

Fairny to warrant the disposition for 13 bolls of victual, paid to the minister for his stipend, since the year 1646. It was *alleged* by Fairney, That the warrandice cannot be extended to minister's stipend, unless the warrandice had *per expressum* carried the same, especially seeing, since the date of the disposition, the Lord Melvile has been still in use to pay the minister, without seeking relief till now; and Fairny offered to prove, by Bogie, who was the bargain-maker, and by the rest of the Lord Melvile's curators, that the lands and teinds were bought according to a rental, which they paid over and above the minister's stipend. It was *answered*, That the absolute warrandice was opposed *per expressum* set down in the disposition, and that the price of the lands and teinds were equivalent thereto, being freed of the minister's stipend; and no tutor, curator, nor witness's oath, could be taken to take away writ.

THE LORDS, before answer, ordained the tutors' and curators' oaths to be taken.

*Gilmour, No 37. p. 26.*

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1662. February 13. JAMES SLUMOND *against* WOOD of Grange.

JAMES SLUMOND having charged James Wood of Grange, to pay a sum wherein he was cautioner for the Laird of Balcaskie, to William Smith merchant in Edinburgh, who constituted Richard Potter assignee, who transferred the same to the said James Slumond, and suspends; the reason of suspension was, because this bond was paid, and retired by Balcaskie the principal debtor, who took a blank translation thereto, from Potter the assignee, which translation, with the bond itself, were surreptitiously taken out of his coffer by James Hay, who filled up this charger's name therein; likeas, the suspender produced a declaration of Potter, that the sum was paid to him by Balcaskie, and therefore the suspender craved, that the oaths of this charger, the said James Hay, and Potter, and also the witnesses who were present at the payment of the sum, might be taken before answer.

Which the LORDS granted, albeit the charger had the translation for an onerous cause.

*Stair, v. 1. p. 100.*

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1662. July 5. DUNCAN DRUMMOND *against* COLIN CAMPBELL.

DUNCAN DRUMMOND pursues Colin Campbell for payment of a debt of his father, because, in a writ betwixt his father and him, the father had disposed all his moveables to him, and he had undertaken his father's debt, whereby the pursuer, as creditor, had interest to pursue him to pay this debt; the defender having *alleged*, That the bond and disposition was never a de-

No 70.  
to the extent  
of warrandice  
in a disposi-  
tion.

No 71.  
Witnesses  
received to  
prove pay-  
ment of a  
bond.

No 72.  
Delivery of a  
writ probable  
by the notary  
and witnesses  
inserted in it,  
where it was

No 72.  
not produced  
by the person  
in whose fa-  
vour it was  
granted, but  
by a third  
party.

livered evident, either to the father or to the son; but two blanks subscribed by them both were put in the hands of notary, to fill up the bond and disposition; but, before delivery, both parties resiled, and desired the notary to cancel and destroy them, yet eight or nine years after the notary gave them up to this pursuer, and neither to the father nor to the son; and the question being how this should be proved;

THE LORDS, before answer, ordained the notary, and witnesses inserted, to be examined *ex officio*, which being done, their testimonies proved as is alleged before. Then the question was *in jure*, whether the depositions of writs could be proved any other way, than by the oath of the party in whose favour the writs were conceived, he having the same in his hands.

THE LORDS found, that seeing these two writs were not produced by the father, nor the son, by and to whom they were mutually granted, but by a third party, in whose favour a clause therein was conceived, in that case, the deposition probable by the writer and witnesses inserted, and by the said testimonies found the writs null.

*Fol. Dic. v. 2. p. 217. Stair, v. 1. p. 122.*

1662. July 19.

FIDDES against JACKS.

No 73.  
A proof al-  
lowed that a  
person had,  
by a public  
calamity, lost  
money he had  
in charge.

FIDDES pursues Jack for payment of a bond of 500 merks, which Jack acknowledged to have received in custody from Fiddes to be kept as his own. Jack *alleged*, That he had but the custody, and did conform to his obligation; he sent the money to Dundee *in anno 1650*, where he lost both it and much more of his own at the plunder of Dundee. The pursuer *answered*, No way granting that his money was lost at Dundee, yet it ought not to liberate the defender; because he oft-times required and desired the defender to pay him his money before the plundering of Dundee, and seeing he did not then give it, it was lost upon the defender's hazard. The defender *answered*, That any requisition was made, was but verbal, without instrument, and that it was made to the defender, being in Edinburgh, after this money, and the defender's whole means, was sent to Dundee for safety, and that at the time of any such desire, he shows the pursuer so, and bid him send for it to Dundee when he pleased and he should have it.

THE LORDS, before answer, having ordained witnesses to be examined, *hinc inde*, and having advised the same, found that the pursuer did desire his money, and at that same time the defender told him it was at Dundee, and said he might have it when he pleased to send for it; and witnesses also proved that he was at Dundee, and was in esteem as a man of good means then, and that he was there at the plunder of Dundee, and ever since was in a poor miserable