

No 31.
whole of it,
where the
witnesses
proved the
verity of the
subscription.

disposition was false in the date, and that the defunct was *alibi* at the time it appears to have been subscribed; and, therefore, is false in all. It was *answered*, That there was only an error in the date, in respect the same right having been conceived formerly in favour of another, Dumbaith gave order to draw it over in favour of the defender *verbatim*, and the writer ignorantly wrote over the date as it was in that first disposition, which can noways annul the writ, especially seeing it was offered to be proved by the witnesses inserted that the writ was truly subscribed by Dumbaith, and them as witnesses, when he was in his *liege poustie*, against which no allegiance of *alibi* by other witnesses not inserted can be respected.

This having been disputed in the English time, the witnesses were examined before answer, by three of the Judges, and now the cause was advised.

THE LORDS found the defence relevant to elide the improbation, that the writ was truly subscribed before the defunct was on death-bed; and found the same proved by the witnesses adduced, and thereafter assolizied.

Fol. Dic. v. 2. p. 215. Stair, v. 1. p. 449.

1667. July 16.

HAMILTON *against* SYMINGTON.

No 32.

A BOND was found null, which being written on two sides, on that side where the subscriptions were, there was nothing but the clause of registration, the other side was entirely filled up with another hand, without any subscription, so that it appeared to have been the last sheet of a writ taken of and filled up upon the back by the pursuer; but being before the act of Parliament 1681, the LORDS declared, that if the pursuer could adduce writs or adminicles, or witnesses, to astruct the verity of the bond, they would hear him upon the same.

Fol. Dic. v. 2. p. 215. Stair.

*** This case is No 2. p. 382, *voce* ALIMENT.

No 33.
Witnesses
were *ex officio*
sustained to
take away an
exception,
that the bond
craved to be
paid was *in-*
strumentum
apud debito-
rem; the man-
ner of deli-
very being
most special.

1671. Jane 15. ELLIS of Southside *against* CHARLES CASS.

SOUTHSIDE having right to a bond granted by Richard Cass, did transact therefor with Charles Cass's curators, as being heir, or apparent heir, to the said Richard, for which he got bond from the said Charles, with consent of his curators, for 5500 merks; against which transaction, Charles being reponed by a decret of reduction, and both parties put in their own place, Southside did pursue the said Charles Cass, as representing Richard, for payment of the said bond. It was *alleged* for the defender, That the bond, which was the ground of the pursuit, was in the defender's own hands and possession, and *instrumentum apud debitorem repertum præsimitur solutum*. It was *replied*, That the said

bond was only delivered in contemplation of the transaction ; and the pursuer craved, that the depositor, in whose hands the bond was put, with a translation thereto, and Mr John Smith, who were the defender's curators, and others who meddled in that transaction, might be examined *ex officio*. It was *duplied*, That the bond being now retired, and in the defender's keeping, that debt could not be proved but *scripto vel juramento*. THE LORDS did sustain the summons and reply, notwithstanding of the defence and duply, and ordained witnesses to be examined *ex officio*, because the manner of the delivery of the bond, and the cause thereof, were so evident, and the probation so strong and pregnant.

Fol. Dic. v. 2. p. 216. Gosford, MS. No 349. p. 168.

No 33.

1671. November 22.

PITTILLO against FORESTER.

No 34.

A BOND being vitiated *in substantialibus*, and this consequently presumed *dolose* done, the LORDS found it not relevant to be proved by the instrumentary witnesses that the writ was vitiated at subscribing ; for though the tenor of a bond may be proved by witnesses, this is *ex necessitate*, which obtains not in the present case ; for, in executing writings, it is easy to avoid vitiations.

Fol. Dic. v. 2. p. 213. Stair.

* * * This case is No 217. p. 11536, *voce* PRESUMPTION.

1677. July 3.

MR WILLIAM AIKMAN against JOHN AIKMAN of Cairnie.

No 35.
The delivery back of a bond uncanceled must be proved *scripto vel juramento* of the receiver, if no force be alleged, and witnesses here cannot be received *ex officio*.

IN the action betwixt the said parties, wherein, by interlocutor, the LORDS did find, that the provisions granted by Mr William, who was then apparent heir to his father, in favour of his mother-in-law and her children, were not obligatory, as being founded upon a contract of marriage, whereby the said Mr William was to receive a considerable tocher, seeing the marriage was dissolved, within year and day, by the decease of his future spouse ; it was farther *alleged*, That, by a prior bond and contract, he was obliged for the same provision. It was *replied*, That, if any such bond was granted, it was thereafter cancelled, and was not obligatory. It was *duplied*, That it was offered to be proved, by witnesses of near relation, that the bond was only borrowed up upon trust from the father, and cancelled by the son, without his knowledge or order. It was *answered*, That the same was only probable *scripto vel juramento*.—THE LORDS having advised, if, in this case, they might examine witnesses *ex officio*, as being an alleged trust betwixt father and son, did at last find, that it was only probable *scripto vel juramento* of the son, there being no force alleged, but a naked trust, especially seeing the only parties concerned were a mother-in-law and her children. See APPENDIX.

Fol. Dic. v. 2. p. 116. Gosford, MS. No 989. p. 667.