No 65.
tionsly taken from among the debtor's writs. Not allowed to be proved by witnesses, but the creditor examined.

he could desire to be answered as a creditor, seeing it was never delivered to him by the maker, but by the contrary, the same remained ever in the custody and keeping of the said Sir Thomas and his wife, after whose decease (Sir Thomas's self being then out of the country) the said William at his own hand, he being then in service with Sir Thomas's wife, took the bond out of a coffer pertaining to the said Sir Thomas, and told his wife where the same was among these other writs within her dwelling-house, where she died; which allegeance was found relevant, albeit the bond was since then registered by the said William, and that comprising had also followed at his instance thereupon; and because the proponer offered to prove the exception foresaid by witnesses, the Lords before they would give an answer to that, if it was probable by witnesses, (which they found hard to be done tending to destroy the bond) ordained the party to be examined *ex officio*, who being examined confessed the same, and so the bond was not sustained.

Act. *Cunningham.* Alt. *Stuart, Oliphant & Burnet.* Clerk, *Hay.*

Fol. Dic. v. 2. *p.* 217. *Durie, p.* 366.

1630. *January* 21. Earl of Murray *against* Dunbar of Burgy.

No 66.
A bond was not allowed to be taken away by witnesses, however honourable.

A bond of L. 10,000 granted by Burgy to the Earl of Murray, for desisting and quiting a criminal pursuit of slaughter and adultery, moved against Burgy, before the Justice, at the King's Advocate's instance, and at the instance of the nearest of kin to the party slain, (the Earl of Murray not being pursuer of the criminal pursuit himself, and the only doer, but the assister, and prosecutor thereof,) this bond being desired to be reduced at Burgy's instance, because it was alleged to be given at the intercession of their noble friends, who interponed themselves to mediate and accord betwixt this pursuer and the Earl of Murray, only for show, and to be a mean to preserve the Earl in his honour, and for his contentment, but not with any intent of exaction; which was offered to be proved by the oaths of the friends who interceded, being all noblemen of eminent quality, and of dignity, against whom no exception in law could be taken, viz. the Lord Lorn, the Lord Gordon, the Earls of Winton, Linlithgow, and Galloway; this reason was not found relevant to be proved by their oaths, neither would the Lords take their oaths *ex officio*, for they found, that witnesses, how honourable and noble soever they were, could not be received to destroy the bond; and the bond being also desired to be reduced, because it was granted for desisting from a criminal cause against the law, which prohibits parties to make such transactions upon criminal pursuits, and appoints the accusers making such transactions to be punished, as is statuted per Senatus Consultum Turpillianum D. et C.; for albeit transactions, per L. 16. Transigere, C. De Transact. be permitted, which are made super-crimine, sanguinis pœnam

ingerente, as the defender proponed, and *alleged*, That the reason founded upon *Senatus consult Turpill.* specially where there is impetrate *absolutio principis* it liberates *a pœna*; yet the pursuer *replied*, That the law permitting such transactions, it is a parte rei, sed non a parte accusatoris, nam accusator turpiter transigit, specially where he is not party interested in the accusation, and where the party accused, neither has remission, nor declines the trial, but offers himself to the Justice; notwithstanding whereof, the transaction was sustained, and absolvitor granted to the defender; for the LORDS found, That any bargain, or bond given by the party accused to him who urged the accusation, and whereupon the accusation deserted (albeit he to whom the bond was made, was not the party interested), the same could not be retreated upon that ground, specially by him who made the bond; but in this cause, the King had allowed of this transaction, by his Majesty's warrant, and also had granted remission to the party, which his Majesty willed not to be expede, while the bond and transaction were performed to the Earl of Murray. No 66.

Act. *Nicolson* & *Aiton.* Alt. *Advocatus* & *Stuart.* Clerk, *Gibson.*

Fol. Dic. v. 2. *p.* 219. *Durie, p.* 483.

1631. *February* 18. HOUSTON *against* HOUSTON.

No 67.
A nuncupative testament cannot be proved by witnesses, to take away a former legacy constituted by writ.

IN this cause, mentioned 13th and 20th January 1631, No 5. p. 8049, the LORDS now found the allegeance, offering to improve that bond, where it had the two initial letters of the maker's name, was not receivable, but repelled the same, seeing it was made in Ireland, according to the English law; conform whereto bonds, which are sealed by the maker, and bearing, to be sealed and delivered in presence of witnesses, as this bond bore, are valid, albeit not subscribed by the parties; also the LORDS found, that this bond, albeit reputed as a legacy, yet being extant in a writ, was not to be taken away by an allegeance of a posterior nuncupative testament, made by the granter of the bond, he being then upon the sea within the ship, whereby he revoked all preceding legacies made by him; and which the defender offered to prove, by the mariners present for the time within the ship, who saw and heard the same, and which being quasi testamentum militare, et nuncupativum, licet non in scriptis, the defender *alleged*, was sufficient to evacuate this prior bond, it being found of the nature of a legacy only; which was repelled, for they found, that this bond in writ, was not revokable, by any such posterior deed, to be proved only by witnesess, there being no writ to verify the same.

Fol. Dic. v. 2. *p.* 223. *Durie, p.* 571.