1712. *January* 2. ANDREW JAFFRAY *against* GEORGE ROBERTSON.

No 113.
One charged on his bill offered to prove, by the charger's oath, that the bill was for goods, and that being admitted, to prove by witnesses, the goods were deficient. The proof by witnesses refused.

GEORGE ROBERTSON, merchant in Brechin, being debtor to Andrew Jaffray merchant in Aberdeen, by accepted bill, in L. 102 Scots, and charged thereon, he suspends, that he offered to prove by his oath, that the true cause of his granting these bills was for some geneva, brandy, and other ware he had bought from him; and which being acknowledged by him, then he offered to prove, by the witnesses present at the bargain, that the quantity and price agreed on would not extend to that sum by far, unless he proved delivery of a greater quantity. *Answered*, This were to subvert that firm principle of law, that writ cannot be taken away by witnesses, but only *scripto vel juramento*: Here are bills accepted by you without any objection or reclamation, which can never be taken away by such a mixed and divided probation. *Esto* it were true that they were granted as the price of merchant ware, have you not acquiesced both in quantities and prices, by your accepting a clear liquid bill, without any quality or reservation; which can never be elided by offering to prove the conditions of the bargain by witnesses? For your signing the bill is a plain renouncing such after-game, to which you can never recur, unless you had burdened your bill with that reserve. *Replied*, This manner of probation does not impinge on that rule, witnesses cannot take away writ; for here it is your own oath, acknowledging the cause to have been merchant-ware that lays aside the writ, and reduces it to the near state of a bargain about moveables, which being within the three years of prescription can be proved by witnesses; and this is no such novelty; for on the 15th June 1665, Aikman, No 74. p. 12311, and 22d February 1676, Brown against Laury, No 94. p. 12324. the Lords allowed such a mixed probation both by oath and witnesses. The Ordinary found that Robertson having accepted the bill simply, he had renounced any objections against the debt, except what he could prove by the charger's oath, and so he could not divide his probation, part by oath, and part by witnesses; but behoved to refer all, both quantities, prices, and conditions of the bargain, to his oath; and Robertson having reclaimed by bills on the grounds aforesaid, the LORDS adhered to the Ordinary's interlocutor, and refused his bills, with the heteroclite kind of probation offered.

Fol. Dic. v. 2. *p.* 221. *Fountainhall, v.* 2. *p.* 696.

1714. *June* 5.
DANIEL GUN, Writer in Edinburgh, *against* Mr WILLIAM FRASER.

No 114.
It was allowed to be instructed by parole-evidence, that a

DANIEL GUN having right by assignation from William Carruthers, Chirurgeon in Edinburgh, to 600 merks, contained in a bond granted to him by Mr William Fraser, charged Mr Fraser to make payment. He suspended on this rea-

No 114. bond was for an apprentice-fee by indenture, of which the master had not fulfilled his part.

son, that the bond ought to be reduced, in regard the same was granted by the suspender for his brother, Hugh Fraser's apprentice-fee, to the said Gun, who by the indenture was obliged to educate the said Hugh in the employment of apothecary chirurgeon, which he failed to do by his turning bankrupt shortly thereafter, and so was *causa data non secuta*; and that this was the cause of the bond is to be presumed, from its bearing the same date with the indenture; besides, he offered farther to astruct the same by the writer and instrumentary witnesses.

The Lords found that the bond and the indentures being of the same date is relevant to presume that the indentures and apprentice-fee therein mentioned was the cause of the bond charged on; the suspender astructing the same by the writer and instrumentary witnesses in the said indentures and bond; and to reduce the bond charged on *pro tanto* and proportionably to the time the apprentice was not alimented, educated, and instructed by his master, according to the indentures.

Fol. Dic. v. 2. p. 222. Forbes, MS. p. 45.

No 115. 1730. *December.* Robertsons *against* Dunbar.

In a competition upon a defunct's executry, it being *alleged* against a creditor, That the Commissary's deliverance, upon his application, was antedated, in order to bring him in within the six months, this allegeance was found relevant to be proved by the Commissary's oath. See Appendix.

Fol. Dic. v. 2. p. 219.

No 116. 1734. *February* 14. Neilson *against* Russel.

In a competition betwixt an onerous indorsee to a bill and an arrester, it having been found relevant to prefer the arrester, that the bill was not completed by subscription of the drawer at the time of the arrestment, the same was found relevant to be proved *prout de jure*. See Appendix.

Fol. Dic. v. 2. p. 218.

1742. *November* 3.

Mrs Jean Whitefoord, and Dalrymple, her Husband, *against* Aiton and his Spouse.

No 117. A legacy found not competent to be proved by witnesses, to

The deceased Doctor Hamilton having, by his missive in 1743, directed to Mrs Dalrymple, left her his watch in the following words; "I give you my watch, chain, and seal, which you shall enjoy after my death;" after the Doc-