*** Auchinleck reports this case:

No 25.

ARTHUR STRATON pursues his mother Robertson, for removing from the lands of Kirkside. It is *excepted*, By his father's testament it was appointed, that his mother should bruik the whole heritage during her lifetime, and that if they could not agree in household, that she plenish a little room called Scotston, and he should give to his sister the half of the tocher, and to dispone to them the heritable title of a tenement in Montrose; conform to which the defender had plenished and delivered to her the said room, whereby he had fulfilled the said testament. To which it was *answered*, That his father could not make any such reversion by way of testament; and as to the fulfilling, it could not be proved by the alleged accepting of the plenished room, but must be proved *scripto vel juramento partis*; which the LORDS sustained.

*Auchinleck, MS. p.* 148.

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1636. *February* 5. HECTOR ACHESON *against* EUPHAME HERRING.

No 26.

UMQUHILE Thomas Hamilton in Leith, and Euphame Herring his spouse, gave bond to Hector Acheson in the Pans, for payment to him of L. 120 for some ale that the said Hector had furnished to them. After Thomas's death, Hector pursues his relict to make payment conform to her bond. *Alleged*, The bond was null *quoad eam*, as being given by her *stante matrimonio*. *Replied*, He offered to prove, that she had promised to pay the same since her husband's decease. The defender *contended*, That her promise was only probable by writ or oath, the matter being of importance, above L. 100, and likewise tending to make a bond null in law effectual against her. THE LORDS notwithstanding found it probable *prout de jure*.

*Fol. Dic. v.* 2. *p.* 216. *Spottiswood*, (PROBATION.) *p.* 244.

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1665. *June* 21. CHRISTIAN BRAIDIE *against* LAIRD of FAIRNY.

No 27.
A holograph writ proves not *quoad datam*, but the date may be proved by witnesses of unquestionable character.

CHRISTIAN BRAIDIE, relict of James Sword, having inhibited George Glasford upon his bond, pursues a reduction of a disposition, granted by George to the Laird of Fairny, of certain lands, as being done after her inhibition. Fairny having produced the disposition, it bears to be holograph, whereupon it was *alleged*, That it was null by the act of Parliament, requiring all writs of importance to be subscribed before witnesses, and this disposition wanted witnesses. The defender offered to prove it was holograph. The pursuer *replied*, That the question being *de data*, not that it was subscribed, but when it was subscribed, whether prior or posterior to the inhibition, witnesses could not be received,

No 27. where the question was not against the granter of the writ, or his heir, but against a third party.

The Lords, before answer, did appoint witnesses to be examined, *omni exceptione majores*, who being now examined, both deponed that they saw the disposition subscribed, and that it was long before the inhibition.

It was then *alleged*, That this being done, but before answer, it was entire to discuss the relevancy of the allegeance, whether a date may be instructed by witnesses; 2*do*, Albeit witnesses *omni exceptione majores* were receivable, for such an effect, that these witnesses were not such, the one being but a town-officer, and the other procurator-fiscal of a Sheriff-court, especially seeing there were strong presumptions of fraud, as that nothing followed upon this disposition; that it remained clandestine for several years; that thereby the disponer becoming bankrupt, had excluded some of his creditors, and preferred others; and that there was no *penuria testium*, seeing both these witnesses assert they saw it subscribed; and the one deponed that he dited it so, that their names might easily have been inserted; and therefore it must be thought, it was done for some fraudulent intent, as to be of an anterior date to the inhibition; and therefore, in such a case, the witnesses should be persons of fame and known reputation. It was *answered*, That the witnesses adduced were sufficient, seeing they were above exception; 1*mo*, Because they were publicly called to the bar, and received without any objection, so that now none is competent; 2*do*, That there is no relevant exception yet alleged; for the being a town-officer is no legal exception, neither to be of a mean condition, nor to be of a small estate, if he were worth the King's unlaw; and for the presumptions, they were but mere conjectures; for it was free for a man to make his disposition all with his own hand, or before witnesses; and what his motives have been to it, cannot be known, and so ought not to be presumed fraudulent, *nam nullum vitium præsumitur*.

The Lords having fully considered this case, and having debated, whether witnesses at all were receivable to astruct the date of a holograph writ, and also, whether these witnesses adduced were sufficient; they found, that in respect of the presumptions of fraud adduced, these two witnesses were not sufficient to astruct without further adminicles, either by witnesses of unquestionable credit, or by writ.

*Fol. Dic. v.* 2. *p.* 215. *Stair, v.* 1. *p.* 284.

Gilmour reports this case:

1665. *June.*—Christian Braidie being infeft in certain tenements and acres in Coupar of Fife, belonging to her debtor, she pursues the Laird of Ferny, Jamison and Glasford, for reducing of certain dispositions made by her debtor, *ex capite inhibitionis*; in which reduction the dispositions being produced, it was *alleged*, That this Ferny, who was called as apparent heir to his father, should be assoilzied, because the disposition was anterior to the inhibition, and the infeftment thereupon anterior to the pursuer's apprising or infeftment. *Answered*, That the disposition was null, because it wanted witnesses; and al-

beit it mentioned holograph, as written with the disponer's own hand, yet that could not prejudge a third party a lawful creditor, who had served inhibition, else it should be in the power of any to antedate writs at their pleasure, to prejudge creditors and others. No 27.

THE LORDS, before answer, ordained the defender to instruct the verity of the date by witnesses, *omni exceptione majores*.

And the defender having used two witnesses only, one of them being a procurator in the Sheriff-court of Coupar, and the other being a town-officer,

THE LORDS found they were not such witnesses as would astruct the verity of the date, their depositions being most suspected, in regard they declared they saw the disposition subscribed, and one of them, that he had dictated the same, whereas they might very easily have been subscribing witnesses, if their depositions had been without and above exception. THE LORDS also considered, That no infeftment had followed till near two years after the date, and long after the inhibition; and therefore they ordained Ferny to use further probation for astructing the date, with certification, they would reduce, notwithstanding of the probation of the two witnesses already adduced.

*Gilmour, No* 148. *p.* 106. No 28.

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1665. *June* 29. RICHARD THORNTOUN *against* WILLIAM MILN.

THORNTOUN as assignee by Patrick Seaton, having obtained decreet before the Bailies of Edinburgh against William Miln, he suspends and alleges compensation, upon a count due by the cedent, and a ticket subjoined by him, acknowledging the count to be due, subscribed before witnesses, which must prove against this assignee. It was *answered*, That the ticket wanted a date, and so could not not instruct itself to be anterior to the assignation. It was *replied*, That it was offered to be proved by the witnesses inserted, that it was truly subscribed before the assignation.

Which the LORDS sustained.

*Fol. Dic. v.* 2. *p.* 215. *Stair, v.* 1. *p.* 291.

*** Gilmour reports this case:

1665. *June*.—RICHARD THORNTOUN an Englishman, as having right from Patrick Seaton to a ticket of L. 641 granted by William Miln to him, for certain merchant-ware, obtains a decreet before the Bailies of Edinburgh for payment, against the said William Miln, who suspends and intents a reduction upon this reason, that the Bailies had repelled a most relevant reason of compensation, founded upon a subscribed account, by which the said Patrick Seaton acknowledges himself debtor to the suspender for L. 126, for merchant-ware, also expressed in the count, dated in March 1663, whereas the assignation was