

an interval of time is said to have elapsed between the one and the other; which, though short, is evidently not to be distinguished in this matter from a longer period.

Now, payment of debts, even constituted without writing, unless they are below L. 100 Scots, cannot be proved by witnesses; Act of Sed. 8th June 1597; Erskine, b. 4. tit. 2. § 21. The mere delivery of moveables is a fact that can hardly be misapprehended by witnesses when it is seen; but the payment of money they cannot understand by mere observation, or without a previous knowledge of the cause from which it arises.

Answered; The supposition, that payments beyond L. 100 Scots cannot be proved by witnesses, appears not to rest on any sufficient ground. On the contrary, it seems more reasonable to admit that kind of evidence in every case, where it is not known or presumed that the parties had meant to disallow it, and where the facts or things to be enquired about, are of such a nature as to be sufficiently understood or distinguished by witnesses; a doctrine which is likewise better supported by authority; Stair, b. 4. tit. 43. § 4. The payment of money arising from any well-known or accustomed transaction, such as sale, being of that description, is proveable by witnesses; 19th June 1605, No 54. p. 12301.; 16th December 1626, Finlayson *contra* Executors of Lauder, No 63. p. 12304.

In the present case, however, the payment of the money is to be viewed rather in the light of one of the mutual prestations of a bargain of moveables, than as made in discharge of a prior debt.

THE LORD ORDINARY allowed the proof of payment by witnesses.

A reclaiming petition being presented, the COURT considered the payment as the counterpart of the bargain; and refused the petition without answers.

Ordinary, Lord Justice-Clerk. Act. Stewart. Alt. Dean of Faculty. Clerk, Menzies.
S. Fol. Dic. v. 4. p. 159. Fac. Col. No 270. p. 417.

1794. June 21. TRUSTEE FOR RAE'S CREDITORS *against* GORDON.

No 158.

A debtor, during the dependence of an action, being appointed to consign in the hands of the clerk of the Court; it was afterwards disputed, how far this order had been obeyed; and the debtor *contended*, That he had consigned a part, which he offered to prove by witnesses, and had retained the rest in satisfaction of a counter-claim. *Pleaded* in objection, That consignment is a judicial act which can be proved only by the records of Court; and, at any rate, a parole proof of payment is incompetent in so far as the sum exceeds L. 100 Scots. THE LORDS found the proof by parole evidence was competent.

Fol. Dic. v. 4. p. 159. Fac. Col.

* * This case is No 5. p. 3078. *voce* CONSIGNATION.

No 157.
The Lords allowed the proof of payment by witnesses.