

1688. *January 27.* JAMES OSWALD *against* CAPTAIN HAMILTON.

IN a competition betwixt James Oswald, as executor-creditor to Ninian Henderson, and Captain Hamilton assignee, by Ninian's son, to a new blank bond taken by the cedent, after his father's death, from one Wauchop, in place of an old bond granted by Wauchop to the defunct; the cedent and Wauchop being both pursued, and the former having deponed that he gave up the old bond, and took the new in place thereof, for saving the charges of confirmation, they were decerned to deliver up the said bond, or pay the money. Alleged for Hamilton, That the debtor ought to be liable to him, as having the blank bond delivered to him; and if he renewed the bond unwarrantably, let him be liable to both, and seek his relief of young Henderson. Answered for Oswald, That his decret against young Henderson and Wauchop, being prior to the intimation of the blank bond, is preferable thereto; seeing, in a competition with creditors, blank bonds require intimation. Alleged for Wauchop, That he not being obliged to know that the creditor was dead, as he might have retired his bond upon *bona fide* payment, so he might renew a blank bond; and *bona fides non patitur ut idem bis exigatur*. The Lords preferred James Oswald, and found the debtor but once liable.

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1688. *February.* SIR JAMES DICK *against* WILLIAM DICK of GRANGE.

ONE having got an assignation to a bond in satisfaction, with a provision that the assignee (in case he should not get payment of the bond assigned, by doing diligence by horning, within fifteen days after the term of payment thereof,) might then recur against the cedent; the assignee did no diligence till about two months after the time prefixed, and then intented a pursuit of recourse against the cedent. Alleged for the defender, That the diligence, two months after the time appointed, was not sufficient. Answered, The debtor was in as good case when the diligence was used as he was at the term of payment; and the pursuer got a partial payment, which occasioned the delay. Replied, The condition was precise as to the time; and the debtor was suspected at the date of the assignation, and now is broken and gone; which is the difference betwixt his case and that of Dundas against Wilson, December 1686. The Lords sustained the allegiance and reply, and assoilyied from the relief. *Vide* No. 117, [Dundas of Ballendary against Mr George Wilson of Pleughlands, December 1686.]

Page 24, No. 124.

1688. *February.* JAMES MERCER *against* CUNNINGHAM of BARNS.

ONE Elizabeth Cunningham having granted a bond, mentioning no cause, to Mercer her brother-in-law, or to his wife the granter's sister, or to the heirs of

the marriage, at the next term after her the granter's decease; which failing, to return to herself, her heirs and assignees: The marriage having dissolved without heirs, and the husband having, as far, pursued the debtor's executors for the money;—Alleged for the defenders, 1. The bond is conditional, failing heirs. 2. Though there were no condition in the case but a substitution, the defenders have [the] only right as heirs substitute to the pursuer, who is far, and liable as an heir. [*Nota*, what follows should be part of the defence.] Answered, The bond being gratuitous, and the pursuer having but a qualified fee, the substitution must be effectual. The Lords found, That the pursuer had but a qualified fee, and decerned him to find caution to restore the money, after her death, to the defenders.

Page 50, No. 219.

1688. *February.* CAMERON *against* _____.

MR Archibald Cameron having [died] after he had gotten a son, [the son] raised reduction of a 1000 merks' bond, taken by him when he had no children, to his cousin in fee, reserving his own liferent upon the grounds of [the] civil law, *ex supernascentia liberorum*. 2. Mr Archibald, before his death, drew an assignation to the said bond, (conform to a power reserved,) with his own hand, which is *judicium mutatae voluntatis*. 3. *Testamentum imperfectum inter liberos* is sustained. Answered, This part of the civil law hath no place with us. 2. It took only place by the civil law *inter patronum et libertos*. And 3. It was in the case of a total donation, whereas this is but a small part of the defunct's estate. The Lords assoilyied from the reduction. *Vide* No. 146, [David Oswald against Somervell and Boyd, February 1687.]

Page 51, No. 222.

1688. *February.* LORD YESTER *against* LORD LAUDERDALE.

MY Lord Yester having adjudged at Christmas 1686, for principal sum and annualrent, due and accumulated at the Martinmas preceding;—the Lords found, That the accumulated annualrent did not bear annualrent from Martinmas, but from the date of the adjudication; and that no annualrent was due for the two months intervening, by virtue of the personal obligation in the bond, which was the ground of the adjudication, seeing the adjudger did not delay till the term, though now the term is past. *Vide* No. 332, [Cleland and Paterson against William Wilson, January 1688.]

Page 81, No. 334.

1688. *February.* The EARL of ROXBURGH *against* Mr JAMES CHISHOLM, Minister of LESLIE.

MR John Chisholm, parson of Leslie, having obtained certification, in a reduc-