1680. *February* 21.

No. 30. MR. WILLIAM BAILLIE, Advocate, *against* MR. ROBERT PITILLOCK.

The Lords found a sufficient adminicle to make up a disposition in an action for proving the tenor of it, that the granter of it had subscribed as witness in a disposition of reversion of the same lands, narrating his own disposition, now questioned by his heir; but this the Lords conjoined with the testimonies of the witnesses who saw and read the same disposition.

Fountainhall MS.

1681. *January* 13. CALDERWOOD *against* COURTIE.

No. 31.
Consequence of the circumstance, that there was no proof who were the writer and witnesses.

Courtie having trusted a bond to Calderwood, he pursued him for delivery of the bond, or the sum therein mentioned, and obtained decree; which being suspended, and it being alleged, that the bond was lost in a process among the Clerks, the Lords allowed the tenor to be proved *incidenter* in this process; which was accordingly proved by the oaths of the Ordinary, who perused the bond in process, and heard the cause, and by the advocates and Clerks; and accordingly a decree of tenor was extracted; but the next day a bill was given in for recalling of the decree, because the tenor did not express the writer of the bond, and the witnesses inserted, so it would be found null by the act of Parliament, "requiring the designation of the writer and witnesses," and because the mean of improbation is thereby wanting; and albeit it had been proved who were the writer and witnesses specifically designed, yet if the witnesses were called they could not astruct the bond, unless they saw the subscription in the principal bond, which neither extract nor tenor could supply; for it cannot be presumed that witnesses can remember what writs they subscribe to; and therefore the style of tenors is not only, "that there was such a writ, and how it was lost," but "that the matter contained in it was truly done;" for though, by our law, delivery of money, or other deeds of importance, where writ uses to be adhibited, is not proveable by witnesses, yet it hath this necessary exception, that if writ was once adhibited, and by accident lost, witnesses may prove that there was such a writ; but it must also be proved, that the contents of the writ were truly so done; otherwise, that great security of the lieges would be evacuated, by forging false writs, and pretending them to be lost, when truly they are destroyed by the forgers or users; and so proving the tenor, that there were such a writ, there were no remeed to redargue it; and therefore law doth necessarily require that the contents of the writ must also be proved, as the delivery of the money, or the like; and therefore *rei gestæ veritas* must also be libelled and proved. It was answered, That these grounds cannot hold in this case, where the principal bond was produced, and a dispute thereon, without any suspicion or pretence of falsehood, and the same proved by the oath

of the Lord Ordinary who heard the cause, and perused the bonds, and by the oaths of the advocates, who produced their informations, bearing no ground of suspicion, and therefore this was not competent to recal the decree of tenor lawfully extracted; nor was it proper for Courtie to object against his own bond; but if the debtor did object against the execution, the Lords might then consider the same. No. 31.

The Lords refused the desire of the bill, and would not recal the decree of proving the tenor.

Stair, v. 2. p. 832.

1681. *December.* LORD CRANSTON *against* ANNE TURNBULL.

No. 32.
Tenor of the verdict of an assize.

My Lord Cranston, for making up the tenor of the verdict of an assize, by which one Turnbull was forfeited, produced several writs relative thereto, though not narrating it *ad longum*, viz. the King's presentation of the lands, with consent of the Treasurer, &c. and the infeftment thereon by the Lord Angus, superior, whereby the Lords of Cranston had been in possession since the year 1610.

It was alleged against the forfeiture: That the same being pronounced by the Justice-court holden by the Earl of Dunbar, for the alleged crimes of treasonable theft in landed men, and especially treasonable fire-raising, that are *placitæ coronæ*, these ought to have been expressly mentioned in the commission; whereas, it mentions no treasonable crime, but only thefts, depredations, reiffs, and routs.

Answered: The commission of Justiciary, of its own nature, includes a capacity for all crimes; and the act of Parliament 1610 insinuates as much; 2*do*, The King's presentation, then recent, expresseth these crimes to have been the cause of forfeiture.

The defender, the rebel's daughter, being a poor woman, the Lords recommended to one of their number to get my Lord Cranston to give her some consideration; and so the matter ended friendly, and the tenor was decerned for his security.

Harcarse, No. 810. p. 226.

1682. *February* 2. EARL of SOUTHESK *against* DUKE of HAMILTON.

No. 33.
What to be considered adequate as *casus amissionis?*

Mr. John Ellies and the Earl of Southesk having raised a proving of the tenor of a bond of £.1000 Sterling, granted by the Lord Lanerk to James Livingstoun, *in anno* 1645, and the libelled *casus amissionis* being, that the bond was produced in the year 1656, before Commissioners of the Chancery of England, and miscarried,