No 300. according to certain conditions, the ordinary price was found due, unless the debtor would prove that the conditions affected it.

dinary price of wine. It was *alleged* no process, for the ordinary price of wine, but only for the price agreed on, which behoved to be condescended on, and proved by the debtor's oath, being above L. 100. It was *answered*, That, seeing these conditions were not adjected, the ordinary price was to be understood, unless it were proved by the debtor, what they were, and that they differed from the common price.

The Lords found, That the debtor, by his ticket, behoved to condescend on the conditions, *qui potuit legem apertius dicere*, and not the pursuer, but they found witnesses might prove the condition.

Fol. Dic. v. 2. p. 161. Stair, v. 1. p. 305.

*** Gilmour reports this case:

Peter Russel and James Gordon gave a bond to Cowan for payment of the price of certain wines according to condition (these are the very words.) The bond is assigned to Stephen Douglas, who charges the debtors, and they suspend upon this reason, That the bond being relative to a condition agreed upon, he is obliged to condescend upon and prove the condition. It was *answered*, That unless the suspenders condescend upon, and prove the condition, they must be obliged to pay the ordinary price of wine as wine then gave.

The Lords found no necessity to the charger to condescend upon, and prove any condition, he nevertheless proving the sufficiency of the wine the time of the delivery, and the price which such wines gave the time of the bond or delivery.

Gilmour, No 163. p. 115.

1674. *July* 3. Young *against* Cockburn.

No 301. In a pursuit for rent by a verbal tack, the real worth of the lands was presumed the rent agreed on, unless the tenant would prove an agreement for a lesser duty.

George Young, as assignee by the Earl of Winton, pursues John Cockburn for 250 merks, as the rent of certain lands of the Earl of Winton's, possessed by him, libelling that the same was set by the Earl's chamberlain at that rate: And the pursuer, in the debate, declared, that he insisted against the defender for that duty, as that for which the land was worth and in use to pay, immediately before and after the defender's possession, and would not burden himself with probation of any agreement, which would put the quantity of the rent upon the tenant's oath, which were a great detriment to all heritors throughout the kingdom, who, for most part, have no tacks in writing; and, therefore, it hath always been sustained to prove *prout de jure* what they possessed, and that the lands were worth so much, unless they did except upon an agreement for a lesser duty, and proved the same. The defender *answered*, That a particular

agreement libelled ought to be proved, and that he being no violent nor unwarrantable possessor, could only be liable *ex pacto* for what he agreed.

No 301.

THE LORDS sustained the libel as it was mended, and declared, as aforesaid, relevant; and found, that the heritor needed only prove the tenant's possession and worth of the land, unless the tenant prove an agreement for a lesser duty.

Fol. Dic. v. 2. *p.* 161. *Stair, v.* 2. *p*247.

*** Gosford reports this case:

GEORGE YOUNG, as assignee by the Earl of Winton, having pursued the said John Cockburn for the sum of 500 merks, for two years mail and duty for the Castle of Niddrieyard, and park thereof, which was set to him by Sir Walter Seaton, as commissioner for the Earl of Winton, upon this ground, that the possessors thereof, two years before, and as long since the defender's removal, paid so much for the same; it was *alleged*, That any tack set by Sir William was verbal; and the defender was content that the pursuer prove the mail and duty libelled *prout de jure*. It was *replied*, That it was sufficient to offer to prove, that the Castleyard and park paid so much before and since the tack, which infers a prescription in law, that it could not be set for less by a verbal tack, that being a common case of all heritors, unless the possessors prove that it was set for a less duty.—THE LORDS did find, that the tack being verbal, and the defender not denying but that the house, yards, and parks, did pay so much, both before and after, the presumption in law transferred *onus probandi* upon the defender, to prove that it was set for a less duty; but found it sufficient to prove the same by Sir Walter's oath, who had power and commission to set the same; and if he confessed that he set them for a less duty, the defender would be free.

Gosford, MS. No 703. *p.* 421.

No 302.
A clause in a contract, mentioning a certain number of chalders of victual, found to mean of the measure of the place where the deed was granted, and not the Linlithgow measure, which is the standard of measures.

1678. *February* 7. CLELAND *against* The LAIRD of KIRKURD.

MARGARET CLELAND pursues the Laird of Kirkurd for making up of her jointure, which her husband was obliged to make appear to be worth, and pay six chalders of victual, and 300 merks yearly. The defender *alleged*, That, by this clause, Linlithgow measure, that is the common standard, behoved to be understood. It was *answered*, That the said act is only in relation to commerce, and never took place in most shires, and, particularly, in the shire of Tweeddale; and that contracts of marriage being most favourable, and of greatest trust, parties consider only the measure of the shire of the lands contracted.