

No 79. yet above Abercromby's head, and Newark makes use of some of them to exhaust the 37,000 merks bond at the foot of the account. It was *answered* for Newark, That after eighteen years time, that he was not obliged to count again; but the foot of the account being subscribed by the pursuer, bearing 37,000 merks to be only resting, was sufficient to exoner him, and the not mentioning of instructions delivered, cannot presume, or prove against him, that they are in his hand, else the account signifies nothing, and he must not only instruct this article, but all the rest; neither did he make use of any bonds to exhaust the foot of the account, but such only for which precepts were directed to him after the account.

THE LORDS found the defender not liable to count, or produce the instructions of any of the articles, unless it were proved by his oath, or writ, that the instructions were retained in his hand.

Stair, v. I. p. 496.

1668. February 6. ALEXANDER CHISHOLM *against* RENIES.

No 80.
Witnesses *ex officio* examined to instruct the cause of a bond, the sum being filled up by another person than the writer of the bond.

ALEXANDER CHISHOLM, as executor to John Graham of Orchel, pursues William and Archibald Renies for a bond, granted by them to the defunct, *in anno* 1635, who *alleged*, That the true cause of the bond was by transaction of a blood-wit, made by the Laird of Gloret and Mr James Row, in whose hands this bond (then being blank) was put, and which unwarrantably came in the hands of Orchel the party, who, instead of 400 merks, filled up 2000 merks, which is offered to be proved by the arbiters' oaths, yet in life. The pursuer *answered*, That his bond could not be taken away by witnesses, especially extrinsic witnesses, there being no writ relative to this bond, or of the same date, or witnesses that might give any presumption of the cause thereof. The defender *answered*, That there were here far stronger presumptions, viz. that this bond hath been dormant thirty-three years, albeit it bore no annualrent, and Orchel was known to be in great necessity, and, by ocular inspection, it appears to be filled up with another hand, and blotted, which presumptions, being so singular, give ground enough to the LORDS to examine witnesses *ex nobili officio*.

THE LORDS ordained the witnesses and arbiters to be examined *ex officio*, reserving to themselves what these testimonies should operate, in respect of the antiquity and singularity of the case.

Stair, v. I. p. 520.

1668. June 9. JOANNA M'ALEXANDER *against* CHARLES DALRYMPLE.

No 81.
Witnesses examined relative to the

JOANNA M'ALEXANDER, a sister's daughter, and one of the nearest of kin to umquhile Elizabeth Dalrymple, pursues a reduction of the said Elizabeth's testament,

whereby she nominates Charles Dalrymple, her brother's son, her executor, and universal legatar, upon this reason, that in the time of the making that testament she was not *compos mentis*, but fatuous and insensible.

No 81.
state of mind
of a testator.

THE LORDS having appointed the witnesses of the testament, and other witnesses, to be examined thereanent, the witnesses in the testament, and writer thereof, being examined, deponed, That she was in her right mind, and gave order for drawing of the testament; and gave order to subscribe it; the other witnesses deponed, That about that time, for several weeks before, and some time after, the defunct was fatuous, and not in a right mind, and to every question proposed to her, she answered always yea, yea, and some words of ravery, which she frequently spoke.

THE LORDS having also caused re-examine the testamentary witnesses, that it might appear whether she did only answer to interrogatories, as when it was answered, whether she would have Charles Dalrymple her executor, and universal legatar, and whether she said yea, yea, and whether she gave direction without a foregoing question by words that might signify her sensibility; and having considered the whole testimonies, they found that probation most pregnant, that she was fatuous, and insensible at the time of the making the testament; and therefore reduced, albeit the witnesses were extraneous that proved, and were not present at making the testament, at which time a lucid interval of a person distempered by disease, not constantly fatuous, might have been sufficient.

This was stopped till it were further heard.

Stair, v. 1. p. 539.

1669. January 9. WALLACE of Galrigs against M'KERNEL.

UMQUHILE Wallace of Galrigs being alleged to have given a sasine *propriis manibus*, to his second wife, of two chalders of victual;

THE LORDS sustained the sasine without any other adminicle, but that the wife had quited her former liferent by a former husband, in favour of Galrigs, whereupon Galrigs offered to improve the sasine by the witnesses inserted, which being four, two deponed positively that they were never witnesses to a sasine given by Galrig's to his wife, and the third deponed, that he remembered not that he was witness; the fourth deponed, that he was witness, but said that this sasine was in summer, whereas it bore to be in winter; the notary abode by the sasine, but was not examined.

THE LORDS found the sasine improved, but would not examine the notary, nor any other person, mainly in consideration that the sasine was *propriis manibus*, without any other adminicle; otherways the notary and one witness

No 82.
Witnesses examined relative to the delivery of sasine *propriis manibus*.