

No 6.

What proof of
deposition?

1685. December. M'INTOSH and DRUM *against* RANDESTOUN.

It being *alleged* for Humbie's interdictors, That they consented to an alienation of lands, upon condition, that they should have power to dispose of the price, and prefer creditors as they thought fit, and that the disposition was deposited in Sir John Cunningham's hands, not to be delivered to Sir William Primrose, until they had destined the price to what creditors they pleased :

THE LORDS found the deposition only probable *scripto vel juramento*, and not by witnesses instrumentary, or others, in respect the disposition was now in the hands of the buyer, and the price payable to the interdicted seller, and the disposition bore no qualified consent of the interdictors reserving power to apply the price, but a simple consent.

Harcarse, (DEPOSITION,) No. 415, p. III.

No 7.

A person with whom a bond had been deposited, was forced, by warrant of a magistrate, at at the instance of a third party, to give it up. He was notwithstanding liable to the person from whom he received it.

1696. November 7.

BRAIDY *against* Gow.

In a concluded cause, Braidy *contra* Gow, for exhibition and delivery of a bond for 1000 merks, granted by Corsehill to her father, and deposited in his hand by him for the behoof of the pursuer, his daughter, providing she accepted it in satisfaction, and gave up her mother's contract of marriage; Gow, in his deposition, acknowledged he had received the said bond from Braidy, to be given up to the pursuer on the terms aforesaid; but that in 1683, he was called before the bailies of Glasgow by one Robertson, an apothecary there, alleging right to the bond, and was summarily incarcerated, and was forced to deliver up the bond to Robertson, on his receipt of the same, ere he could obtain his liberty. The question, at advising of this oath, was, whether this was an intrinsic quality, and if the force was such a legal and warrantable force, as he was bound to obtemper and acquiesce in without seeking farther redress. The Lords considered that a common haver of a writ by the act of sederunt is bound no farther, if he depone that he had it not since the citation, and put it not fraudulently away at any time; but here it was a *depositarius*, who ought to be faithful to his trust; and if he had been forced to give it up by way of a judicial legal process, that it might have exonerated and assoilzied him; but being called for by a summar warrant, and imprisoned, till he gave it up, this cannot be a legal force, nor *metus licitus*, nor done *auctore prætoris*; but he ought to have applied for a suspension, that all parties might have debated their rights; which he having neglected, it was not such a *vis major* as could liberate him; else any depositary may by collusion suffer himself to be imprisoned, to afford a pretence to deliver up the writ to the prejudice of them in whose favour the deposition was made; and though a *depositarius* in law *tenetur tantum de dolo et lata culpa*, and there could be no fraud here qualified against Gow,