

1670. July 13.

RUTHERFORD *against* RUTHERFORD.

No 85.

Found in conformity with Williamson against Tenant, No 64. p. 12305.

WILLIAM RUTHERFORD, younger of Bankend, being charged at his father's instance to make payment of a bond of 1200 merks, did suspend upon this reason, that the bond was consigned blank in the creditor's name in his father's hand, to the behoof of his brother Andrew, who had granted a discharge thereof, which was offered to be proved not only by the writer and witnesses inserted, but by the charger's own sons-in-law and nearest friends the time of the deposition. THE LORDS, notwithstanding, found the letters orderly proceeded, unless it were offered to be proved by the charger's oath, whom they declared they would ordain to depone in presence of all these witnesses; but the bond being now filled up in his name, and he being father to the suspender, they found it could not be taken away but by his own oath, and not by witnesses, albeit they were above all exception, and near relations.

*Fol. Dic. v. 2. p. 217. Gosford, MS. No 304. p. 132.*

1671. February 14.

ALEXANDER NAPIER *against* The EARL of EGLINTON.

No 86.

The Lords *ex officio* examined witnesses as to the custody of a bond, but not as to the payment of it.

THERE was a bond granted by the Laird of Minto as principal, Lugton, James Crichton, and the Earl of Eglinton cautioners, *in anno* 1641, to Adam Napier and his spouse in conjunct fee. Alexander Napier, as heir to his father, pursues this Earl of Eglinton, as heir to his father, for payment, who *alleged*, Absolvitor, because Minto having disposed his estate to his son, under express provision to pay the debt, the same was satisfied by Minto younger, and was retired lying by him a long time, or by Robert Urie, who had the trust of Minto's affairs and writs, and Minto younger being *lapsus bonis*, and Robert Urie being dead, the pursuer had either practised with Minto upon his necessity, or upon Robert Urie's friends to give him back the bond; and for evidence that the bond has been satisfied and retired; *imo*, It had lain dormant above these thirty years, without either payment of annualrent, or any diligence; *2do*, The late Earl of Eglinton being forfeited by the usurpers, his creditors were appointed to give in their claims, or else to be excluded, and yet no claim was given in for this debt; and; therefore, craved that witnesses might be examined *ex officio* for proving of the points foresaid. The pursuer *answered*, That it was an uncontroverted principle in our law, that witnesses could not prove payment of any debt due by writ, nor take the same away; and as to the pretences adduced by the defender, they import nothing, for the delay of seeking payment, or claiming the sum, was because the said Adam Napier was with Montrose in the war, and his heir remained a minor, and his wife was married to another