

1682. *March* —. SOUTHESK *against* REDDY and SIMPSON.

No 259.

ONE being pursued upon a written contract of victual, for the agreed price of the number of bolls therein mentioned, and the seller offering to prove delivery by witnesses,

Alleged for the defender; Five years being elapsed since the bargain, it is prescribed *quoad modum probandi* by witnesses.

Answered; The five years prescription concerns only bargains without writ. *2do*, Though writ regularly is not taken away by witnesses, yet the delivery of victual may be proved by witnesses to take away a written obligation to deliver.

THE LORDS inclined to find, that the probation by witnesses did not prescribe in five years. But the decision of the point was waved, in respect the delivery of the victual was confusedly insinuated by some receipts of the skipper, and the witnesses would but adminiculate the writ.

Harcarse, (PRESCRIPTION.) No 759. p. 214.

* * Sir P. Home reports this case :

By contract betwixt William Carnegie, factor for the Earl of Southesk, and George Simpson, and George Keddie, the said William having sold to them 1000 bolls of bear, and they being obliged to pay the price at a certain term, and they having paid a part, and being charged for payment of the remainder, they suspended upon this reason, that albeit by the contract, the said William as factor for the Earl, was obliged to deliver 1000 bolls bear, yet the same was never actually delivered, and the delivery of the victual by the 9th act, Parl. 2d Sess. 1st Chas. II. prescribes within five years; since the pretended bargain for the said victual, the delivery thereof can only now be proved by the pursuer's oath, or by writ, and that they absolutely refuse that the hail 1000 bolls was delivered. *Answered*, That the act of Parliament is only to bargains of moveables, which are not founded on writ, whereas the bargain for 1000 bolls of victual is founded upon an express contract, and so cannot fall under the act of Parliament, so that the bargain being founded on writ, the delivery of the victual is provable by witnesses at any time within the 40 years. THE LORDS sustained the reasons of suspension, and found it being more than five years since the bargain, the delivery of the victual was only probable by the suspender's oath, or by writ; and therefore the charger for proving the delivery of the victual by writ, having produced a letter alleged to be subscribed by the pursuer, relating to an account formerly sent to the Earl's chamberlian, which did bear the receipt of the 1000 bolls victual; the LORDS ordained the suspenders to depone upon the verity of the subscriptions of the letter, and if the account produced in process was holograph, which being acknowledged, they found

the accompt produced, to be the accompt to which the missive letter relates, unless the suspenders will offer to prove by the Earl's oath, or the writ, that there was an other accompt given in.

No 259.

Sir P. Home, MS. v. 1. No 391.

1730. June —.

EWART *against* MURRAY.

No 260.

IN an action for the price of a parcel of sheep, sold and delivered to the defender's predecessor, about forty years preceding the date of the action; the question occurred, whether this action was subject to the triennial prescription of merchants accompts, or to the quinquennial prescription of bargains concerning moveables. It was found to fall under the quinquennial, and not the triennial prescription. (See APPENDIX.)

Fol. Dic, v. 2. p. 118.

DIVISION IX.

Triennial Prescription.

SECT. I.

Of Spuilzies and Ejections.

1587. January —.

CONSTABLE of DUNDEE *against* The LAIRD of STRATHMARTIN.

THE Constable of Dundee pursued the Laird of Strathmartin, for the wrongous intromission and away taking of the teinds of certain lands, and that pertaining to him by virtue of his inhibition and tack. *Answered*, That the action being of the nature of spuilzie, was prescribed by reason of the act of Parliament, that all actions of spuilzie prescribed, except they be pursued within the space of three years after the committing of the same. *Answered*, That this was not action of spuilzie, but of wrongous intromission, and the act of spuilzie differed from the same *in tantum quod in actione spoliij juratur in litem*, and so

No 261.

Found that the act Parliament about prescription of spuilzies and ejection, (1579, c. 81.) concerns only the privileges of the action, viz. the *juramentum in litem*, &c.