

1681. *February 18.* JAMES ALSTOUN *against* WALTER RIDDEL.

JAMES Alstoun pursues Walter Riddel sub-clerk of the bills, for payment of a sum due by Broomhall, which being suspended, he, for a cautioner, did accept of a false bond in name of William Norvel in Culross, who is dead several years before, without any attester; albeit the pursuer required him, by instrument, to take sufficient caution; and being upon the place, as the instrument did certify, Walter ought to have known the cautioner, or had an attester; or at least ought to have acquainted the pursuer what cautioner was offered, who would have told him that the cautioner was dead several years before the date of the bond of cautionary.

The defender ALLEGED, That he was not liable, seeing it is known that there was such a responsal person dwelling in Culross, in whose name the bond of cautionary was offered; and he could not know the certainty of his death, or know his hand-writ: and denied the truth of the instrument, which is not probative, unless it were asserted by the witnesses, seeing it hath no warrant in writ.

The Lords having ordained the procurator, the notary, and witnesses to be examined upon the truth of the instrument; one of the witnesses was dead, and the other deponed he remembered not; but the procurator deponed, that the contents of the instruments were true; and likewise the notary, Cairns, who was *suspectæ famæ*: and there were two declarations produced under his hand, acknowledging two instruments formerly given out by him to be false: Whereupon the question arose, whether the instrument was astructed or improven.

The Lords found the instrument astructed, albeit it had but two witnesses,—the one dead, and the other remembered not; seeing the notary and procurator, though suspected, astructed the same: for, if instruments were improven, when the witnesses depone they remember not, but are not positive that they were not witnesses, or that they were not in that place; most of instruments, even of seaisine, resignation, and the like, would be improven; seeing it is impossible for witnesses that are but overly required, to remember for any considerable time, not having subscribed the instrument, that by their knowledge of their subscription they might affirm the same.

*Vol. II, Page 862.*

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1681. *February 25.* Mr GEORGE BANNERMAN *against* DUNDAS of MORTON.

Mr George Bannerman pursues reduction of a decret absolvitor upon a process at his instance, against one Hamilton, as principal, and Dundas of Morton, and Hugh Sinclair, cautioners in a bond, whereunto he had right by progress: the cautioners were assoilyied; the reason of the decret being, that he passed from them. The reasons of reduction were, *first*, That this decret was unwarrantably extracted, having been scored in the minute-book, as yet appears by the same, and being extracted after Mr George went abroad. *2do*. Because the assertion of the clerk cannot instruct that he passed from the cautioner, un-