

kept by his father, and never delivered to the children, and had no clause to be valid without delivery, so that at best they were in the father's power; and the mother did depon, that she found them in her husband's pockets after his death, and so they were never delivered, and two of the children were majors, and out of the family: And it was further desired, that witnesses *ex officio* might be examined, for proving that the father declared that he would not burden his son with these provisions, which is sufficient to shew the change of his mind and revocation of the bonds, especially seeing they were not in satisfaction of the executry, which was considerable, and fell to the children, and the estate was very mean, and unsuitable to such provisions; or at least that the mother, out of whose hands the bonds were gotten, and other witnesses, might be examined, that the father on his death-bed ordered the mother to take the bonds, and cancel or burn them.

THE LORDS sustained the bonds, and would not admit of witnesses to be examined as to the father's declaring that he would not burden the son with these bonds, which could but declare his present purpose, which was mutable and ambulatory, seeing he did not cancel the bonds; but allowed witnesses to be examined, that when he was on death-bed, he gave his wife warrant to take the bonds and cancel them, and appointed her oath and other witnesses to be taken for that effect.

Fol. Dic. v. 2. p. 218. Stair, v. 2. p. 228.

1674. January 22.

SIM against ENGLISH of Murdistoun.

JAMES SIM having charged English of Murdistoun upon a bond of borrowed money, he suspends on this reason, that albeit the bond bear borrowed money, he offered him to prove by his oath, that the true cause was for the price of a mare which he bought for this sum; and offered to prove by the witnesses at the bargain, that it was upon express condition that he might take the trial of the mare for so many days, and restore her if she pleased him not, and that he sent her back within the time; and also, that the charger obliged himself to uphold her to be free of the scab, whereof there being some appearance upon the skin, he warranted it that it was but harvest rain. It was answered, That the manner of probation could not be divided, but behoved to be all referred to his oath, otherwise witnesses would take away writ.

THE LORDS found, That the cause of the bond being proved by the party's oath to be a bargain, the conditions of the bond might be proved by witnesses.

Fol. Dic. v. 2. p. 221. Stair, v. 2. p. 255.

* * * Gosford reports this case:

IN a suspension raised at Murdistoun's instance, who was charged upon his bond to make payment of L. 13 Sterling to Sim, upon this reason, that albeit

No 90.

No 91.
Witnesses
were admitted to prove
the conditions
of a bargain,
though a
bond might
be evacuated
thereby.

No 91.

the bond did bear borrowed money, yet it was offered to be proved by the charger's oath, that the true cause of the granting thereof was for the price of a mare sold to the suspender as good and sufficient, and which the charger did oblige him to take back again, in case of any fault, within eight days thereafter, which is offered to be proved by the comuners who were present at the bargain; it was *answered*, That the charge being founded upon a bond of borrowed money, which could not be taken away but by the charger's oath or writ as to the cause thereof, so, albeit the cause were confessed, the promise to accept back thereof was not probable but by the charger's oath. It was *replied*, That it being confessed that the bond was granted for another cause than for borrowed money, viz. for the price of a mare, the same being a merchant bargain, the condition thereof was probable by witness, and whether the same was sufficient or insufficient. THE LORDS finding that the bond was confessed to be for the price of a mare, it was then reduced to the nature of a merchant bargain, in which case, if there was any latent vice, the buyer might prove the same by witnesses; and therefore, ordained the comuners who were present at the bargain to be examined; but as to any promise of taking back again, albeit there was no latent disease, they found it not probable by witnesses.

Gosford, MS. No 678. p. 400.

1675. *January 22.* JEAN MAXWELL *against* Mr WILLIAM MAXWELL.

No 92.
The condition of delivery of a bond, allowed to be ascertained by oath.

MR WILLIAM MAXWELL, Advocate, being pursued at the instance of Jean Maxwell, natural daughter to Sprinkel, for 5000 merks, alleged due to her by bond, granted by the said Mr William, which she did refer to his oath; did give in a qualified oath, declaring, that he had granted a bond to the pursuer, at the desire of her said father, but the same was never delivered, and was so far from being effectual, that by the express order of Sprinkel, he was not to deliver the same to the pursuer without his warrant, and that he had given him order to destroy the said bond, in consideration that he was not satisfied with the pursuer's carriage, and that he had left her a legacy, which the defender had paid. This quality was thought to be so intrinsic, that his declaration could not be divided, so as to prove the granting of the bond, and not the quality, specially seeing the said quality was adminiculate with letters, which the said Mr William did produce, which were written by Sprinkel to the same purpose; yet by plurality, it was found, That his oath proved the libel, and decret was given against him. Thereafter the said Mr William obtained a suspension upon that reason, that the decret was extracted by favour of the clerks, not without precipitation, after that he had applied to the Lords, and desired that the case might be reconsidered; and that the LORDS had ordained the decret to be brought back, and because the party refused, they past a suspension.