

*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.

No 100. ceased, to whom they had made up no titles. THE LORDS found it relevant to be proved by the oaths of the arbiters and comuners, That the whole claim due to the defunct was meant to be submitted, and that the sum decerned for was in satisfaction of the whole.

*Fol. Dic. v. 2. p. 220. Fountainhall.*

\* \* \* This case is No 16. p. 7142. *voce* INTERDICTION.

1684. November 28. DOCTOR BRISBANE *against* TWO GLASGOW MERCHANTS.

No 101.

IN the case between Doctor Brisbane, as curator for the Lord Napier, and two Glasgow merchants, to whom he had sold some of my Lord's victual of the lands of Carnock, and charged them on the contract for the price, their reasons of suspension were, *imo*, That they offered to prove, by the writer and witnesses inserted, that he was obliged to have carried these corns to a place 20 miles farther distant than the part where he delivered it, and so was liable arbitrary actione de eo quod certo loco. *Answered*, He opposed the contract bearing no such thing, which could not be taken away by witnesses. "THE LORDS found this only probable *scripto vel juramento*."

Then they offered back the victual as now insufficient. "THE LORDS found the victual, by the year's keeping, would deteriorate, and therefore found the charger was not obliged to take it back now." *See* SALE.

*Fol. Dic. v. 2. p. 219. Fountainhall, v. 1. p. 316.*

1686. March 18. RICHARD CUNNINGHAME *against* The DUKE of HAMILTON.

No 102.

RICHARD CUNNINGHAME's case *contra* the Duke of Hamilton is debated; and the LORDS, before answer, directed a commission to examine Lewis Lews, anent this bond given by Duke William, and Muirhead's condition, if he could want it so long. THE LORDS have often taken away old bonds upon presumptions.—*See* APPENDIX.

*Fountainhall, v. 1. p. 408.*

1688. February. GEORGE BRODY *against* CREDITORS of CROMARTY.

No 103.

The retiring of an apprising and assignation to it, found probable only *scripto vel juramento*.

IN a competition of the Creditors of Cromarty, it was *alleged*, against an assignation to a comprising in favours of Joseph Brody, That it was *instrumentum apud debitorem repertum*, and so extinct, by being in possession of the common debtor, who could not *ex post facto* revive it by delivering the blank assignation. Now, that the assignation and apprising were once retired by the debtor, appears from this circumstance; the assignation is of a date two years anterior to Brody's back-bond, which he gave at the delivery, in respect the sums in the