

of the bond ; and, finding the same usual in such cases, sustained the bond ; but forbore to determine if it was forfeited, at Glenkindy's procurator's desire, till they gave informations, and so have an opportunity to treat in the meantime, and agree.

The Lords, having heard the cause in presence, and advised it, they found the penalty of the bond was not incurred by Glenkindy, it not being proven they were his servants, nor legally intimated to him whom he was to produce.

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1697. *January 13.* ELISABETH NASMITH *against* ROBERT MALLOCH.

ARBRUCHELL reported Elisabeth Nasmith against Robert Malloch, in a reduction and declarator for count and reckoning. ALLEGED,—I cannot take a term at your instance, because you have no active title to pursue ; your right being only a voluntary disposition from the Lady Bearfoot, who had taken out a *bonorum*, and disposed her whole goods and estate to her creditors, and so could make no posterior disposition.

ANSWERED,—She being infest in a liferent of 2500 merks, the same was not able, at the time of her *bonorum*, to pay all her creditors ; but she having lived now many years, Robert Malloch and her other creditors are more than paid ; and therefore no law nor justice can debar her from her jointure ; for if a bankrupt come *ad pinguiolem fortunam*, or fall into an adventitious estate, the same may be affected by the creditors, notwithstanding the former disposition on the *cessio* ; which proves the said disposition is not given to the creditors *in solutum*, but only *in securitatem* of their debts ; and, if all be paid, their interest ceases. But the Lords thought it unreasonable that one creditor should be singled out, and put to count, when he could not be sufficiently exonerated, unless all the rest were likewise brought into the field ; therefore they sustained the disposition *ad hunc effectum*, to cause the defender take a term ; but declared he should not be obliged to take a second term, unless all the creditors were likewise cited by her ; and granted an incident diligence for that effect. Some proposed caution might be found for his expenses, in case the pursuer succumbed ; but the Lords could not oblige them to do the same.

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1697. *January 14.* THE CREDITORS OF LINDSAY OF PYESTON *against* WALTER PITULLO.

HALCRAIG reported the Creditors of Lindsay of Pyeston against Walter Pitullo, clerk of Dysert : it was an objection of a nullity against his heritable bond, and the seasine taken thereon. OBJECTED against the bond,—That the witnesses' names were filled up with a different hand from the body of the writ, and did not mention the upfiller. This the Lords did not regard, seeing there was no Act of Parliament before 1681 requiring it ; and this bond was prior. The only Act concerning it is the 175th Act 1593, requiring all writs to bear the writer's name, under pain of nullity, which this bond did *quoad* the body of the

writ. The nullity against the seasine was,—that it contained three witnesses, and only one of them was designed; in so far as it bore Thomas Miller, and James ———, servitor to Pyeston. Now Miller had no designation, and James ———, who is called servitor to Pyeston, had no surname, and so *habetur pro nullo et non adjecto*. The Lords thought this nullity yet suppliable *quoad* Thomas Miller, (being before the Act of Parliament 1681.) But the question occurred to the Lords,—What if he designed a dead man? the mean of improbation *comparatione literarum*, or otherwise, was perished, seeing witnesses in seasines did not then subscribe. Others thought it alike, *in re antiqua*, whether the party designed was dead or alive; but the Lords, before they would determine whether it was suppliable or not, desired to see the decisions, how the current had hitherto run in such cases. See 7th February 1672, *Stuart* against *Kirkhill*.

The Lords, at last, thought it of dangerous consequence to allow the designation of dead witnesses, where they are not subscribing. Yet here, before answer, they allowed a proof to either party; the one to prove that Miller was then Pyeston's servant, and the other, that he was tenant in Hilton, conform to the designation given him, in another charter, of a creditor on the same estate. See 15th July 1664, *Cokil*; 24th January 1668, *Magistrates of ———* against *Earl Finlater*.  
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1697. January 19. CARMICHEL of BONYNGTON against WILLIAM BAILLIE of LAMINGTON.

I ALSO reported Carmichel of Bonyngton against William Baillie of Lamington; who, being charged on his bond of corroboration, suspended, that he ought to have an assignation to the first original bond granted by his curators, because it proceeded on a narrative that it was borrowed to pay a debt of his grandfather's to Mr Watson, which debt cannot be made appear; and he consigned it on that condition in Mr William Hamilton's hands, then Bonyngton's factor; which he offered to prove by his oath, or by his accounts given in to Bonyngton.

ANSWERED,—No such probation can be taken against his bond; neither can he be obliged to assign in prejudice of those whom Lamington is bound to relieve.

The Lords found Bonyngton had no prejudice to assign; and reserved all Lamington's curators' defences against him, when he should insist on the assignation.  
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1697. January 20. THOMAS FOTHERINGHAM of POWRIE against SIR JAMES OSWALD and CHARLES MURRAY of HALDEN.

PHESDO reported Thomas Fotheringham of Powrie, against Sir James Oswald and Charles Murray of Halden, for holding count to him for the price of 300