1703. *January* 19. SIR GEORGE WEIR of Blackwood *against* JAMES RUSSEL.

No 106.
A promise of the cedent of a bond to warrant payment, was found probable only by his oath.

JAMES RUSSEL having bought the lands of Gartness from Sir George Weir of Blackwood, in part payment he assigns him to a bond for 3500 Scots due by John Corse merchant in Glasgow, from whom Blackwood takes a bond of corroboration payable at the Whitsunday following; but ere that came, Corse breaks; whereupon Sir George intents a pursuit against Russel, to make the money effectual to him, upon this ground, that he asserted Corse's sufficiency, and promised the money should be punctually paid at the Whitsunday, to which term he desired Blackwood to forbear it, in regard he had engaged to Corse by promise that the exaction of the bond should be superceded till then, and he plighted his credit and faith for it; and so he trusting Mr Russel, the loss must fall on him, and not on Blackwood. *Answered*, Blackwood did not rely on his assertion, but informing himself of John Corse's condition, heard that he was in the reputation of a very rich man; and he might have had other bonds, and yet chose to prefer this; and even absolute warrandice in an assignation does not import the warranting the debtor's solvency, but only *quod debitum subest*, as was found 24th November 1671, Barclay against Liddel, *voce* WARRANDICE, conform to the Roman law, L. 4. D. De Hæredit. et Act. Vendit. THE LORDS found the promise to warrant him, if he forbore till Whitsunday, relevant; but the great debate was *de modo probandi*. Blackwood contended that it was more than a promise, or *nuda emissio verborum*; which indeed can only be proven *scripto vel juramento*; but was *pactum incontinenter adjectum*, and so *pars contractus*; and as emption vendition may be proven by witnesses present, so may this like any other bargain. THE LORDS found it only probable by Mr Russel's oath, seeing he had not adhibited writ, as he might have done; but allowed him to adduce the witnesses to the communing to confront with him at his deponing. It has been sometimes pleaded, where the value of the promise was within L. 100 Scots, that witnesses might be admited to prove it; but even in that case it has been denied, 3d July 1688, Donaldson against Harrower, Div. 1. § 9, *h. t.*; and 9th February 1672, Wood against Robertson, No 370. p. 12225.

Fol. Dic. v. 2. *p.* 219. *Fountainhall, v.* 2. *p.* 174.

1703. *November* 20. HISLOP *against* SMART.

No 107

A MESSENGER, who suffered a prisoner to escape, *alleging* a posterior paction with the party, whereby he was bound to apprehend and incarcerate the prisoner, which he had now done, and in which case the party was to pass from any action against him for letting the prisoner escape; the LORDS found this paction

No 107. to be of the nature of a promise, and so not relevant to be proved by witnesses, but only *scripto vel juramento.*

Fol. Dic. v. 2. p. 220. Fountainhall.

*** This case is No 19. p. 8342, *voce* Litigious.

No 108. Witnesses were, *ex officio*, examined, whether a bond of provision had been deposited, and upon what terms.

1703. *December* 30. Stewart *against* Blackhall.

Sir Archibald Stewart of Blackhall, in the disposition of his estate to his son, reserved a faculty to burden the estate with L. 20,000 for provisions to his younger children; and, in prosecution of this power, Mr John Stewart, younger of Blackhall, gave a bond to Anabella Stewart, his sister, for 8000 merks, but put it in his father's hands; and he gave it in keeping to Birsbane of Bishopton, his son-in-law; but Anabella coming by the bond, she marries one Fergusson, without consent of her father and other friends, far below her own quality and degree; and she charging, Blackhall suspends, That it was never a delivered evident, but only consigned and depositated, first, in her father's hand, and then by him in Bishopton's, on this express condition, that it was not be given up without the consent of Blackhalls, elder and younger; and yet she had, *viis et modis*, got it out of Bishopton's cabinet, and so ought to put it back again there. *Answered*, The bond being now in my custody, you cannot take it away but by my oath; and if you found on a depositation that is not probable by witnesses, but only by my oath; and if I acknowledge it, then the terms may be cleared by the depositar's oath; and if it were otherwise, then bonds, and the clearest securities, may be taken away by the depositions of witnesses, contrary to the uncontroverted principles of our law. *Replied*, That bonds to extraneous persons, once come into their hands, cannot be taken away, but *scripto vel juramento*; but in bonds of provision to children, where the father alive, and the child not yet married, the presumption runs stronger that it was not delivered, especially considering her gross misbehaviour; and, in many cases, the Lords have allowed witnesses *ex officio*, to be examined anent the delivery of writs, and on probation have found them null and extinct, 14th February 1629, Farquhar against Wallace, Div. 1. § 6, *h. t.*; 25th November 1631, Douglas against Lauder, Div. 5. § 7, *h. t.*; and 15th December 1681, Mercer against the Lady Aldie, Ibidem, marked by President Newton; for though witnesses cannot take away a writ, yet they may be adduced to clear circumstances in the matter of fact. Some of the Lords thought the depositation could not otherwise be proven but by her oath; and if she confessed it, then the depositar might be examined what were the terms; and if she denied it, and owned she came fairly by the bond, there was an end of it; for they thought parents might obviate this, either by making it only payable, she marrying with their consent, or by reserving a power to alter; but the plurality ordained the witnesses in the bond with Blackhall and Bishopton to be examin-