring over his son in good equipage, and provide L. 2000 Sterling, to pay in Scotland for relief of debts, and providing of the other daughters; which accordingly he did perform, and brought sufficient bonds, payable to the friends of Adie, for that sum, upon the perfecting of the marriage, which was altogether obstructed by the Lady's means; in so far as, when his son came, she would not suffer him to see the young lady he should have married; whereupon the Lieutenant-Colonel concluded, that she should be liable in damage.—It was *alleged* for the Lady, That there being nothing but a verbal treaty, and any assurance that was offered, was only that she should be a friend, finding the young gentleman qualified and provided, as said is, there being no contract of marriage drawn up or subscribed, nor no written obligation to refund the pursuer's expenses, in case the marriage did not succeed, any such verbal communing was not obligatory by our law to infer damage; and at most, being but an offer of friendship, which, if it were sustained to be a ground of damage, it would open a door to infinite pleas; and no verbal assurance of a mother, or any other friend, who, upon better consideration, may alter their resolution, ought to be binding; especially in the contract of marriage, which depended upon the young lady's own inclinations, or those whom she was advised to follow; and the pursuer ought to have taken his own measures, and have raised a contract or minute, to be subscribed; otherwise, what he did he did it upon his own hazard; and albeit it be alleged, that she gave full assurance for completing of the marriage; yet that was only probable *scripto vel junamento*, and to make her liable in a great sum of money.—It was *replied*, That the pursuer being a stranger, and brought over of purpose from Ireland at her desire, having no other business in Scotland, and getting full assurance, upon performance of the conditions required, that the marriage should be solemnized, he was in the case of mandataries, who in law is well-founded to pursue for all damage and interest against the mandator, whose mandate he follows; especially where the Lady, who gave him commission, did obstruct the perfecting of the bargain, for which she gave him warrant; and he being a stranger, did not know what parties to deal with for drawing up a contract, but did rely upon her faith. And as to the manner of probation by the law of Scotland, he being a stranger, could not know the same; but it was sufficient that he did offer to prove, by his own chamberlane and domestic servants, and the deceased Laird of Adie's natural son, whom she could have no reason to suspect, that she did truly give him that commission, and sufferance libelled; and after he parted from her, and was upon the west borders to go for Ireland, she wrote a letter to one who did convoy him, to intimate to him, that he should haste and make no delay; so that the manner of probation, by such confident persons, ought to be received, as being conform to the law of Ireland and other nations.—THE LORDS having seriously consi-

dered this case, found, That it was a dangerous preparative to sustain actions upon verbal treaties of marriage, there being neither a subscribed contract nor mandate; but there being this singularity, that it was libelled that the Lady had given full assurance, and had engaged the pursuer to be at great charges in the prosecution of that marriage, and notwithstanding had obstructed the same, all being performed that she had required, they did sustain the action, reserving to modify after probation: But as to the manner of probation, found it only probable, by the Lady's writ or oath; and in case it were referred to her oath, they did grant diligence to cite such as were her confidants, and named to be present. At her deposition she granting that she did give assurance; they found it probable by witnesses, that she did impede and hinder the young gentleman to see the young lady, and so stopped the marriage.

Gosford, MS. No 820. p. 517.

No 5.

1687. *January 25.* SPENCE and WATSON *against* ROBERT ORMISTON.

THE case of Spence and Watson *contra* Robert Ormiston, was reported by Kemnay.—Ormiston had sold Spence a teirce of brandy, and was to deliver it to to him in his shop at Edinburgh; but the waiters seized on it, and it was confiscated, being stolen in at the port without paying the town's dues; and he being forced to redeem it by paying the triple excise, pursued the seller for refunding his damage, which he restricts to what he actually gave.—*Alleged*, After tradition the peril is the buyer's.—*Answered*, You sold it *prout optimum maximum*, free of all incumbrances; unless you offer to prove, that the buyer took it with the hazard; and the seizure arose from a deed of your's, in not paying the custom. The question was, On whose peril the brandy was confiscated? —THE LORDS found it was the seller's, he being obliged to deliver it in the buyer's shop in Edinburgh; but restricted it to the true damage sustained by him, and not to what he might have made by retailing it. This was reclaimed against by a bill.

Fol. Dic. v. 1. p. 208. Fountainball, v. 1. p. 442.

1710. *June 20.*

SIR GEORGE HAMILTON *against* WILLIAM DUNDAS of Airth and his LADY.

THE Laird and Lady Airth having assigned to Sir George Hamilton several debts due to them by Alexander Hamilton of Grange, particularly an adjudication led upon the estate of Grange in February 1678, in so far as might be extended to 19,000 merks owing by them to Sir George; and Airth having obliged himself and his heirs to deliver the adjudication betwixt and a certain day, under a

VOL. VIII.

18 F

No 6.

Goods were seized before delivery, and redeemed by paying triple excise. The purchaser found entitled to damages to the extent only of what he had actually paid, not for any profit he might have made.

No 7.

A person was bound to produce an adjudication on a third party's estate by a pre-