1672. *July* 26. GORDON *against* MENZIES.

No 26.
The body of a deed bore that a party was cautioner. Consent not inferred by his subscribing as witness. See No 32. p. 5650.

IN a count and reckoning betwixt Mr Arthur Gordon and Menzies, this point was reported by the auditor, viz. that a bond deduced in the account, bearing in the body, Menzies to be cautioner for his mother, was subscribed by him as witness, albeit he was not mentioned as witness inserted, but two other witnesses were inserted, and subscribing; whereupon he *alleged*, that his subscribing as witness could not oblige him, seeing persons frequently subscribe writs as witnesses, without considering the contents, or whether they be inserted witness, conceiving that their subscribing witness imports no more but that they saw the parties subscribe; especially seeing the creditor accepted the bond wherein this person subscribed only as witness. Whereunto it was *answered*, That the subscribing as witness did import consent to the matter, and did infer *presumptive* that the party knew and consented thereto, and that it hath been but by inadvertency of the creditor, in taking the bond subscribed with the adjection of witnesses.

THE LORDS did not find that the subscribing as witness did oblige, unless it were instructed that the bond was read to this party; and therefore ordained the writer and witnesses to be examined thereanent.

Fol. Dic. v. 1. *p.* 378. *Stair, v.* 2. *p.* 111.

1673. *December* 23. MITCHEL *against* MITCHEL.

No 27.
An executor confirming a sum, which was heritable, found not to have thereby homologated the testament so as to be liable for a special legacy of the same sum.

THERE being a special legacy left in favours of John Mitchel, of a particular sum in a testament, wherein James Mitchel is nominated executor, who was also heir to the defunct; the legatar pursues him as executor to pay the legacy. He *alleged* absolvitor, because the sum legated was heritable by infeftment, and could not be legated. It was *answered*, He having confirmed the testament containing this legacy, without protestation, he had homologated and acknowledged the same, and could not quarrel it.

THE LORDS repelled the allegeance, and found the confirmation without protestation to be no confirmation of the legacy, to exclude the heir from his right to the sum, such confirmations passing of course without advertance, or search into the condition of the debts.

Fol. Dic. v. 1. *p.* 379. *Stair, v.* 2. *p.* 246.

1676. *February* 1. VEITCH *against* PALLAT and KER.

No 28.
A person subscribed as witness to a right granted

WILLIAM VEITCH, as having right to a sum due by James Sanderson to one Nairn, whereupon horning was used against Sanderson, did thereupon reduce

an assignation granted by Sanderson to Robert Brown aud James Ker, and was preferred to them in a sum granted by bond by Sir George Maxwell to Ker for the two parts, and Brown for a third, which bond was granted in place of a former bond due to Sanderson by Colonel Stuart. It is now *alleged* for Brown, That Veitch's sum ought only to burden Ker's part of the bond, because Sanderson the common author was denounced at the instance of Brown long before he granted the assignation to Ker, and therefore Peter Pallat succeeding in the right of Brown, could be burdened with no share of Veitch's debt. It was *answered*, 1*mo*, That, before Sanderson's rebellion, Ker had a joint interest with him in Stuart's debt, which is instructed by a declaration under Sanderson's hand, in which Veitch is witness, which must import Veitch's knowledge and consent to the truth of the declaration. 2*do*, Ker and Brown having accepted a bond from Sir George Maxwell to both, two thirds to Ker, and one third to Brown, Brown had acknowledged and homologated Ker's right, and could not quarrel the same, even by reduction, likeas now he hath no reduction.

No 28.
by his debtor. Found, that his knowledge of the contents of the deed, and acquiescence in it, could not be inferred from this circumstance.

THE LORDS found, that Veitch's subscribing as witness to Sanderson's declaration, did not import his knowledge or acknowledgement of the contents of the writ; and found, that Sanderson's declaration, after Veitch's diligence by horning, and a gift of escheat, now insisting upon the debt in the horning by reduction, could not prove or be effectual against Veitch, unless it were proved by a writ anterior to the rebellion: They found also, that the accepting of a joint bond did not so homologate as to hinder either party to reduce the others assignation, it being then standing, and the ground of that bond.

Fol. Dic. v. 1. *p.* 378. *Stair, v.* 2. *p.* 408.

1677. *November* 8.

SINCLAIR of Balcraigie *against* RICHARDSON and her Spouse.

No 29.
In a pursuit on a bond granted by a wife during marriage, it was alleged she had homologated it, by giving it up in a confirmed testament. This the Lords repelled, thinking it hard to prejudge an ignorant woman, who knew no bet-

ELIZABETH RICHARDSON, and Alexander Barclay, her present husband, are charged by Sinclair to pay a sum contained in a bond granted by her, and ——— her first husband, and which she judicially ratified upon oath. They suspend, 1*mo*, Because the bond *quoad* the wife is *ipso jure* null, being granted *stante matrimonio*; and the oath could not validate it, especially it bearing borrowed money. *Answered*, 1*mo*, The oath not being sinful ought to be kept; *Capitulum octavum, Extra, De jure-jurando, Omne juramentum quod non vergit in salutis eternæ dispendium est servandum.* 2*do*, The bond is the price of her wedding clothes. 3*tio*, She has homologated it, for she has given it up in the confirmed testament.—THE LORDS sustained the reason, and repelled the answer; and found the oath could not be obligatory, *ubi accedit obligationi de jure prohibitæ.* Found the 2*d* answer relevant to elide the reason, and assigned a day to prove it was for the marriage clothes, and would not put them to a new process.