

1625. June 29.

CRAWFURD *against* VALLANCE'S HEIRS.

No 62.

It was alleged in a process, that a minute of a mutual contract, which was in the hands of the writer, was lodged till certain things were performed. This not allowed to be proved by the witnesses and writer.

A MINUTE of contract being made betwixt Vallance and Crawford of Bedland, anent the alienation by Bedland of some lands to Vallance, for the price therein contained, which being left in the hands of the notary, who formed and wrote the same, after it was subscribed by both the parties; Bedland pursues for production and registration of the minute; in the which action, the heirs of Vallance, who was the party contractor, but then deceased, being convened, compeared, and proponed in the exception, that the minute ought not to be registered, because it was deposited by both the parties' consent in the notary's hands, who wrote the same, to remain with him, while such conditions were perfected by Bedland, which were appointed to be done, betwixt and a day appointed by both the parties to that effect; and in case the same were not done, the minute should have taken no effect; but the parties to have been free thereof, which conditions never took effect, and this was offered to have been proved by the oath of the notary, haver of the minute, and of the witnesses inserted therein; which was repelled, and only found relevant to be proved by writ, or oath of party; for the LORDS found it not reasonable to take the depositions of the writer or witnesses, to destroy the minute, against the consent of the party, albeit many times they will take their declaration to confirm a writ, and for corroboration thereof, Licet D. D. asserunt instrumentum reprobari posse per testes omni exceptione majores, Mascard. De Prob. verb. testis. In this process also the LORDS sustained this action, at the pursuer's instance, albeit the defender *alleged*, That he ought not to be found a party, who of the law can call for this minute, because, neither has he libelled in the summons, nor is he able to qualify, and allege, that this writ ever was in his hands, or become his proper evident, without the which he could have no interest to pursue therefor; which allegiance was repelled, in respect the writ called for was a mutual contract subscribed by both the parties, after the subscription whereof any of the persons might pursue therefor, albeit it had never been delivered, as is requisite in a simple bond, which cannot be called for, except it had become the party's evident, in whose favour it was conceived, either by delivery, or consignment to that end, viz. to be delivered to the party, which was not necessary in mutual contracts. See WRIT.

Act. Hope & Mowat.

Alt. Stuart & Cunningham.

Clerk, Gibson.

Fol. Dic. v. 2. p. 218. Durie, p. 167.

No 63.

Found in conformity to Crawford a-

1626. June 23.

MAXWELL *against* DRUMLANRIG.

IN a suspension betwixt Maxwell of Hill and L. Drumlanrig, whereby he charges for payment of some money, contained in an obligation made by the

suspender to Drumlanrig; it was desired to be suspended, because the suspender had never borrowed any sums, neither was there any cause of debt, whereby the suspender could be found debtor to the charger at any time, either at the making of that bond or before; which was referred to the charger's oath, and that the said bond was made upon hope and express condition, that such deeds should have been done by the charger to the suspender, and no otherways, which deeds and conditions were never fulfilled; and which point anent the said condition, whereupon the bond was granted, was offered to be proved by the witnesses inserted in the said bond, who were all *testes omni exceptione majores*. THE LORDS would not admit the same to be proved by the witnesses inserted, but only found that the condition whereupon the said bond was made, ought to be proved by the oath of the party, to whom the bond was given, or by writ, and no otherways. See WRIT.

Act. *Stuart & Cunningham.*Alt. *Hope & Nicolson.*Clerk, *Scot.**Fol. Dic. v. 2. p. 218. Durie, p. 205.*

1627. February 22. WILLIAMSON against TENNENT.

In a suspension betwixt Mr James Williamson and Joseph Tennent, wherein the said James Williamson *alleged*, He was wrong charged to pay L. 1000 conform to his bond, because the said bond was never delivered to the charger, but after the subscription thereof was deposited in Abraham Adamson's keeping, to be retained by him until the like sum addebted to the charger by the suspender's brother, should be discharged by the charger, which he hath not done, but by the contrary, in the depositer's absence, and by the knowledge or consent, either of the party or of the depositer, he hath opened the depositer's chest, and taken out the bond, and registered the same, and charged the suspender, which conditions he offered to prove by the depositer's oath. THE LORDS found this reason relevant to be proved only by the oath of the party charger, or writ, but not by the oath of the depositer, but found, that they would take the party's oath in presence of the depositer.

Act. *Nicolson.*Alt. *Stuart.* Clerk, *Hay.**Fol. Dic. v. 2. p. 217. Durie, p. 280.*

1628. March 21. SCOT against CREDITORS OF DISHINGTON.

In a double pointing, Sir William Scot against the Creditors of Sir Thomas Dishington, the LORDS found a bond produced by William Dishington, brother to Sir Thomas, one of the creditors, not to be a good writ, whereupon

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against Vallances Heirs,
supra.

No 64.

That a bond was deposited until performance of a condition, and that it had been surreptitiously taken away, was not allowed to be proved by the oath of the depositer, but only of the charger.

No 65.

It was alleged, that a bond had been surrepti-