

1667. February 20. HELEN JOHNSTOUN *against* ROBERT JOHNSTOUN.

HELEN JOHNSTOUN *alleging*, That there was a blank bond in her brother Robert's hand, to her use, and that he promised to apply the benefit thereof to her, doth pursue the brother, either to deliver the bond, or otherwise the sums therein, and offers her to prove, by the debtor's oath, that the bond was blank in the creditor's name, when it was subscribed by him, and by witnesses above exception, that it was blank when she delivered it to the defender, and craved the defender's oath of calumny concerning the promise. The defender *alleged*, That he was not obliged to give his oath of calumny upon one point of the libel, but upon the whole.

THE LORDS found, that he was obliged to give his oath upon one point of the libel; but they found that witnesses were not receivable to prove the bond to have been blank, to infer re-delivery of the bond, or sums; and found likewise, that seeing the whole libel was only probable by his oath, he was not obliged to give his oath of calumny, but only his oath of verity, seeing he might be ensnared by denying upon his oath of calumny, which was lubrick, and of dubious interpretation, what it imported, and so might be prompted to wrong himself in his oath of verity, lest it should clash with his oath of calumny.

1667. February 21.—IN the cause betwixt Helen Johnstoun and Robert Johnstoun, her brother, it was further *alleged* for her, That the pursuit, being a matter of breach of trust, and fraud, betwixt parties so nigh as brother and sister, the same ought to be probable by witnesses above exception, and ought not to be referred to the defender's oath, because it is offered to be proved, that he did depone before the Justices of Peace in Fife, that he had never had the bond in question, and yet in this process it is judicially acknowledged in the dispute that he hath the bond, and that he received it blank from the pursuer's husband; and it is now offered to be proved by his own brother, and other witnesses, above exception, that the pursuer delivered the bond to him blank after her husband's death, which being a matter of fact, and probable by witnesses, necessarily infers that the bond was not re-delivered to her umquhile husband.

THE LORDS, before answer, ordained the witnesses *ex officio* to be examined, upon the pursuer's delivery of the bond after her husband's death.

Stair, v. 1. p. 445. & 448.

1667. February 23. LAIRD OF MAY *against* JOHN ROSS.

UMQUHILE Dumbaith having disposed several lands to his oye, John Ross, brother to Kilraick, the Laird of May, Dumbaith's heir-male, pursues impropriation and reduction of the disposition; and insisted upon this ground, that the

No 30.

Witnesses not admitted to prove delivery of a bond blank in the creditor's name.

No 31.

Date of writ being false, found not to infer falsehood of the

No 31.
whole of it,
where the
witnesses
proved the
verity of the
subscription.

disposition was false in the date, and that the defunct was *alibi* at the time it appears to have been subscribed; and, therefore, is false in all. It was *answered*, That there was only an error in the date, in respect the same right having been conceived formerly in favour of another, Dumbaith gave order to draw it over in favour of the defender *verbatim*, and the writer ignorantly wrote over the date as it was in that first disposition, which can noways annul the writ, especially seeing it was offered to be proved by the witnesses inserted that the writ was truly subscribed by Dumbaith, and them as witnesses, when he was in his *liege poustie*, against which no allegiance of *alibi* by other witnesses not inserted can be respected.

This having been disputed in the English time, the witnesses were examined before answer, by three of the Judges, and now the cause was advised.

THE LORDS found the defence relevant to elide the improbation, that the writ was truly subscribed before the defunct was on death-bed; and found the same proved by the witnesses adduced, and thereafter assolizied.

Fol. Dic. v. 2. p. 215. Stair, v. 1. p. 449.

1667. July 16.

HAMILTON *against* SYMINGTON.

No 32.

A BOND was found null, which being written on two sides, on that side where the subscriptions were, there was nothing but the clause of registration, the other side was entirely filled up with another hand, without any subscription, so that it appeared to have been the last sheet of a writ taken of and filled up upon the back by the pursuer; but being before the act of Parliament 1681, the LORDS declared, that if the pursuer could adduce writs or adminicles, or witnesses, to astruct the verity of the bond, they would hear him upon the same.

Fol. Dic. v. 2. p. 215. Stair.

*** This case is No 2. p. 382, *voce* ALIMENT.

No 33.
Witnesses
were *ex officio*
sustained to
take away an
exception,
that the bond
craved to be
paid was *in-*
strumentum
apud debito-
rem; the man-
ner of deli-
very being
most special.

1671. June 15. ELLIS of Southside *against* CHARLES CASS.

SOUTHSIDE having right to a bond granted by Richard Cass, did transact therefor with Charles Cass's curators, as being heir, or apparent heir, to the said Richard, for which he got bond from the said Charles, with consent of his curators, for 5500 merks; against which transaction, Charles being reponed by a decret of reduction, and both parties put in their own place, Southside did pursue the said Charles Cass, as representing Richard, for payment of the said bond. It was *alleged* for the defender, That the bond, which was the ground of the pursuit, was in the defender's own hands and possession, and *instrumentum apud debitorem repertum præsimitur solutum*. It was *replied*, That the said