was objected,—that he was Brown's good-brother, having married his sister; and against another, that he was his cousin-german.

It was ANSWERED to the first,—That the affinity being by Brown's sister, she is long since dead; and so the affinity ceased, at least the ground of suspicion of the witness's partiality: and as to the other, cousin-german by our custom doth not exclude a witness; nor doth our law esteem him a conjunct person, which was never extended to an uncle and nephew.

It was REPLIED, That affinity doth not cease by the death of the wife; neither doth the respect that might bias the witnesses; and, upon that same account, a cousin-german is not an unsuspected witness; and, in heritable rights, witnesses should be above exception.

The Lords rejected both the witnesses; unless it could be made appear there was *penuria testium;* in which case they allowed them to be received *cum nota.*

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1679. *January* 17. GEORGE CHEYN *against* The LORD ROSE-HILL.

GEORGE Cheyn having charged the Lord Rose-hill for payment of 5000 merks contained in a bond granted by the Earl of Northesk, his father, and him, —he suspends on this reason, That the bond was never a delivered evident by the Earl of Northesk, the principal debtor, but it was subscribed by him and the suspender for borrowing of the sum; but was detained in Northesk's own hands, or his lady's, or others in his family, blank in the creditor's name, till the Earl fell in his late indisposition of losing his speech, and so becoming unable to manage his affairs; after which no person was in capacity to deliver the same. And as to George Cheyn, there was never money borrowed from him by the Earl, or his son; and if he accepted of a blank-bond after the Earl's indisposition, which was known to all, he was *in pessima fide;* and therefore, though writ ordinarily can be taken away by writ, or oath of party, yet it hath been often sustained,—when bonds were pursued for, against one representing a defunct, or made use of to exhaust his moveables,—that the allegeance that the bond was undelivered, or retired, lying in his charter-chest at his death, was probable by witnesses: and the case here is as favourable; for, after the Earl's indisposition, no bond subscribed by him could be delivered, more than if he had been dead.

The charger ANSWERED, That such pretences might be alleged against every bond; and that Rose-hill, being in health, might have delivered the bond.

It was REPLIED, That there are here special circumstances, by the Earl's indisposition, which put this bond in the case as if it had been granted by a defunct: nor could Rose-hill have delivered the bond, he not being the principal debtor. And it is known there are many such bonds subscribed by Northesk, which, if they were sustained, would ruin his estate. It is also known by some of the Lords who treated betwixt the Lord Rose-hill, his mother and brothers, that this bond was not in Cheyn's hands, but in the heirs, and was to be given up to Rose-hill. Although it was pretended that my lady had received the bond, and delivered the money out of her own closet, yet there was no pretence that the money was Cheyn's, but the law presumes it to be my Lord's money; and

though the bond bears date five years ago, yet Cheyn had neither demanded annualrent, nor done diligence thereupon.

In consideration of these circumstances, the Lords, *ex officio*, ordained witnesses to be examined upon the reasons foresaid; and, if need be, that George Cheyn be examined *ex officio*, how he got this bond, when, and for what causes.

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1679. *February* 13. MAXWELL *against* LINDSAY.

MAXWELL of Cowhill raiseth reduction of a decreet-arbitral, pronounced betwixt him and ———; as being *ultra vires compromissi*, and pronounced after the expiring of the submission.

The defender ALLEGED Absolvitor, Because the pursuer had ratified the decreet arbitral, and acknowledged himself debtor for 2000 merks decerned thereby; and, in corroboration thereof, had disponed land for the same.

The pursuer REPLIED, That he was under caption when he granted the said right; and there was no abatement granted to him, but he gave security for the whole sum decerned; neither did he ratify the decreet-arbitral, nor pass from all question against the same, but only, in corroboration thereof, granted security: and though he had made actual payment upon distress, it would import no homologation, nor would exclude him from reduction of the decreet and recovery of the money.

The Lords repelled the defence founded upon the security granted, in respect of the reply,—that the defender was under caption: which, though it would not reduce the deed as done by force, yet it did not import homologation, as in the case of voluntary payment without distress.

Vol. II, Page 693.

1679. *February* 18. LAIRD of WEDDERBURN *against* SIR ROBERT SINCLAIR.

JOHN Stuart, son to the Earl of Bothwell, having obtained a *commendam* of the abbacy of Coldingham; the Earl his father being forefault, and his posterity dishabilitated to bruik estate or dignity in Scotland, John's *commendam* fell by the dishabilitation; and the abbacy was erected in a temporal lordship, in favour of the Earl of Hume, who gave a tack to Wedderburn's predecessor for 3000 merks of grassum, of the teinds of Kello and Kimmergem, which were parts of the abbacy. But thereafter the King grants a re-habilitation to John Stuart, bearing to be upon commiseration that John was an infant the time of his father's crimes, and noways accessory thereto; which was in March 1621. Thereafter there are several contracts betwixt Henry Stuart, brother to John, for John's behoof, and John himself; whereby the Earl of Hume dispones all right he has to the abbacy in favour of John; and consents, that, in the subsequent Parliament, John's re-habilitation by the King should be ratified, and that he should procure an erection to himself of the abbacy: whereupon, in August 1621, there is an Act of Parliament ratifying the King's re-habilitation to John,