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be taken in his prejudice, they being *functi officii*; and could only be taken away by Sir George's own oath. The LORDS having taken the declaration of the oversman and some of the arbiters, who declared, that it was agreed that the warrantice should only be from fact and deed, they decerned the sisters to be no further liable, in respect that *ex natura rei* they could not be further obliged in law, which seems hard.

Fol. Dic. v. 2. p. 122. Gosford, MS. No 419. p. 211.

1673. January 10. LAWRIE of Blackwood against Sir JOHN DRUMMOND.

No 89.

A disposition had been written out with a blank for the disposer's name, and filled up with another hand. It was not allowed to be proved, that it had been filled up after the granter's death, otherwise than *scripto vel juramento*.

IN a reduction at Blackwood's instance, as having adjudged from the apparent heir of Sir Robert Drummond the lands of Meidhope, of a disposition made to Sir John of the said lands, upon this reason, that the disposition was lying by Sir John, and filled up in his own name after Sir Robert's death, which was offered to be proved by the writer and witnesses who were present at the filling up thereof; it was *answered*, That the reason was not probable but *scripto vel juramento* of the defender, the same being now in his possession, and in law could not be otherwise taken from him. It was *replied*, That in such cases the Lords, *ex nobili officio*, might examine witnesses specially, Sir John's name being filled up with another ink and hand; likeas, they craved Sir John's oath of calumny, if he had reason to deny the same; in that case the LORDS declared, that they would not find the reason probable by witnesses, if the defender being ordained to give his oath of calumny should declare, that he had reason to deny the same, as being against our law, and of a dangerous consequence.

Fol. Dic. v. 2. p. 217. Gosford, MS. No 553. p. 298.

No 90.

It being alleged against a bond of provision, that when the granter was on death-bed, he gave his wife warrant to cancel the bond, this was found relevant to be proved by the wife and other witnesses.

1673. November 7.

CHISHOLM against CHISHOLM.

CHISHOLM of Hairhope having subscribed a bond of 7000 merks for the provision of his younger children, and having afterward disposed his estate to his eldest son, caused him grant a bond of corroboration in favour of the children, which the father kept; and the mother having both bonds in the father's pocket after his death, and lent them to one of the children, he caused transcribe them by two notaries and four witnesses, and having given them back to her they were abstracted, and the children pursue for proving the tenor of them. The heir's oath of calumny having been taken, he acknowledged there were such bonds, but remembered not the tenor of them, which, with the notary's attested doubles, were found sufficient adminicles to sustain the tenor, and the tenor was found proved by the oaths of the notaries and witnesses. It was *alleged* by the heir, That both his father's bond of provision and his corroboration were

kept by his father, and never delivered to the children, and had no clause to be valid without delivery, so that at best they were in the father's power; and the mother did depone, that she found them in her husband's pockets after his death, and so they were never delivered, and two of the children were majors, and out of the family: And it was further desired, that witnesses *ex officio* might be examined, for proving that the father declared that he would not burden his son with these provisions, which is sufficient to shew the change of his mind and revocation of the bonds, especially seeing they were not in satisfaction of the executry, which was considerable, and fell to the children, and the estate was very mean, and unsuitable to such provisions; or at least that the mother, out of whose hands the bonds were gotten, and other witnesses, might be examined, that the father on his death-bed ordered the mother to take the bonds, and cancel or burn them.

THE LORDS sustained the bonds, and would not admit of witnesses to be examined as to the father's declaring that he would not burden the son with these bonds, which could but declare his present purpose, which was mutable and ambulatory, seeing he did not cancel the bonds; but allowed witnesses to be examined, that when he was on death-bed, he gave his wife warrant to take the bonds and cancel them, and appointed her oath and other witnesses to be taken for that effect.

Fol. Dic. v. 2. p. 218. Stair, v. 2. p. 228.

1674. January 22.

SIM against ENGLISH of Murdistoun.

JAMES SIM having charged English of Murdistoun upon a bond of borrowed money, he suspends on this reason, that albeit the bond bear borrowed money, he offered him to prove by his oath, that the true cause was for the price of a mare which he bought for this sum; and offered to prove by the witnesses at the bargain, that it was upon express condition that he might take the trial of the mare for so many days, and restore her if she pleased him not, and that he sent her back within the time; and also, that the charger obliged himself to uphold her to be free of the scab, whereof there being some appearance upon the skin, he warranted it that it was but harvest rain. It was answered, That the manner of probation could not be divided, but behoved to be all referred to his oath, otherwise witnesses would take away writ.

THE LORDS found, That the cause of the bond being proved by the party's oath to be a bargain, the conditions of the bond might be proved by witnesses.

Fol. Dic. v. 2. p. 221. Stair, v. 2. p. 255.

* * * Gosford reports this case:

IN a suspension raised at Murdistoun's instance, who was charged upon his bond to make payment of L. 13 Sterling to Sim, upon this reason, that albeit

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Witnesses
were admit-
ted to prove
the conditions
of a bargain,
though a
bond might
be evacuated
thereby.