

1636. *January 30.* SIR WILLIAM SCOTT of Harden *against* The LADY BONINGTON.

SIR William Scott of Harden took to improve, by way of action, the executions of an inhibition served by the Lady Bonington against her husband's heirs. In the executions quarrelled, which was at Selkirk, there were three witnesses, whereof one improved directly, who deponed that he was not there at all; the other two declared that they never remembered of any such thing. The officer abode by the truth of the executions, and was divers times confronted with the witnesses, who nevertheless abode by their first depositions. Afterward the defender got leave to give in articles of approbation, whereupon sundry witnesses were examined. The effect of that which her witnesses said for approving of the deed, was, That the common fame of the country was different, as men stood affected to the parties: That the officer was ever held for an honest man, and of a good reputation; that, being upon his death-bed, he affirmed it to be a true deed, and done before the witnesses inserted in his executions. There were likewise other circumstances that made for the verity of it; as, that the same inhibition was truly executed that same day at Peebles, and sicklike was registrat at Edinburgh. In regard of all which, the defender contended that he ought to be assoilyed from the improbation, especially since, by the consent of the most part of the doctors, *Quando testes descripti in instrumento dicunt se non recordari, non reprobatur instrumentum per hujusmodi testes; cujus rationem reddit Bartol. ex Innoc. quia, contra ipsum nihil probatur: Tanta enim est fides notarii, quod ei debet credi de presentia testis, licet testis ipse se dicat non recordari.*—Act. Paul. Cons. 205. On the other part, the pursuer did contend, That one of the witnesses improving directly, and the rest saying both of them, *Non memini*, the executions behoved to be decerned to make no faith, it being all one as if there were no witness at all; for there are other doctors of no less authority, and Felinus by name, that hold, *Quod quando essemus in scriptura quam oporteret coadjuvare testibus, et per se fidem non faceret, si testis diceret quod non recordetur, vitiatur scriptura: Nam ex quo dicunt se non recordari, statim scriptura spoliatur eorum auxilio.* The Lords having considered the whole circumstances, all in one voice assoilyed from the improbation.

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1636. *February 9.* MURRAY *against* MURRAY.

IN an action pursued by one Murray against another Murray, the defender having alleged that he was served and retoured heir to such a person, It was replied, That he should not be heard to obtrude his service and retour; because he offered to prove, by the defender's own oath, that he was a bastard, and so not in kindred to the defunct, and consequently the service and retour was null. Duplied, Oppones his retour standing, which could not be taken away *hoc ordine*, but behoved to be reduced. The Lords sustained the reply to be proven by the defender's oath.

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