

1706. February 19.

The EARL of EGLINTON, and HUGH FLEMING, his Cedent, *against* ROBERT DURHAM, SON TO ADOLPHUS DURHAM.

No 573.

In an improbation of a bond by the indirect manner, the direct having perished, a variety of articles specified were not found sufficient, and the bond was sustained.

THOMAS HAMILTON of Boghead or Foulshiels grants bond, in July 1685, to the said Hugh Fleming for 1000 merks; Hugh, and the Earl his assignee, pursue Robert Durham, as heir of tailzie to his uncle Thomas. The writer, witnesses, and granter, being dead, Robert propones improbation and falsehood against the bond, by the indirect articles, (the direct manner being perished,) and consigned L. 40. Fleming abides at it *sub periculo falsi* as a true bond. The qualifications and presumptions urged to infer its being false were, *1mo*, That Fleming was a poor man, and never known amongst his neighbours to have so much money to lend; and if he had it, he could never have spared it for sixteen years, during all which time Thomas Hamilton lived after the date of the bond, but was never craved or demanded, neither for principal nor annualrent, till now that all are dead; whereas Thomas was most solvent, and both *volens et valens* to pay his debt. *2do*, The bond is signed at Glasgow, and that same day Thomas signs a tack at Swine-abbey, at a great distance, which proves him *alibi*. *3tio*, It will appear *comparatione literarum*, that there is a very observable diversity betwixt the subscription of this bond, and the other subscriptions contained in the sundry writs produced. *4to*, Smith of Browsterland, one of the witnesses, his subscription seems to be plainly razed and vitiated. *Answered*, The articles adduced have neither truth nor relevancy in them to infer falsehood. For as to the *1st*, Lenders of money are not bound to instruct their condition and ability; and some love not to be reputed rich and wealthy; and the bond confessing the receipt of the money, proves that he had it; and what though it had been a donation? and his lenity and civility of not craving it, infers no suspicion against the bond, many debts being longer owing than that; and the said Fleming has the repute of an honest man where he lives. To the *2d*, Glasgow and Swine-abbey are only 17 miles distant; and in July it was easy to be at both in one day; whereas the exception of *alibi* lies in a natural impossibility to be at these two in one day, in respect of their vast distance. As to the *3d*, It is not every variation in the shape of letters that will amount to a falsehood, especially when the writs are subscribed *ex intervallo*; for a bad pen, the distance of time, negligent writing, a man's age, or his indisposition and infirmity, may occasion a considerable alteration in subscriptions, and yet make no conviction of falsehood. To the *4th*, If there had been a design of forging it, it had been folly to have inserted three such famous known witnesses, but mean obscure witnesses would have fitted such a work of darkness better; and there is no material vitiation appears. And the writs produced for comparing the subscriptions may be as well charged with the suspicion of falsehood as this bond; and men's evidents must not be taken away by so slender presumptions. THE LORDS.

thought there might be some jealousy against the bond, but the qualifications adduced did not amount to a full proof, and therefore repelled the articles, and sustained the bond.

No 573.

Fol. Dic. v. 2. p. 267. Fountainball, v. 2. p. 329.

1707. November 14. SANDERS against SCOT and DONALDSON.

AN objection against a witness was reported by my Lord Register.— It was an improbation of a disposition made of some lands made by one Cruikshanks and Syme to John Donaldson writer in Banff, subscribed by two notaries for the parties, and four witnesses; which instrumentary witnesses being, by the direct manner of improving, adduced, (one of them being dead,) and two of them being examined, it was *objected* against the fourth, That *esto* he was *testis instrumentarius*, and so necessary, yet *res hic devenit in alium casum*, for he being apparent heir to the granter of the disposition, viz. his grandchild, and the granter being since dead, he is become his heir, and debtor by the clause of warrandice, and so he was plainly in the case of one who could tine or win in the cause; and his deposition could make the right fall, and so he gets back the land if the disposition were taken out of the field. *Answered*, There was nothing more ordinary than for parties to adhibit their sons and nearest relations witnesses to their subscribing of writs, and no law made them inhabile or incompetent; and a supervenient accident of his succeeding as heir to the granter, can never incapacitate him *ex post facto*, especially being an instrumentary witnesses, and the LORDS receiving all manner of trial in the expiscation of falsehood. Some were for receiving him *cum nota*; but it being evident, that he lay under some temptation to deny the deed, they superceded to examine him till the probation already adduced came to be advised; that if, from the circumstances, it appeared false or true, they might take measures accordingly of admitting or rejecting him. All the hazard is, if he die in the mean time, law reputes him for a proving witness.

No 574.

In an improbation of a writ, one who had succeeded in right of blood to the granter was examined as a witness only in presence of the Court, and *cum nota*.

1708. July 14.—THE Lord Banff being debtor by an heritable bond to William Cruikshanks in L. 800 Scots, William Syme his grandchild, by his daughter Jean Cruikshanks, serving heir to his goodsire, and claiming the bond, compearance is made for John Donaldson, notary in Banff, who produces a disposition to said bond by the said William Cruikshanks, in 1695, subscribed for him by two notaries and four witnesses; whereof the said William Syme, his grandson, being surprised thereat, raises improbation; and adducing the witnesses on life, one of them deponed, that he was never called to be a witness to that writ, but acknowledges it is very like his subscription. Another says, he cannot be positive but that it may be his hand-writing, but his memory cannot serve him now, after twelve years time, but he is sure he would never have subscribed witness, had he not seen the notaries sign, and heard them get war-