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-

tor's death, she pursued Charles Aiton, in whose house he died, and who had got possession of the watch, for exhibition and delivery; and having referred the having of the watch to his oath, he deponed and acknowledged, "That he had the watch libelled at the Doctor's death, and that, in June 1736, when he was at Lochlomond attending the Doctor at the goat-whey, the Doctor delivered the watch to the deponent, and desired him to keep the same for the use of his son; and that, upon the deponent's refusing to take it, the Doctor pressed him to take it, telling him, he expected to die there, and it might be lost; whereupon the deponent carried the watch home, and had it ever since."

No 117. take away the effect of a prior *donatio mortis causa* constituted by writ.

As this quality was yielded to be extrinsic, especially in a landlord, in whose house the Doctor had died, it was for the deponent offered to be proved by witnesses, that the watch was delivered him in the way and manner deponed; and had the allegeance been, that it was simply gifted to him, the proof would have been admitted, the transmission of moveables by donation being probable by witnesses; but as by the allegeance as laid in his oath, it was no more than a legacy to him, the LORDS "found, that the defunct's letter did constitute a *donatio mortis causa* in favour of the pursuer, and that a proof by witnesses was not competent in this case to take away the effect of a donation constituted by writ, and create a new legacy of the same."

Fol. Dic. v. 4. p. 158. Kilkerran, (PROOF.) *No 5. p. 442.*

*** Clerk Home's report of this case is No 25. p. 8072, *voce* LEGACY.

1744. *November* 23.

MARION WILSON *against* CHILDREN of WILLIAM PURDIE.

No 118. Proof by witnesses to supply a clause omitted in a deed *ex dolo* of the grantee.

ANDREW PURDIE, merchant in Mossplat, died intestate, leaving three children by his wife Marion Wilson, William, Anna, and Jean. Anna was married while her father was alive, and got a provision of 2000 merks in full of her bairns' part of gear, whereby the relict and the other two children were entitled to the free effects which wholly consisted in moveables. By a minute of agreement in February 1732, it appears, that there was a meeting of all the the parties concerned in the succession, where it was agreed, by the intervention of friends and communers, that the daughter Jean should have 2000 merks, the same sum which her elder sister had got; that Marion Wilson, the relict, should have a liferent of L. 5 Sterling yearly, and a faculty to dispose of 1000 merks of the subject by testament; and that the remainder of the effects should belong to William the son, and he be the sole intromitter. This minute of agreement was so far fulfilled, that Jean Purdie got 2000 merks at her marriage; and as Marion Wilson continued to carry on the business of a retailer in her husband's shop, her son, William, who had set up as a merchant