

assigned apprising were greater than those due to the assignee; and the retiring of the assignation and apprising was offered to be proven by witnesses.

No 103.

The allegiance is only relevant to be proven *scripto vel juramento*; and it were a dangerous preparative to take away men's rights by witnesses, it being customary for apprizers to have blank assignations lying by them, till they meet with a merchant.

*Replied,* The assignee being dead, his oath cannot be had; but it is offered to be proven by the cedent, Dean-of-Guild Hamilton, and other witnesses, that the apprising, with the assignation, was delivered to Cromarty.

THE LORDS found the allegiance only probable, *scripto vel juramento*.

*Fol. Dic. v. 2. p. 218. Harcarse, (COMPRISINGS.) No 335. p. 81.*

1696. June 19.

ROBERT BRUCE, Petitioner.

No 104.

ROBERT BRUCE of Bordy, by a petition, represented, that he had granted bond to the deceased Daniel Nicolson, for 1000 merks, bearing borrowed money, yet truly it was a salary for agenting his law business, and which, being now assigned to Bailie John Murray, he craved the Lords would, *ex officio*, examine the writer, and subscribing witnesses, in the bond, anent the true cause of it; which being proven, it might be declared null *condicione, ob causam datam causa non secuta*. THE LORDS refused this bill; for they considered whatever might be done for expiscation where the writ bore alienary onerous causes in the general; yet where it bore *speciatim ex causa mutui* the same could not be cancelled, save only *scripto vel juramento* of the creditor, and which mean of probation he had omitted to crave, though Daniel was several months in prison before his execution. Some may think strange, why witnesses should be allowed to prove a trust, and not to qualify the narrative of a bond: only trusts are more frequent in relation to heritable rights.

*Fol. Dic. v. 2. p. 221. Fountainball, v. 1. p. 722.*

1697. February 3.

THOMAS DRUMMOND of Ricarton *against* THE CREDITORS of Sir WILLIAM NICOLSON.

No 105.

I REPORTED Thomas Drummond of Ricarton against the Creditors of Sir William Nicolson. He and Ricarton were bound as conjunct principals in two bonds, the one for 6000 merks to Mr Edward Wright advocate, and the other of 4000 merks to Sir John Young of Lenny. Ricarton *alleging*, That he was but on the matter cautioner in both, though, to please the creditors, he had bound as *correus*, he raises a declarator against Sir William, to have him discerned to relieve him of the whole 10,000 merks; but Sir William dying *medio*

Found, by a narrow plurality, that witnesses might be admitted to prove, that one of the co-obligants in a bond, was cautioner only.

No 105.

*tempore*, and thereby having lost his oath, he gives in a bill to the Lords, in 1687, craving witnesses might be examined *ex officio*, to lie *in retentis*, for proving that Sir William was truly principal in both the debts, and the money was paid to him, and applied to his use, and that there were sundry treaties and communings, where Sir William was content to give him a bond of relief; but he craved it might bear an obligation to pay and retire the bonds betwixt and a precise day, at which Sir William's lawyers scrupling, he died ere it was perfected. THE LORDS allowed witnesses to be examined on this bill; and the same coming now to be advised, the Creditors of Sir William contended, seeing it was before answer, and the relevancy yet entire, the procedure was altogether illegal, seeing the witnesses were neither old nor valetudinary, nor any then to contradict and defend; and the matter was nowise probable by witnesses, tending to take away clear writs, and to prove the omission of words, wherein witnesses are very liable to mistake; and though matters of fact *cadunt sub sensu*, and so may be proven by witnesses, yet delivery of money is not, because, though witnesses see the numeration, yet *non constat quo animo* it is given, and it may be upon quite another account than they apprehend it to be. *Answered* for Ricarton, That there is nothing more ordinary for the Lords than to allow witnesses to be examined to lie *in retentis*, being a *casus arbitrarius*, and much in the Judge's discretion; and though *regulariter* writ cannot be taken away by witnesses, yet it suffers many exceptions; for how many bonds have been annulled upon extortion and circumvention; and yet the qualifications of the force, fear and fraud, may be proven by witnesses? A bond may be declared extinct, on proving by witnesses that they saw it lying beside the debtor retired. A bond bearing assignation to mails and duties can be declared satisfied, by witnesses deponing the creditor intromitted with these mails and duties. How many bonds have been explained by witnesses deponing on dubious clauses therein contained, or taken away by proving a trust? And here it is not *nuda verborum emissio* that Ricarton has proven, but clear facts *et rei interventus*, that bonds of relief were drawn, and the money actually converted to Sir William's own use, &c. which was both convincing and pregnant. THE LORDS, by a plurality of nine votes against eight, (the bench being full) did sustain Ricarton's declarator as relevant, and found, by the testimonies adduced, that he was only cautioner, and that Sir William was bound to relieve him of the whole. He carried it by the votes of three extraordinary Lords; and many differed, thinking there was *locus pœnitentiæ*, till Sir William had signed the bond of relief and delivered it; and here there was neither.

*Fol. Dic. v. 2. p. 222. Fountainhall, v. 2. p. 762.*