

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 allegiance 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 obligation 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 obligation by lucrative deeds.

THE LORDS found the father might provide the second son to a competent provision effecting to his estate, but not exorbitantly to disappoint the obligation ; 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 obligation, and which they offered to prove by witnesses ; the LORDS found the payment only probable *scripto vel juramento*, the obligation 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 infestment of annualrent, 4th

February 1671, Wishart, No 3. p. 9978.; but had not extended it to wadsets till now.

No 153.

*Fol. Dic. v. 2. p. 224. Fountainhall, v. 1. p. 456.*

\* \* A similar decision was pronounced, 7th January 1662, Lauderdale against Tenants of Swinton, No 5. p. 10023. *voce* PAYMENT BEFORE HAND.

1687. December 8. JAMES HUME *against* ROBERT HYSLOP.

No 154.

In a pursuit at the instance of James Hume *contra* Robert Hyslop, for the price of a horse,

*Alleged* for the defender; That he had proved payment by two witnesses, who deponed before the Commissary-Clerk.

*Answered* for the pursuer; Payment of money is not probable by witnesses; *2do*, The deponents were not witnesses to the bargain, the alleged payment being a month posterior thereto; *3tio*, They say only, that they saw the defender deliver twenty dollars to the pursuer, and not that the money was paid as the price of a horse.

*Replied*; Witnesses are competent to prove payment of bargains entered into without writ, especially the prices of horse; *2do*, Twenty dollars was the price of the horse, and ought to be ascribed to that cause, unless the pursuer prove another cause; *3tio*, The libel should bear, that the price is resting owing, which the pursuer must prove.

THE LORDS sustained the probation by the depositions of the witnesses; and assolizied the defender.

*Harcarse, (PROBATION.) No 803. p. 225.*

1697. December 23. LAURIE *against* CRAIK.

No 155.

A PURCHASER of land by a verbal bargain, alleged he had paid the price, after which there was no *locus pœnitentiæ*. This was found only relevant to be proved *scripto vel juramento*, because witnesses could not well know whether the money was paid in contemplation of the bargain, or whether the seller reserved himself freedom to resile upon repaying the money.

*Fol. Dic. v. 2. p. 224. Fountainhall.*

\* \* This case is No 33. p. 8425. *voce* LOCUS PŒNITENTIÆ.