1624. *February* 11. CASSIMBRO *against* IRVINE.

No 46.
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.

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 intented, *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 allegeance 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, unles 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.

No 47.

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 oatn 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

No 47. litiscontestation, as said is, the LORDS did give a term to prove the said quality. See SUSPENSION.

Fol. Dic. v. 2. p. 299. Dirleton, No 101. p. 39.

1674. *January 3.* GORDON *against* CUSIGNE.

No 48.
A person having deponed in an action against him, that he had bought a horse, and delivered the pursuer a cow, which was accepted as the price of the horse, the defender was found obliged to prove what he had deponed.

ANNA GORDON pursues William Cusigne for several sums and goods of her's intrusted to him, and wherewith he had intromitted, and, amongst others, for the price of a horse; he deponed, that he received and bought the horse at the price of L. 24 Scots, and deponed that he delivered to her a cow, which she accepted for the price of the horse; whereupon the question arose, whether this was a competent quality in the oath, or behoved to be proved as an exception; for if he had deponed that he bought the horse at L. 24, and that he paid the same, payment would have been made a competent quality, the libel being referred to the party's oath, but compensation would not have been a competent quality, but behoved to have been proved.

THE LORDS found, that if the acceptance of the cow for the price of the horse had been a part of the bargain at the same time with the sale of the horse, it had been an intrinsic quality, declaring a part of the bargain; or if it had been payment *ex post facto* in money, conform to the bargain; but being the acceptance *ex post facto* of the cow for the same price, which was in effect a new sale of the cow, they found that it was no competent quality, but behoved to be proved.

Fol. Dic. v. 2. p. 299. Stair, v. 2. p. 246.

1699. *December 12.* WORKMAN *against* YOUNG.

No 49.
Where a sailor sued his master for wages, and the master, in his oath on reference, adjected an allegation of undutiful service. This was found extrinsic. Action for damages was reserved to him.

ROBERT WORKMAN pursues John Young, skipper, on this ground, that he having hired him to be one of the sailors of his ship in a voyage to Bourdeaux, he now refused to pay him his wages; and both the service and *quota* of his fees being referred to the Master's oath, he acknowledged the same, but deponed he had served him most unfaithfully and undutifully, and condescended that he had embezzled the wines on board, and drawn some of them, and hid it in his bed, and had made sundry of the crew to mutiny and carry in the ship to Orkney. The question, at advising, arose, whether these qualities adjected were intrinsic, or behoved to be otherwise proved; for as to the wines, all the mariners did so, and it was the merchant's and not the skipper's loss; and as to his being rebellious and disobedient, he might have turned him off at the first port they came to: But others thought there was a difference betwixt a mariner and an apprentice, or a servant at land, who may be turned off