

No 100. ceased, to whom they had made up no titles. THE LORDS found it relevant to be proved by the oaths of the arbiters and comuners, That the whole claim due to the defunct was meant to be submitted, and that the sum decerned for was in satisfaction of the whole.

Fol. Dic. v. 2. p. 220. Fountainhall.

* * * This case is No 16. p. 7142. *voce* INTERDICTION.

1684. November 28. DOCTOR BRISBANE *against* TWO GLASGOW MERCHANTS.

No 101.

IN the case between Doctor Brisbane, as curator for the Lord Napier, and two Glasgow merchants, to whom he had sold some of my Lord's victual of the lands of Carnock, and charged them on the contract for the price, their reasons of suspension were, *imo*, That they offered to prove, by the writer and witnesses inserted, that he was obliged to have carried these corns to a place 20 miles farther distant than the part where he delivered it, and so was liable arbitrary actione de eo quod certo loco. *Answered*, He opposed the contract bearing no such thing, which could not be taken away by witnesses. "THE LORDS found this only probable *scripto vel juramento*."

Then they offered back the victual as now insufficient. "THE LORDS found the victual, by the year's keeping, would deteriorate, and therefore found the charger was not obliged to take it back now." *See* SALE.

Fol. Dic. v. 2. p. 219. Fountainhall, v. 1. p. 316.

1686. March 18. RICHARD CUNNINGHAME *against* The DUKE of HAMILTON.

No 102.

RICHARD CUNNINGHAME's case *contra* the Duke of Hamilton is debated; and the LORDS, before answer, directed a commission to examine Lewis Lews, anent this bond given by Duke William, and Muirhead's condition, if he could want it so long. THE LORDS have often taken away old bonds upon presumptions.—*See* APPENDIX.

Fountainhall, v. 1. p. 408.

1688. February. GEORGE BRODY *against* CREDITORS of CROMARTY.

No 103.

The retiring of an apprising and assignation to it, found probable only *scripto vel juramento*.

IN a competition of the Creditors of Cromarty, it was *alleged*, against an assignation to a comprising in favours of Joseph Brody, That it was *instrumentum apud debitorem repertum*, and so extinct, by being in possession of the common debtor, who could not *ex post facto* revive it by delivering the blank assignation. Now, that the assignation and apprising were once retired by the debtor, appears from this circumstance; the assignation is of a date two years anterior to Brody's back-bond, which he gave at the delivery, in respect the sums in the

assigned apprising were greater than those due to the assignee; and the retiring of the assignation and apprising was offered to be proven by witnesses.

No 103.

The allegiance is only relevant to be proven *scripto vel juramento*; and it were a dangerous preparative to take away men's rights by witnesses, it being customary for apprizers to have blank assignations lying by them, till they meet with a merchant.

Replied, The assignee being dead, his oath cannot be had; but it is offered to be proven by the cedent, Dean-of-Guild Hamilton, and other witnesses, that the apprising, with the assignation, was delivered to Cromarty.

THE LORDS found the allegiance only probable, *scripto vel juramento*.

Fol. Dic. v. 2. p. 218. Harcarse, (COMPRISINGS.) No 335. p. 81.

1696. June 19.

ROBERT BRUCE, Petitioner.

No 104.

ROBERT BRUCE of Bordy, by a petition, represented, that he had granted bond to the deceased Daniel Nicolson, for 1000 merks, bearing borrowed money, yet truly it was a salary for agenting his law business, and which, being now assigned to Bailie John Murray, he craved the Lords would, *ex officio*, examine the writer, and subscribing witnesses, in the bond, anent the true cause of it; which being proven, it might be declared null *condicione, ob causam datam causa non secuta*. THE LORDS refused this bill; for they considered whatever might be done for expiscation where the writ bore alienary onerous causes in the general; yet where it bore *speciatim ex causa mutui* the same could not be cancelled, save only *scripto vel juramento* of the creditor, and which mean of probation he had omitted to crave, though Daniel was several months in prison before his execution. Some may think strange, why witnesses should be allowed to prove a trust, and not to qualify the narrative of a bond: only trusts are more frequent in relation to heritable rights.

Fol. Dic. v. 2. p. 221. Fountainball, v. 1. p. 722.

1697. February 3.

THOMAS DRUMMOND of Ricarton *against* THE CREDITORS of Sir WILLIAM NICOLSON.

No 105.

I REPORTED Thomas Drummond of Ricarton against the Creditors of Sir William Nicolson. He and Ricarton were bound as conjunct principals in two bonds, the one for 6000 merks to Mr Edward Wright advocate, and the other of 4000 merks to Sir John Young of Lenny. Ricarton *alleging*, That he was but on the matter cautioner in both, though, to please the creditors, he had bound as *correus*, he raises a declarator against Sir William, to have him discerned to relieve him of the whole 10,000 merks; but Sir William dying *medio*

Found, by a narrow plurality, that witnesses might be admitted to prove, that one of the co-obligants in a bond, was cautioner only.