

No 246. past memory of man. This exception was found relevant, but the alleged custom was ordained to be proved by writ expressly or oath of party, and no otherwise, and so it was admitted to be proved, and not by instances of others, who having paid the like, bruiked for their lifetime; which was not found sufficient.

Act. ———.

Alt. *Miller.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 232. Durie, p. 227.*

No 247.

1626. December 6. STRANGER of MIDDLEBURG against EXECUTORS of SMITH.

IN an action pursued by a Stranger of Middleburg against the Executors of one Smith, for payment of a sum contained in the defunct's bond made in Flanders, which wanted witnesses inserted therein; the LORDS sustained the bond, albeit it was *alleged*, That it wanted witnesses, and so was null; because the pursuer offered to prove that it was the custom of the country that such bonds, albeit wanting witnesses, yet were effectual against the subscribers thereof; which the LORDS admitted to probation, but found, that that custom should not be proved by the declaration of witnesses, but by a testimonial of the Judges of the country.

Act. *Rig.*Alt. *Belsher.*Clerk, *Gibson.*

*December 8.*—IN the above-written action of the Stranger against the Executors of Smith, the defenders denied the subscription of the obligation to be the hand-writ of the alleged maker thereof, and so *alleged*, That except the same were approved by the pursuer, no action could follow thereon, seeing the same wanted witnesses. THE LORDS found no necessity of approbation, but that the defenders ought to improve the same, if they doubted of the subscription thereof; and the want of witnesses was not respected as a motive, thereby to urge the pursuer to approve in respect, as is above-written, that the pursuer was ascribed to prove that the custom of the country is, that such obligations are sufficient, albeit wanting witnesses inserted; and so being proved, he had no necessity further to approve, but the same ought to be respected as a perfect bond, and as any other bond in this country with witnesses, *quo casu* the defender behoved to improve, and the user of the bond needed not to approve the same.

*Fol. Dic. v. 2. p. 232. Durie, p. 242. & 243.*