

The Lords thought it would be sufficient amongst merchants, though it wanted witnesses, but being unwilling *via ordinaria* to allow of such a writ, or subscription, for which we have neither custom nor decision; yet in respect of the decret, and of the the alleged custom so to subscribe, they before answer, ordained the oaths, *ex officio*, to be taken of the writer of the bill, if he could be condescended on by either party, and of the witnesses who saw Johnstoun write this mark or receive the money, for which the bill was granted. See No. 6. *infra*.

Stair, v. 1. p. 105.

No. 4.

1667. November 16. LAIRD of CULTERALLERS *against* SILVESTER CHAPMAN.

Culterallers having pursued Silvester Chapman for a bond of 200 merks, subscribed by the initial letters of the defender's name;

The Lords sustained the pursuit, the defender being in use thus to subscribe; and that he did subscribe this bond, the notary and three witnesses insert being examined, they proved the defender's custom so to subscribe, but as to the actual subscribing this bond, two were affirmative, and two were negative, denying their subscription, deponing that they remembered not they saw the defender subscribe. The pursuer's own oath was also taken *ex officio*, who affirmed the truth of the subscription, and that the witnesses insert were present. The question arose whether the verity of the subscription were proved.

The Lords found that it was sufficiently proved, the pursuer being a man above all suspicion, and no improbation proponed.

Stair, v. 1. p. 485.

No. 5.

A subscription by initials before a notary and witnesses was supported by the party's oath, in opposition to the contradictory evidence of the instrumentary witnesses.

1669. February 1. ROBERT BROWN *against* JOHNSTON of CLACHERIE.

Robert Brown pursues Johnston of Clacherie, for payment of £1200, contained in a bill of exchange, subscribed before two subscribing witnesses, and marked with Clacherie's hand. There were several other bills for greater sums produced, marked with the like mark; and none compearing for Clacherie;

The Lords caused examine the witnesses insert, who deponed that Clacherie was accustomed so to subscribe, and one of them deponed, that he saw him put this mark to the bill in question. Several others deponed, that they had accepted such bills in regard of his custom, and had obtained payment from him, without any debate thereupon.

The question arose to the Lords, whether a sum above £100. could be proved by such a writ, that had only a mark; and having demurred upon it before, till they should try if any such case had been sustained formerly, and none having been found sustaining any writ not being subscribed with the whole name, or at least the initial letters of the debtor's whole name; it was offered by some, that

No. 6.

A bill subscribed by a mark before witnesses, was sustained, it being proved to be the party's custom so to subscribe.

- No. 6. Clacherie's oath might be taken, *ex officio*, or *de calumnia*, not simply to refer the debt to his oath, but whether that truly he set to this mark, before these witnesses; but Robert Brown being a dying the Lords would not defer, but decided the case, and found that this writ being a bill of exchange among merchants, and Clacherie's custom so to grant bills of greater importance than this, being clearly proved, and none appearing for him, they decerned against him upon the bill and testimonies, many of the Lords being of different judgment, and that it was of dangerous preparative to encourage forgery; but it was sustained only in all the particular circumstances aforesaid, and not to be a general rule.

Stair, v. 1. p. 595.

1674. January 14. OGIIVIE against EARL of FINLATOR.

No. 7.
A bond written upon two sheets sustained against the cautioner, though side-scribed only by the principal.

Thomas Ogilvie pursues the Earl of Finlator, as representing his father, for payment of a bond wherein his father was cautioner, who alleged absolvitor, because the bond being written on two sheets, and only a part of the clause of relief upon the last sheet, the margin was not subscribed by the cautioner; so that it must have been a collusion betwixt the principal debtor and the creditor, which is the more evident, that the bond hath lain over for many years, without payment of either principal or annual. It was answered, that the principal having subscribed the margin, it was never accustomed for cautioners to subscribe the same, and the last sheet, and the clause of relief thereon mention the principal and cautioner.

The Lords sustained the bond.

Stair, v. 2. p. 252.

1681. June 21. COUTS against STRAITON.

No. 8.

An assignation of a bond of 2000 merks, signed only by initials, being challenged in a reduction by the alleged granters as false; the Lords found it necessary to be proved, not only that the party had been in use formerly so to subscribe, but also that he did actually subscribe the writ challenged, the first *prout de jure*, the other by the instrumentary witnesses only; it being of dangerous consequence to carry considerable rights by such subscriptions, which may be easily counterfeited, and can hardly be redargued *comparatione literarum*; therefore they would sustain no extrinsic witnesses, though it was reported there was only one of the instrumentary witnesses alive, the assignation being of an old date, and nothing having followed thereupon.

Stair.

* * This case is No. 12. p. 6842. *vide* INDIVISIBLE.