

1687. *November 5.* ANENT PROOF of PAYMENT of a BOND.

The Lords refused to allow, for taking away a double bond conceived in the English form, but made amongst Scotsmen, to prove payment thereof by witnesses, but only *scripto vel juramento*; though, by the English law, payment may be proven by witnesses, and we had followed their custom *quoad* such bonds in our former Decisions, as appears by *M'Morland's case*, the 28th of June 1668, in Stair's Institut. *tit.* 1.

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1687. JAMES CHIESLY and LOWIS of MERCHISTON *against* The EARL of WINTON.

*June 30.*—JAMES Chiesly and Lowis of Merchiston, as creditors to James Inglis in Seton, pursue the Earl of Winton, by a subsidiary action, to pay the debt; because he being required, as Sheriff of East-Lothian, to apprehend the said James, who was alleged to be within his own house then, he delayed, and shifted the messenger who came to search, and caused close the gates on him; by which means he gave the rebel an opportunity to escape. ALLEGED,—The Earl did not refuse concurrence, but allowed him to go through the rooms after the doors were opened, they being shut the time of the Earl's dinner; *et non relevat* (esto he were in the house,) unless the Earl knew it.

The Lords, on Kemnay's report, found the libel relevant, and admitted it to probation, especially that part of it, that the rebel was in the Earl's house at the time the concurrence was sought.

A bill was given in against this, showing, the Sheriff was a gratuitous officer, and not bound to go along himself; and that all the Sheriffs of Scotland were concerned in the preparative: and craved a joint probation on the particular facts alleged on either side.

And the Lords having advised it on the 20th of July, they, before answer, allow the pursuer to prove his libel, and the verity of his execution of caption, and that the rebel was *de facto* within the Earl's dwelling-house the time the messenger gave the charge: as also allow the Earl defender to prove, that, immediately after he got the charge, he gave access to the messenger to search, and that, *de facto*, he did search all the rooms he pleased, and was not debarred by the Earl or his servants to search any room in or about his house; but refused to allow the Earl to depone upon his knowledge, whether the rebel was within the house or not. *Vide* 8th November 1687. *Vol. I. Page 461.*

*November 8.*—James Chiesly and Merchiston having omitted to take out their diligence in the subsidiary action against the Lord Winton, as mentioned 30th June 1687, they get it prorogated on a bill till the 22d of this month, seeing the other probation was not closed yet, and so did not retard the advising.

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