

No 172.
Found as
above.

1624. March 5.

HAY against WRIGHT.

AN action for delivery of a bond, being pursued betwixt Hay and Wright, after the same was exhibited by ——— who was called as haver of the bond, and in whose hands the same was depositated, the LORDS found, that the conditions whereupon the same was depositated, ought to be proved by the oath of the depositar, and would not receive the probation of the said conditions to be proved by the witnesses inserted in the bond. And this was found relevant, albeit that the defender alleged, that the like reason was for receiving of this probation by the witnesses inserted in the bond, as by the depositar, seeing the depositar was but one of the witnesses inserted therein, and the rest had the like interest to know and depone upon the conditions, which he had, they being all witnesses together, which was repelled. The like was done 22d January 1624, Lermonth *contra* Alexander, No 171. p. 12376. *Ratio videtur, quia deponendo apud eum ejus fidem sunt secuti*, and so the parties had more confidence in him than in the rest.

Act. Primrose.

Alt. Morvat.

Fol. Dic. v. 2. p. 226. Durie, p. 116.

. Haddington reports this case :

PAUL HAY pursued John Laing for exhibition of a bond, made by James Wright, merchant, and James Wright to him, and being exhibited, the said John Laing and James Wright, writer, to see it decerned to be delivered. Laing having exhibited the bond, Wright opposed against the delivery, *alleging*, That it was consigned to remain undelivered till conditions were performed to him. It was *answered*, That the allegiance was only probable by the oath of Laing, because by consignation of it in his hands, *contrahentes secuti erant ejus fidem*, and alleged the practick betwixt M'Morran and Alexander, and Mr Robert Lermonth, No 171. p. 12376. which was so found by the Chancellor, by whose vote the matter was decided. I had alleged, that since the defender offered to prove the conditions of the assignation by the witnesses inserted in the bond, and that the condition of the consignation was made in their presence, *tanquam pactum instrumento interpositum nullo alio actu interveniente*, but immediately after subscription of the bond, that the witnesses inserted might be examined, which many of the LORDS thought reasonable.

Haddington, MS. No 3052.