

1688. *June.* MR JOHN CURRENCE *against* SIR CHARLES HACKET.

IN a pursuit for payment of a bond, the debtor alleged payment of L.100 sterling thereof, and, for proving, founded upon a receipt of L.50 from James Foulis, and a holograph note written by the creditor upon the back of the bond, bearing, that L.50 was received from Sir Robert Murray. It was alleged for the pursuer, That the receipt and holograph note related to one and the same L.50; and the mistake lay here,—That Sir Robert Murray had treated with the pursuer for Sir James Hacket the debtor, and James Foulis paid the money, and the holograph note was writ on the bond when it was sent to Scotland, that the factor might not pursue for it. 2. The holograph note is not probative, because not subscribed. The Lords sustained the note as a distinct payment.

*Page* 113, No. 424.

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1688. *June.* MARION MONTEITH *against* HER BROTHER GEORGE.

ONE, pursued as a vitious intromitter, made this defence, That he had right from the donatar of the defunct's escheat, which was declared. 2. He was executor nominated to the defunct. Answered for the pursuer, That the gift was simulate, and procured by the rebel's own means, as appears from his continuing in possession of the goods all his lifetime, and disposing thereof in his testament when he died. The Lords found the gift was simulate, and decerned against the defender, as vitious intromitter, the testament not being confirmed now several years after the defunct's death.

*Page* 118, No. 440.

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1688. *June* 9. MR WILLIAM THOMSON'S DAUGHTER *against* DUKE of HAMILTON.

IN a pursuit at the instance of Thomson against the Duke of Hamilton upon a precept,—Alleged for the defender, That the precept was null, as wanting writer's name and witnesses, and not holograph. Answered for the pursuer, That he offered to prove the subscription by the Duke's oath. And the Duke having deponed, that the subscription was not his handwrit, to the best of his knowledge, it was alleged, at advising, that the oath was not positive, but only an oath of credulity, and that the precept could be adminiculate by other papers produced by the defender, which imported a homologation of the precept. The Lords found the oath did admit of no other probation.

*Page* 211, No. 746.

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1688. *June* 13. AUCHINHARVEY *against* DUKE of HAMILTON.

*In anno* 1637, Duke James Hamilton granted a bond for L.204 sterling, pay-

able to William Muirhead, for the use and behoof of Robertland ; which bond the present Duke contended was void and null, upon these presumptions : 1. It bears Belhaven to be cautioner, who is not subscribing. 2. *In anno* 1642, £500 was borrowed from Robertland, and paid in the 1643, which was a better security ; and the greater sum is presumed to contain the lesser. 3. In the year 1648, Robertland got a new security, with several cautioners, for £20,000, in the name of Auchinharvey, for his own behoof, and yet did not claim payment or security for the bond in question, for which he had no cautioner. 4. [*Anno*] 1658, the lands of Chelsey were sold by commission ; and William Muirhead, though a commissioner, did not claim payment of this bond. 5. The estate of Hamilton, *in anno* 1658, was disposed of for payment of the debts of the family, by commission from the usurpers, and publication made at the market-cross of Edinburgh for that effect ; and the creditors came to Hamilton, where the commissioners sat, and got lands and conveyances for their debts ; and yet Robertland set up no claim for this bond, although he was in the country, and at the same time assigned the bond to Richard Cunninghame, who intimated the same to the Duke and Duchess, and could never hope to have any satisfaction thereafter, the lands being forfeited, and the Duchess not representing her predecessor. Answered, Robertland being a cavalier, did not trouble the family during the usurpation, when it was in distress ; but, *in anno* 1662, process was commenced and insisted in some years. 2. *In anno* 1652, the bond is entered in the court of claims, as appears by the attest of William Welsh, secretary. 3. If presumptions may take away bonds, no man will be secure. The Lords sustained the foresaid presumption to take away the bond.

*Page 52, No. 223.*

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1688. *June 20.* BLACKBARRONY *against* CLERKINGTOUN.

IN a pursuit upon a contract of marriage, for payment of a bond due to the wife by her father, and therein assigned to her husband, against the debtor's grandson, whose father was heir to the debtor, and consenter in the said contract with the wife, his sister ;—Alleged for the defender, No process for payment of the bond narrated in the contract, unless the bond itself were produced ; and, whatever might be pretended against the debtor in the bond, had he narrated the same in the contract, the narrative ought not to militate against the defender's father, who was but heir to the debtor, and not principally concerned, or obliged to pay, but only a consenter in the contract. Answered, The contract narrates all the substantials of the bond, and the defender's father, who was then heir to the debtor, would not have signed any contract narrating a debt himself would be liable for, had he not been convinced of the truth of it ; nor is he a consenter in general, but also in the clause of assigning the said bond. The Lords sustained process on the contract.

*Page 263, No. 936.*

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