

1670. July 13.

RUTHERFORD *against* RUTHERFORD.

No 85.

Found in conformity with Williamson against Tenant, No 64. p. 12305.

WILLIAM RUTHERFORD, younger of Bankend, being charged at his father's instance to make payment of a bond of 1200 merks, did suspend upon this reason, that the bond was consigned blank in the creditor's name in his father's hand, to the behoof of his brother Andrew, who had granted a discharge thereof, which was offered to be proved not only by the writer and witnesses inserted, but by the charger's own sons-in-law and nearest friends the time of the deposition. THE LORDS, notwithstanding, found the letters orderly proceeded, unless it were offered to be proved by the charger's oath, whom they declared they would ordain to depone in presence of all these witnesses; but the bond being now filled up in his name, and he being father to the suspender, they found it could not be taken away but by his own oath, and not by witnesses, albeit they were above all exception, and near relations.

*Fol. Dic. v. 2. p. 217. Gosford, MS. No 304. p. 132.*

1671. February 14.

ALEXANDER NAPIER *against* The EARL of EGLINTON.

No 86.

The Lords *ex officio* examined witnesses as to the custody of a bond, but not as to the payment of it.

THERE was a bond granted by the Laird of Minto as principal, Lugton, James Crichton, and the Earl of Eglinton cautioners, *in anno* 1641, to Adam Napier and his spouse in conjunct fee. Alexander Napier, as heir to his father, pursues this Earl of Eglinton, as heir to his father, for payment, who *alleged*, Absolvitor, because Minto having disposed his estate to his son, under express provision to pay the debt, the same was satisfied by Minto younger, and was retired lying by him a long time, or by Robert Urie, who had the trust of Minto's affairs and writs, and Minto younger being *lapsus bonis*, and Robert Urie being dead, the pursuer had either practised with Minto upon his necessity, or upon Robert Urie's friends to give him back the bond; and for evidence that the bond has been satisfied and retired; *imo*, It had lain dormant above these thirty years, without either payment of annualrent, or any diligence; *2do*, The late Earl of Eglinton being forfeited by the usurpers, his creditors were appointed to give in their claims, or else to be excluded, and yet no claim was given in for this debt; and; therefore, craved that witnesses might be examined *ex officio* for proving of the points foresaid. The pursuer *answered*, That it was an uncontroverted principle in our law, that witnesses could not prove payment of any debt due by writ, nor take the same away; and as to the pretences adduced by the defender, they import nothing, for the delay of seeking payment, or claiming the sum, was because the said Adam Napier was with Montrose in the war, and his heir remained a minor, and his wife was married to another

husband. The defender *answered*, That the wife was liferenter of the sum, and she and her second husband would certainly have sought her annualrent, or claimed the sum, which takes off the excuse of the pursuer's minority; and albeit writ be not taken away by witnesses ordinarily, yet where the matter is so ancient, and the evidences so pregnant, the Lords use not to refuse to examine witnesses *ex officio*.

THE LORDS *ex officio* ordained witnesses to be examined as to the being of the bond in the custody of Minto, or his doers, being a matter of fact; but would not examine them as to the payment made thereof.

*Stair, v. 1. p. 719.*

No 86.

1671. July 22. ALICE MILLER *against* BOTHWELL of Glencorse.

ALICE MILLER pursues improbation of a minute of a tack betwixt her and Glencorse, who compeared and abode by the verity of the tack; and the writer and witnesses of the tack being examined upon oath, did depone, that they did not see Alice Miller subscribe; and one of them deponing, that he had subscribed at Glencorse's instigation, who told him, that he had caused set to Alice Miller's name, only one witness who was writer, and was Glencorse's brother, deponed, that he saw the said Alice Miller subscribe with her own hand.

THE LORDS having this day advised the cause, found that the witnesses did not abide by the verity of the subscription of the said Alice Miller, and did therefore improve the minute; but found it not proved who was the forger of the said Alice Miller's subscription.

*Stair, v. 1. p. 765.*

No 87.

1671. December 9.

ISABEL and HELEN HAYS *against* Sir GEORGE HAY of Pitcullen, their Brother.

By a decret arbitral betwixt Sir George and his two sisters, they are decerned to renounce whatever could befall to them by the decease of their father and mother, and particularly half a year's annual duty of their mother's liferent, which might have fallen to them as executors, which denunciation they are decerned to warrant against all deadly, whereof they having intended reduction upon this reason, that the absolute warrandice was filled up by the writer without the knowledge or consent of the arbiters, and therefore ought to be only from their own fact and deed, as being only proper for renunciations of rights bearing no disposition; it was *answered*, That the decret being subscribed and performed on Sir George's part, the arbiter's oaths or declaration could not now

No 88.

A decret arbitral, bearing to grant a renunciation with absolute warrandice, was found so far reducible, as to bear warrandice only from fact and deed, upon the deposition of the arbiters to this effect, after they were *functi*.