1667. *July* 9. GRANGE HAMILTON *against* SMITH.

No 150.

THE LORDS found, That as the payment of annualrents, so the payment of feu-duties may be proved *prout de jure*. (See APPENDIX.)

Clerk, *Hay*.

Fol. Dic. v. 2. *p.* 224. *Dirleton, No* 91. *p.* 37.

1674. *December* 11. M'DUFF *against* STUART.

No 151.
Witnesses were not admitted to do away writ by proving compensation by the value of the price of goods, as being delivered in satisfaction of a bond.

M'DUFF having pursued Stuart for the sum of 800 merks by bond, wherein he is cautioner, he *alleged* absolvitor, 1*mo*, Because he offered him to prove that the principal debtor had made payment, in so far as he had given moveable goods in satisfaction of the sum; 2*do*, Though he should not be able to prove that the goods were given expressly in satisfaction, yet the price of the goods is relevant as a compensation. It was *answered*, That both allegeances are relevant, but delivery of goods in satisfaction of a bond is only probable *scripto vel juramento*, and the compensation is receiveable, if it be instantly liquidated by the pursuer's oath or writ. The defender *answered*, That the delivery of goods is probable by witnesses, or intromission therewith, and the value thereof is presumed to be in satisfaction of this debt, except another cause were instructed; 2*do*, That even the terms of delivery is probable by witnesses for bargains of moveables, and all the conditions thereof, are ordinarily found probable by witnesses. It was *replied* by the pursuer, That albeit bargains of sale, or the like bargains of moveables where writ useth not to be adhibited, are probable by witnesses and all the conditions thereof, it cannot be drawn to this case where no bargain or contract is made, but a contract dissolved by payment, and where it is for taking away of a written bond, where writ useth to be adhibited for the discharge thereof.

THE LORDS found that the allegeance proponed upon delivery of the goods in satisfaction, was only probable *scripto vel juramento*, and that as compensation, it behoved to be instantly verified.

Fol. Dic. v. 2. *p.* 225. *Stair, v.* 2. *p.* 293.

*** Gosford reports this case:

IN a pursuit at M'Duff's instance against Stuart, upon a bond for payment of the sum therein contained, it was *alleged*, That the defender ought to have compensation, because it was offered to be proved, that there were as many goods delivered to the pursuer, as the price of them would satisfy this bond; and they were truly delivered in satisfaction thereof, which was offered to be proved by witnesses who were present at the delivery. It was *replied*, That the delivery of goods might be a ground of an action to infer payment of the prices and was probable

by witnesses; but, to be a ground of compensation, or to infer satisfaction or a discharge of a written bond, was not probable but *scripto vel juramento.* The Lords found the allegeance only relevant to be proved *scripto vel juramento*, and not by witnesses; reserving action for the price of the delivered goods as accords.

Gosford, MS. No 722. p. 438.

*** Dirleton's report of this case is No 22. p. 2565. *voce* Compensation.

1683. *February.* A. *against* B.

No 152.

A father having obliged himself, in his eldest son's contract of marriage, to make payment of 1000 merks to him, and also to make him equal sharer in the goods, sums of money, heritages, and others pertaining to him the time of his decease, whereby one of his children should not have more of his estate than another; and having afterwards, in his second son's contract of marriage, provided the greatest part of his estate to him; this was quarrelled by the eldest son.

It was *alleged* for the second son; That the obligement relating to goods the father should have the time of his decease, did not hinder him to dispose of his estate to any person, by a deed *inter vivos.*

Answered; The father could not disappoint the obligement by lucrative deeds.

The Lords found the father might provide the second son to a competent provision effeiring to his estate, but not exorbitantly to disappoint the obligement; and, although the first son had a stocked room, and an estate far above the 1000 merks in his contract; which the defenders *alleged* ought to be presumed given him by his father, in satisfaction of the obligement, and which they offered to prove by witnesses; the Lords found the payment only probable *scripto vel juramento*, the obligement being in writ. See Provision to Heirs and Children.

Fol. Dic. v. 2, p. 225. Harcarse, (Contracts of Marriage.) *No* 353. *p.* 88.

1687. *June* 14. Agnew and Muir *against* Agnew of Croich.

No 153.

The Lords found, in the case of Agnew and Muir *contra* Agnew of Croich, That the delivery of victual for extinguishing the irritancy of a back-tack in a wadset was probable by witnesses; though it took away writ, and might extinguish the whole wadset. They had formerly found this satisfaction and payment probable by witnesses for extinguishing an infeftment of annualrent, 4th