

1624. February 11. CASSIMBRO against IRVINE.

ONE Cassimbro, a Fleming, pursues Captain Irvine for payment L. 500 Flemish, conform to his bond granted to him thereupon *in anno* 1624; and whereupon pursuit was intended, *in anno* 1631, which, sinsyne lying over, was now again wakened; wherein the defender *alleging*, The bond was null, because it wanted witnesses insert therein; and the pursuer *answering*, That this allegiance ought not to be received against a bond made out of Scotland, and granted in favours of a stranger, remaining in the Low-Countries, where such bonds are valid, albeit wanting witnesses; likeas he offered and referred to the Captain's oath, the verity of the subscription, to be his proper hand-writ, and also that he was debtor of the sum the time when he subscribed the bond; and the defender *replied*, That that was not enough, unless she referred also to his oath, that the sum was still resting owing unpaid;—the LORDS found, That they would not supply this nullity alleged against the bond, viz. of wanting witnesses, except that as the pursuer referred the verity of the subscription and truth of the debt at the time of the making of the bond to his oath, so also that he referred, and that the defender should also therewith depone by the same oath, if the sum was yet resting unpaid or not; and found that the defender ought not to be compelled to depone upon the one, without consideration of his declaration, which he was found he ought and might declare upon the other, viz. if it was yet resting owing unpaid; in respect that the libel bears that he was debtor by his bond in the sum therein contained, and that it was yet resting owing unpaid, so that he ought to swear upon the whole libel conjunctly, and not divide the same, in respect of the alleged nullity of the bond; and this was also found, albeit the bond was made in Flanders, and to a Fleming, and not betwixt Scotsmen.

Act. Mowat.

Alt. Nicolson.

Clerk, Gibson.

*Fol. Dic. v. 2. p. 300. Durie, p. 702.*

1667. November 6. FYFE against DAW in Perth.

A BURGESS in Perth having put his son with a neighbour to be his apprentice, and the boy having diverted from his service, the father was pursued for damage and interest sustained by the master, who did refer to the father's oath his absence and diverting. In which process, the father having declared with a quality, That the master had beaten and put away his son,

THE LORDS found, The quality being *super facto alieno* did resolve in an exception, which he should have proponed, and cannot be proved by his own oath; and yet though the process was a suspension, wherein there had been

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Where the deed is not holograph, the defender is not bound to depone *simpliciter* upon the verity of the subscription. He may either plead, that it is not relevant to refer the verity of the subscription to his oath, or he may retain liberty to depone as if resting owing were referred.

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