No 63. [against Vallances Heirs, supra.]

suspender to Drumlanrig; it was desired to be suspended, because the suspender had never borrowed any sums, neither was there any cause of debt, whereby the suspender could be found debtor to the charger at any time, either at the making of that bond or before; which was referred to the charger's oath, and that the said bond was made upon hope and express condition, that such deeds should have been done by the charger to the suspender, and no otherways, which deeds and conditions were never fulfilled; and which point anent the said condition, whereupon the bond was granted, was offered to be proved by the witnesses inserted in the said bond, who were all *testes omni exceptione majores*. The Lords would not admit the same to be proved by the witnesses inserted, but only found that the condition whereupon the said bond was made, ought to be proved by the oath of the party, to whom the bond was given, or by writ, and no otherways. *See* Writ.

Act. *Stuart* & *Cunningham*. Alt. *Hope* & *Nicolson*. Clerk, *Scot*.

Fol. Dic. v. 2. *p.* 218. *Durie, p.* 205.

1627. *February* 22. Williamson *against* Tennent.

No 64. That a bond was deposited until performance of a condition, and that it had been surreptitiously taken away, was not allowed to be proved by the oath of the depositor, but only of the charger.

In a suspension betwixt Mr James Williamson and Joseph Tennent, wherein the said James Williamson *alleged*, He was wrong charged to pay L. 1000 conform to his bond, because the said bond was never delivered to the charger, but after the subscription thereof was deposited in Abraham Adamson's keeping, to be retained by him until the like sum addebted to the charger by the suspender's brother, should be discharged by the charger, which he hath not done, but by the contrary, in the depositer's absence, and by the knowledge or consent, either of the party or of the depositer, he hath opened the depositer's chest, and taken out the bond, and registered the same, and charged the suspender, which conditions he offered to prove by the depositer's oath. The Lords found this reason relevant to be proved only by the oath of the party charger, or writ, but not by the oath of the depositer, but found, that they would take the party's oath in presence of the depositer.

Act. *Nicolson*. Alt. *Stuart*. Clerk, *Hay*.

Fol. Dic. v. 2. *p.* 217. *Durie, p.* 280.

1628. *March* 21. Scot *against* Creditors of Dishington.

No 65. It was alleged, that a bond had been surrupti-

In a double poinding, Sir William Scot against the Creditors of Sir Thomas Dishington, the Lords found a bond produced by William Dishington, brother to Sir Thomas, one of the creditors, not to be a good writ, whereupon

No 65.
tiously taken from among the debtor's writs. Not allowed to be proved by witnesses, but the creditor examined.

he could desire to be answered as a creditor, seeing it was never delivered to him by the maker, but by the contrary, the same remained ever in the custody and keeping of the said Sir Thomas and his wife, after whose decease (Sir Thomas's self being then out of the country) the said William at his own hand, he being then in service with Sir Thomas's wife, took the bond out of a coffer pertaining to the said Sir Thomas, and told his wife where the same was among these other writs within her dwelling-house, where she died; which allegeance was found relevant, albeit the bond was since then registered by the said William, and that comprising had also followed at his instance thereupon; and because the proponer offered to prove the exception foresaid by witnesses, the Lords before they would give an answer to that, if it was probable by witnesses, (which they found hard to be done tending to destroy the bond) ordained the party to be examined *ex officio*, who being examined confessed the same, and so the bond was not sustained.

Act. *Cunningham*. Alt. *Stuart, Oliphant & Burnet*. Clerk, *Hay*.

Fol. Dic. v. 2. *p.* 217. *Durie, p.* 366.

1630. *January* 21. Earl of Murray *against* Dunbar of Burgy.

No 66.
A bond was not allowed to be taken away by witnesses, however honourable.

A bond of L. 10,000 granted by Burgy to the Earl of Murray, for desisting and quiting a criminal pursuit of slaughter and adultery, moved against Burgy, before the Justice, at the King's Advocate's instance, and at the instance of the nearest of kin to the party slain, (the Earl of Murray not being pursuer of the criminal pursuit himself, and the only doer, but the assister, and prosecutor thereof,) this bond being desired to be reduced at Burgy's instance, because it was alleged to be given at the intercession of their noble friends, who interponed themselves to mediate and accord betwixt this pursuer and the Earl of Murray, only for show, and to be a mean to preserve the Earl in his honour, and for his contentment, but not with any intent of exaction; which was offered to be proved by the oaths of the friends who interceded, being all noblemen of eminent quality, and of dignity, against whom no exception in law could be taken, viz. the Lord Lorn, the Lord Gordon, the Earls of Winton, Linlithgow, and Galloway; this reason was not found relevant to be proved by their oaths, neither would the Lords take their oaths *ex officio*, for they found, that witnesses, how honourable and noble soever they were, could not be received to destroy the bond; and the bond being also desired to be reduced, because it was granted for desisting from a criminal cause against the law, which prohibits parties to make such transactions upon criminal pursuits, and appoints the accusers making such transactions to be punished, as is statuted per Senatus Consultum Turpillianum D. et C.; for albeit transactions, per L. 16. Transigere, C. De Transact. be permitted, which are made super crimine, sanguinis pænam