agreement libelled ought to be proved, and that he being no violent nor unwarrantable possessor, could only be liable *ex pacto* for what he agreed. No 301.

The Lords sustained the libel as it was mended, and declared, as aforesaid, relevant; and found, that the heritor needed only prove the tenant's possession and worth of the land, unless the tenant prove an agreement for a lesser duty.

*Fol. Dic. v. 2. p. 161. Stair, v. 2. p247. .*

*** Gosford reports this case:

George Young, as assignee by the Earl of Winton, having pursued the said John Cockburn for the sum of 500 merks, for two years mail and duty for the Castle of Niddrieyard, and park thereof, which was set to him by Sir Walter Seaton, as commissioner for the Earl of Winton, upon this ground, that the possessors thereof, two years before, and as long since the defender's removal, paid so much for the same; it was *alleged*, That any tack set by Sir William was verbal; and the defender was content that the pursuer prove the mail and duty libelled *prout de jure*. It was *replied*, That it was sufficient to offer to prove, that the Castleyard and park paid so much before and since the tack, which infers a prescription in law, that it could not be set for less by a verbal tack, that being a common case of all heritors, unless the possessors prove that it was set for a less duty.—The Lords did find, that the tack being verbal, and the defender not denying but that the house, yards, and parks, did pay so much, both before and after, the presumption in law transferred *onus probandi* upon the defender, to prove that it was set for a less duty; but found it sufficient to prove the same by Sir Walter's oath, who had power and commission to set the same; and if he confessed that he set them for a less duty, the defender would be free.

*Gosford, MS. No 703. p. 421.*

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No 302.
A clause in a contract, mentioning a certain number of chalders of victual, found to mean of the measure of the place where the deed was granted, and not the Linlithgow measure, which is the standard of measures.

1678. *February 7.* Cleland *against* The Laird of Kirkurd.

Margaret Cleland pursues the Laird of Kirkurd for making up of her jointure, which her husband was obliged to make appear to be worth, and pay six chalders of victual, and 300 merks yearly. The defender *alleged*, That, by this clause, Linlithgow measure, that is the common standard, behoved to be understood. It was *answered*, That the said act is only in relation to commerce, and never took place in most shires, and, particularly, in the shire of Tweeddale; and that contracts of marriage being most favourable, and of greatest trust, parties consider only the measure of the shire of the lands contracted.

No 302. The Lords found the measure of the shire or lands contracted to be the rule, and not Linlithgow measure.

*Fol. Dic. v. 2. p. 162. Stair, v. 2. p. 612.*

*** Fountainhall's report of this case is No 83. p. 449. *voce* Aliment.

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1696. *January* 23. Hugh Montgomery *against* John Thomson.

No 303.
Where there is no uniform measure in the place where a contract is made, the general standard measure for the kingdom is understood to be meant.

Rankeilor reported Hugh Montgomery against John Thomson of Sevenacres, and others thirled to his mill. By a contract they are bound to pay some bolls for dry multure. The question arose, What should be the measure? The heritor of the mill *contended*, It behoved to be the measure by which they commonly bought and sold in markets within the regality of Kilwinning, and bailiary of Cunningham, within which the mill lies. *Answered*, Where a measure is not expressed, it must be understood of the universal general measure for the whole kingdom, which, by the 115th act 1587, is the Linlithgow measure; whereas, in Nithsdale, Galloway, and many other places, the measure will be two or three pecks more on the boll than the common Linlithgow measure. *Replied*, The meaning of parties is to be adverted to in all contracts; and when one agrees for bolls indefinitely, it must be presumed to be conform to the measure of the place where the land lies, and the parties dwell and contract; and Sir George M'Kenzie, on that act of Parliament, shews the local particular measures have derogated in many places from the general standard, as particularly in womens jointures and ministers stipends; and that they are to be paid and received by the accustomed measure of the place, and not by the Linlithgow measure.—The Lords considered, that if there were a general uniform received measure in this jurisdiction and regality of Kilwinning, then there might be reason to presume that was the measure the parties meaned in this contract; but it being alleged that they varied, there was no reason to make the measure of a single parish or barony a fixed rule and standard; therefore, before answer, they ordained the custom to be tried, if it extended to the whole district and regality, or if it is various and dissonant from one another; in which last case, they would expound the contract to be the Linlithgow measure, and no other. This variation of measures is very prejudicial to the lieges.

*Fol. Dic. v. 2. p. 162. Fountainhall, v. 1. p. 703.*