

would be sustained *pro tanto*; and, as to the delivery of goods, in satisfaction of the debt, it resolved in an exception, and ought to be proved.

No 17.

Clerk, Hamilton.

*Fol. Dic. v. 2. p. 297. Dirleton, No 280. p. 136.*

1702. December 22.

JAMES NICOLSON *against* JAMES MURRAY.

JAMES NICOLSON of Trabrown, late Dean of Guild of Edinburgh, pursues James Murray, taylor, for L. 11 Sterling of account, as the price of merchant-ware sold to him; and it being past three years since the furnishing, the debt is referred to his oath. He depones, that he received the goods from the pursuer and Provost Home, they being in copartnery, and that he had paid Provost Home, and recovered his discharge of the same. The Bailies having advised this oath, they found it proved the furnishing, and that the quality adjected of his being in company with Provost Home was extrinsic, and behoved to be *aliunde* proved. James Murray thinking himself lesed by this interlocutor, raises advocacy on the head of iniquity, and insisted on this reason, that the account being prescribed *quoad modum probandi*, he had no other way of proving but by his oath, and he having deponed on the fact as it was, the Bailies ought not to have divided it, but should have taken it in the terms it stood, the quality being intrinsic; for what if he had deponed it is not owing, but paid? they could have required no more; and he cannot be burdened with proving they were in copartnery together, they having treated with him as such; and the Lords have been in use to sustain this quality as intrinsic; 11th February 1624, Cassinbrow *contra* Irving, *infra, h. t.*; and 10th July 1632, Fenton *contra* Drummond, *infra, b. t.* Answered, That his oath cannot prove that the pursuer and Provost Home were in copartnery together, such an adjection being quite extrinsic, and debtors might be encouraged to add this to their oaths, that they received the goods from him and another person, which might lay a dangerous foundation to evite their lawful debts. THE LORDS found the quality intrinsic, the pursuit being without the three years; and that paying any one of the copartners, and recovering his discharge, exoners the debtor; and therefore assoilzied the defender.

No 18.

Resting owing of a merchant's account, after the three years, was referred to oath. The defender acknowledged he had received the goods from the pursuer and his partner, and paid the same to the partner. The quality found intrinsic.

*Fol. Dic. v. 2. p. 297; Fountainhall, v. 2. p. 168.*