

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, burges 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 particuar 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, decerned executor to him, pursues Mr David Merchinstoun, to pay to him 400

merks, which the said Mr David was owing to the said umquhile Thomas his debtor, and the defender *alleged*, That he ought to be assoilzied for so much as he had paid of this sum, before the defunct's decease, to some tailors and baxters, for some furnishings made by them to him, at his direction, which direction he offered to prove by the oath of those persons to whom he made payment. THE LORDS found, that the said direction was not probable by the oath of those to whom the said payment was made, albeit the particulars were but small, and the debt was constituted by writ; and if it were to be proved by witnesses, these could not be witnesses to prove for their own advantage. See WITNESS.

*Fol. Dic. v. 2. p. 228. Durie, p. 889.*

1661. December 12. GORDON *against* ABERCROMBY.

In a process of ejection the defence being, That the defender entered into void possession, with consent of the pursuer, this consent not being qualified by any palpable fact was not found probable by witnesses.

*Fol. Dic. v. 2. p. 229. Stair.*

\* \* This case is No 364. p. 12220. *voce* PROCESS.

1662. July 26. MARGARET ROBERTSON *against* WILLIAM M'INTOSH.

MARGARET ROBERTSON pursues an ejection against William M'Intosh, who *alleged* absolvitor, because he offered him to prove, that he had warned the defender's umquhile husband, and that he dying shortly thereafter, he enquired of his wife, if she would continue in the possession, and she declared she would not, but willingly removed. It was *replied*, *Relevat scripto vel juramento*; but witnesses cannot be received to prove willingness of removing, being *mentis*.

THE LORDS considering that the defender *alleged* no tack nor title in writ, but mere possession, were inclinable to sustain the defence probable, *prout de jure*; but withall, considering the parties were Highlanders, and had great advantage, whoever had the benefit of probation; therefore they ordained the pursuer to condescend what deeds of violence were done in ejecting her; and both parties to condescend what persons were present at the pursuer's outgoing, and the defender's incoming, being resolved to examine all these before answer, so that there might be no advantage in probation to either party.

*Fol. Dic. v. 2. p. 229. Stair, v. 1. p. 137.*

No 205.  
where the ar-  
restee alleg-  
ed he had  
paid great  
part of the  
debt to  
tradesmen,  
by his credi-  
tor's direc-  
tions.

No 206.

No 207  
In a process  
of ejection, an  
alleged con-  
sent to re-  
move allowed  
to be proved  
*prout de jure*.