

1681. *February 18.* JAMES ALSTOUN *against* WALTER RIDDEL.

JAMES Alstoun pursues Walter Riddel sub-clerk of the bills, for payment of a sum due by Broomhall, which being suspended, he, for a cautioner, did accept of a false bond in name of William Norvel in Culross, who is dead several years before, without any attester; albeit the pursuer required him, by instrument, to take sufficient caution; and being upon the place, as the instrument did certify, Walter ought to have known the cautioner, or had an attester; or at least ought to have acquainted the pursuer what cautioner was offered, who would have told him that the cautioner was dead several years before the date of the bond of cautionary.

The defender ALLEGED, That he was not liable, seeing it is known that there was such a responsal person dwelling in Culross, in whose name the bond of cautionary was offered; and he could not know the certainty of his death, or know his hand-writ: and denied the truth of the instrument, which is not probative, unless it were asserted by the witnesses, seeing it hath no warrant in writ.

The Lords having ordained the procurator, the notary, and witnesses to be examined upon the truth of the instrument; one of the witnesses was dead, and the other deponed he remembered not; but the procurator deponed, that the contents of the instruments were true; and likewise the notary, Cairns, who was *suspectæ famæ*: and there were two declarations produced under his hand, acknowledging two instruments formerly given out by him to be false: Whereupon the question arose, whether the instrument was astructed or improven.

The Lords found the instrument astructed, albeit it had but two witnesses,—the one dead, and the other remembered not; seeing the notary and procurator, though suspected, astructed the same: for, if instruments were improven, when the witnesses deponed they remember not, but are not positive that they were not witnesses, or that they were not in that place; most of instruments, even of seaisine, resignation, and the like, would be improven; seeing it is impossible for witnesses that are but overly required, to remember for any considerable time, not having subscribed the instrument, that by their knowledge of their subscription they might affirm the same.

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1681. *February 25.* Mr GEORGE BANNERMAN *against* DUNDAS of MORTON.

Mr George Bannerman pursues reduction of a decret absolvitor upon a process at his instance, against one Hamilton, as principal, and Dundas of Morton, and Hugh Sinclair, cautioners in a bond, whereunto he had right by progress: the cautioners were assoilyied; the reason of the decret being, that he passed from them. The reasons of reduction were, *first*, That this decret was unwarrantably extracted, having been scored in the minute-book, as yet appears by the same, and being extracted after Mr George went abroad. *2do*. Because the assertion of the clerk cannot instruct that he passed from the cautioner, un-

less it had been subscribed under his hand ; for, though the assertion of the clerk may instruct a passing from *pro loco et tempore*, which only *perimit instantiam*, yet it cannot a passing from *simpliciter*, which *perimit causam*. 3tio. The decret, being unwarrantably extracted, must be turned into a libel ; at least turned back unto the minute, as if it had not been extracted ; and therefore, albeit the pursuer had passed from the cautioner simply, he may resile before a warrantable extract.

It was ANSWERED, to the *first*, That the scoring of the minute-book can prove nothing *ex intervallo* ; but this decret was pronounced four years ago ; and it were of dangerous consequence to reduce decreets, if not recently quarrelled, upon scoring them in the minute-book, which might be done by any hand ; and there is no reason to put all decreets in the power of the keeper of the minute-book. To the *second*, Whatever is ordinary to be proponed without writ, is sufficiently instructed by the clerk's minutes, and extended decret ; for, upon his assertion, depend all the interlocutors, both of relevancy and probation, and it is very ordinary to pass from some defenders *simpliciter* ; but, if there were a decree of consent of special nature, it behoved to be upon a subscribed warrant.

The Lords considering that the decret was extracted when Mr George was abroad, they did take the oath of the keeper of the minute-book ; and he deponing *affirmativè*, they did reponè against the decret, as if it had been unextracted ; and found that Mr George might resile before a warrantable extract : and so had no need to determine whether his passing from *simpliciter* required his subscription.

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1681. *February 25.* The COMMISSIONERS of the BORDER *against* ELLIOTS.

THE Commissioners of the Border having apprehended Robert Elliot upon an accusation of theft, there were two Elliots gave bond to present him to the Border-court, at Jedburgh, the 25th April 1676, or at any other time or place thereafter the Commissioners of the Borders pleased, under the pain of 5000 merks, upon six days warning, allenary. And, in 1680, they summoned them, upon six days, to produce him again at Jedburgh ; and, upon their failie, decerned them in 5000 merks. And having obtained letters of horning upon the said decret, by deliverance of the Lords, and having therewith charged the said cautioners, they gave in a bill of suspension. And the Lords having appointed the cause to be heard upon the bill, before report, there was an address made to the council, that the council would, by their act, prohibit the meddling with the sentence of the Commissioners of the Border : they being a commission of many eminent persons and having their commission under both the Great Seals of Scotland and England, and being a supreme criminal court, not subordinate to the Justice-General,—the Lords of Session, who have no criminal jurisdiction, could not meddle with their sentence, but should refuse all bills of advocacy or suspensions thereanent.

The matter being debated in council sharply enough, it was shown, That the Lords of Session were the King's ordinary council in matters of right, as the