

No 203.

as there was a dyke, which distinguished the pursuer's land from the defender's; within which dyke, the pursuer's land, and this piece controverted, lay on the one side, and this defender's land on the other side; likeas also the tenants of the defender's lands, who possessed the lands controverted, paid to the pursuer's predecessors mail and duty for this land, now in question, diverse years together, at the direction and command of the defender's predecessor; this reply being admitted to the pursuer's probation, at the term assigned, witnesses being produced to prove the same; and it being questioned, If the direction and command ought to be proved by witnesses, as this defender alleged it ought not to be, but only ought to be proved by writ, or oath; the LORDS found, that this direction or command was only probable by writ, or oath of party, and that witnesses ought not to be admitted, nor received, to prove the same.

Clerk, Gibson.

Fol. Dic. v. 2. p. 228. Durie, p. 703.

No 204.

The direction to deliver victual to a certain person, found proveable only *scripto vel juramento*.

1638. November 28. BROWN against HAMILTON.

ALEXANDER BROWN, burghess of Edinburgh, pursuing Alexander Hamilton for payment of the price of 12 bolls of bear, as delivered by the pursuer at the defender's direction, to a certain person condescended upon, at least as received by the defender's servant from the pursuer; and the defender *alleging*, That the summons was not relevant, bearing, that the defender directed to receive the said 12 bolls of bear, but only to be proved by writ, or the defender's oath; and where the libel bore, that the pursuer delivered the victual to the defender's servants, in the defender's name, he also *alleged*, That ought to be proved by writ, or oath of party; the LORDS found that part of the summons, anent the delivery of the victual, at the defender's direction, ought to be proved in that part, viz. anent the defender's direction, only by writ or oath of party; and anent that part, where it bore to be delivered to the defender's servant, the LORDS ordained the pursuer to condescend upon the particular person, who it was that received the victual; and it being condescended upon, and proved that he was then the defender's servant, the LORDS sustained the summons to be proved by witnesses.

Act. Baird.

Alt. Heriot.

Clerk, Hay.

Fol. Dic. v. 2. p. 228. Durie, p. 862.

1642. February 2. MURRAY against MERCHINSTOUN.

No 205.

The like is a case of a furthcoming,

RONALD MURRAY being a creditor to umquhile Thomas Merchinstoun, deceased executor to him, pursues Mr David Merchinstoun, to pay to him 400