

No 97.  
being in the  
hand of the  
party, in  
whose favour  
it was grant-  
ed, yet it was  
allowed to be  
proved by wit-  
nesses, that  
a deed was  
found among  
the papers of  
the granter at  
his death.

for payment of a bond of 1200 merks due by Corsclays to Mr Hugh, secluding executors. The defender *alleged*, That he had equal interest, as nearest of kin to Mr Hugh, with the pursuer's father, the one being the brother, and the other the sister's son, and offered to prove that this disposition remained by the defunct, Mr Hugh, till his sickness, and was seized upon, amongst his writs, by Carletoun, in whose house he lived and died. It was *answered*, That this was only probable *scripto vel juramento*; for this writ being in the pursuer and his father's hand, the law presumes the delivery, and all the interest the defender could have, is but a share of the annualrents resting at the defunct's death; but if witnesses were admitted to take away writ, by proving it was by the defunct, it would endanger the most of all securities. It was *replied* for the defender, That though writ cannot be taken away by witnesses, in cases where writ is adhibited, as in proving the payment thereof, or the like, yet they are competent in all other cases, as in force, fraud, and in any sensible fact, necessarily inferring an exclusion of the writ, as the being thereof in the coffers or cabinets of dying persons, without which, there were no way to secure their interest, but any person that could be master of their writs, might re-deliver retired bonds, and fill up a blank bond, and deliver dispositions, and other writs, which, though the defunct had once intended, yet did not make the same effectual by delivery, nor did he insert a clause dispensing with the not delivery thereof.

THE LORDS found the defence relevant, and probable by witnesses, that Mr Hugh's disposition was in his own possession the time of his death, without a clause dispensing with the not delivery.

*Fol. Dic. v. 2. p. 217. Stair, v. 2. p. 694.*

\* \* \* Fountainhall reports this case :

1679. February 13.—A DISPOSITION is quarrelled as an undelivered evident in the granter's lifetime. THE LORDS found this relevant to annul it, that it was offered to be proven, that it was seen after his decease, among his papers; but if the disposition had been *in lecto*, the objection of not delivery would have been repelled, because then it would have been of the nature of a testament, or universal legacy, which the LORDS declared was valid and obligatory, though lying beside the defunct the time of his decease, and not delivered in his lifetime.

*Fountainhall, MS.*

1683. February. EARL SOUTHESK *against* SIMPSON and REDDIE.

No 98.

IN a pursuit for the price of a quantity of victual, conform to a contract of vendition thereof,

*Alleged* for the buyer, That a part of the victual was not delivered.

*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.