

*Answered* for the pursuer, That he offered to prove delivery of the whole, partly *scripto*, partly by witnesses.

No 98.

*Replied* for the defender, That witnesses could not be allowed to take away the writ as to the obligation for delivery of the victual, more than they could be allowed to prove payment of the price; *2do*, By the late act of Parliament probation of bargains by witnesses prescribes in five years.

THE LORDS demurred upon this point, if the obligation in the contract to deliver so much victual, could be taken away without writ or oath; but they found, that the act of Parliament related to verbal bargains, not constituted *scripto*.

*Harcarse, (PROBATION.) No. 786. p. 222.*

1683. *November.* LADY BALLEGARNO and Her HUSBAND *against* HAYS.

ELIZABETH GRAY, Lady Ballegarno, at the time of her marriage with David Fotheringham, having, with consent of her curators, and of the said David, her future husband, granted a discharge to Mr Patrick Hay, and Janet Hay his sister, of their office of curatory and tutory *respective*, and of all their intromissions and omissions, and of all actions of count and reckoning, restitution *in integrum*, and others; and which discharge is likewise with consent of the Laird of Powrie, the said David's father, who is taking burden for his son, and who is expressly obliged to move, and cause his son ratify and renew the discharge, at his perfect age of twenty-one years; and the Lady and her Husband having pursued a reduction of the said discharge, upon minority and lesion, against the relict and children of the said Mr Patrick Hay; and that they ought to be restored *in integrum*, seeing it was offered to be proven, by the Commissioners, that the discharge was granted upon trust, and therefore, notwithstanding thereof, the defenders, as tutors, ought to be liable to compt; the LORDS sustained the first reason, founded upon minority and lesion, reserving to the defenders action against the Laird of Powrie for warrandice of the discharge, as accords; and found the second reason of trust only probable *scripto vel juramento*.

No 99.

The averment that a discharge had been granted upon trust, was found probable only *scripto vel juramento*.

*Fol. Dic. v. 2. p. 222. Sir Pat. Home, MS. v. 1. No 479.*

1684. *January 22.* DAVIDSON *against* TOWN of EDINBURGH.

A DECREET-ARBITRAL having been pronounced, upon a submission betwixt some children of a defunct, on the one side, and a single person on the other, discerning a considerable sum to be paid to the children; when the money came to be paid, they refused to discharge the whole claim competent to the defunct, but only their own proportions, there having been another brother, now de-

No 100.