

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.

M'DUFF having pursued Stuart for the sum of 800 merks by bond, wherein he is cautioner, he *alleged* absolutor, *imo*, 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; *2do*, 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 allegiances 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; *2do*, 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.

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.

THE LORDS found that the allegiance 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