No 605.

for, albeit, in the proving of the tenor of writs, the testimony of witnesses will be received, that saw the tenor of the writ libelled, but witnesses cannot be received upon the import of a writ. for that were to make them judges rather than witnesses; it being only proper to the judge to consider the importance of a writ, how far the same does operate; and albeit in the case of forgery, the Lords do reduce writs upon the testimonies of the instrumentary witnesses when they refuse there subscription, as also writs may be improved by indirect articles and extrinsic testimonies, the question there being *de veritate auctores* which is *facti*, or in the case of fraud, circumvention, force or extortion, which arise all from facts, and are inferred from deeds that fall under sense, where writs neither are nor can be interposed, and therefore cannot be supposed to be instructed *scripto*; or in the case of exubrated trust, where the design of the party is to conceal to whose behoof a right is conveyed; and therefore a person, out of entire trust and confidence, will rest upon another's faith without taking his obligement; or in the case of dubious clauses in writs, where the communers and witnesses are inserted will some times, before answer, be examined anent the meaning of the parties, and will be generally admitted, in every case that falls under sense; since where writs use not to be adhibited, but in all cases where writ uses and is adhibited, and particularly in relation to the payment of sums and discharges, witnesses, though above all exception, cannot be received. The Lords found the foresaid presumptions accumulated together, sufficient to instruct, that the sum contained in the bond was satisfied and paid.

Sir P. Home, MS. v. 1. *No* 20.

1697. *July* 7. Houston *against* Houston.

No 606.

The Lords found that certain presumptions, tho' pregnant, were not sufficient to do away a bond, and that nothing arbitrary should be done in such a matter.

The Lords heard and advised the debate in the declarator pursued by Andrew Houston, late of Garthland, against Houston of Drummaston, for extinction of a bond of 1200 merks, dated in 1662, upon sundry presumptions; such as, that shortly thereafter the creditor, by a missive letter to the debtor, craved his delay for paying 800 merks he owed him; which he would never have done if he had been resting the said 1200 merks; for he had no more to say, but you are owing me more, et frustra petis quod mox es restituturus. I will compense you. 2*do*, The debtor sold the creditor a piece of land after the bond, and it cannot be imagined but the sum in the bond was retained in the fore-end of the price. 3*tio*, By a diary exactly kept, the debtor had marked, that this bond was in that way satisfied; and there has been a long silence and taciturnity. *Answered*, He opponed his clear liquid bond; and as to the first presumption, it was no wonder he did not mention the 1200 merk bond, seeing the term of payment was not then come; and if it was so soon paid, then

this is inconsistent with the second presumption, which ascribes it as part of the price. To the *third*, Such count-books may be made up at will; and the pretence of taciturnity is irrelevant, being within prescription; likeas, it was not so overlooked but it was confirmed in the charger's father's testament. Presumptions have been by all lawyers sustained to take away bonds as well as a positive probation, the one being as pregnant to convince the mind of a Judge as well as the other. See Menochius De præsumptionibus, lib. 10. præsumpt. 5. et 135. where he shews, creditori solutum et satisfactum quando præsumitur? And Mascardus De probationibus is large on the same subject; and our decisions agree therewith, 12th January 1666, Stevenson *contra* Crawfurd, *infra h. t.*; 6th February 1668, Chisholm *contra* Renies, No 80. p. 12314.; the Duke of Hamilton *contra* Cunningham, in 1688; and Mercer of Clavage *contra* Lady Aldie, 15th December 1682, No 605. p. 12708.; and many others, where evidentia facti fidem facit judici as much as a discharge of the debt could do; as in Solomon's decision about the true mother of the child; yet the LORDS, in this case of Houston's, found the presumptions (though pregnant), not sufficient to take away this bond; and thought it safest not to use too much arbitrariness in disposing upon the lieges' rights. No 606.

Fol. Dic. v. 2. p. 265. Fountainhall, v. 1. p. 783.

1709. *February* 9.

ROBERT WATSON of Muirhouse, and his Tutors, *against* ROBERT SMITH, Merchant in Edinburgh.

No 607.
Partial payments marked on the foot of an accepted bill in the creditor's handwriting, were sustained in a process at the instance of the creditor's heir.

IN the action at the instance of Robert Watson and his Tutors against Robert Smith, for payment of L. 402 : 16s. Scots, contained in a bill drawn by the deceast Robert Watson of Muirhouse, the pursuer's father, and accepted by the defender;

Alleged for the defender; He had paid the whole bill except L. 63 : 16s. Scots to the pursuer's father, as is clear from the several payments marked on the foot of the bill, and the balance of L. 63 stated due in figures, which he offered to prove by witnesses, was the defunct's hand-writ; and further, he offered to prove by witnesses, that he had made payment conform to the stated account. So the LORDS in a like case, February 19th 1708, Millar against Bonnar, No 523. p. 12626., found an account neither subscribed nor written in a count-book, but on a scroll lying by the writer at his death, probative against his heirs.

Replied for the pursuer; 1*mo*, The account subjoined to the bill might have been relative to some other extraneous affair, since it doth not expressly relate