No 91. the bond did bear borrowed money, yet it was offered to be proved by the charger's oath, that the true cause of the granting thereof was for the price of a mare sold to the suspender as good and sufficient, and which the charger did oblige him to take back again, in case of any fault, within eight days thereafter, which is offered to be proved by the communers who were present at the bargain; it was *answered*, That the charge being founded upon a bond of borrowed money, which could not be taken away but by the charger's oath or writ as to the cause thereof, so, albeit the cause were confessed, the promise to accept back thereof was not probable but by the charger's oath. It was *replied*, That it being confessed that the bond was granted for another cause than for borrowed money, viz. for the price of a mare, the same being a merchant bargain, the condition thereof was probable by witness, and whether the same was sufficient or insufficient. The Lords finding that the bond was confessed to be for the price of a mare, it was then reduced to the nature of a merchant bargain, in which case, if there was any latent vice, the buyer might prove the same by witnesses; and therefore, ordained the communers who were present at the bargain to be examined; but as to any promise of taking back again, albeit there was no latent disease, they found it not probable by witnesses.

Gosford, MS. No 678. p. 400.

1675. *January* 22. Jean Maxwell *against* Mr William Maxwell.

No 92.
The condition of devery of a bond, allowed to be ascertained by oath.

Mr William Maxwell, Advocate, being pursued at the instance of Jean Maxwell, natural daughter to Sprinkel, for 5000 merks, alleged due to her by bond, granted by the said Mr William, which she did refer to his oath; did give in a qualified oath, declaring, that he had granted a bond to the pursuer, at the desire of her said father, but the same was never delivered, and was so far from being effectual, that by the express order of Sprinkel, he was not to deliver the same to the pursuer without his warrant, and that he had given him order to destroy the said bond, in consideration that he was not satisfied with the pursuer's carriage, and that he had left her a legacy, which the defender had paid. This quality was thought to be so intrinsic, that his declaration could not be divided, so as to prove the granting of the bond, and not the quality, specially seeing the said quality was adminiculate with letters, which the said Mr William did produce, which were written by Sprinkel to the same purpose; yet by plurality, it was found, That his oath proved the libel, and decreet was given against him. Thereafter the said Mr William obtained a suspension upon that reason, that the decreet was extracted by favour of the clerks, not without precipitation, after that he had applied to the Lords, and desired that the case might be reconsidered; and that the Lords had ordained the decreet to be brought back, and because the party refused, they past a suspension.

The case being debated *in præsentia*, the decreet *in foro* was obtruded, and that it was just upon the matter, seeing as to not delivery, it appeared by his oath, that he was trusted to the behoof of the pursuer, and was in effect a depositar, so that he could not cancel the bond without consent of the pursuer. To which it was *answered*, That the decreet was extracted as said is, and that immediately upon the pronouncing of the same, he had applied to the Lords to the effect foresaid, and it cannot be said, that he had any trust from the pursuer, but only from her father; and though he could be thought to be a depositar, the manner and quality, and terms of the depositation, could not be proved otherways, but *scripto* or *juramento*. No 92.

THE LORDS notwithstanding thought they were concerned to adhere to the decreet, being *in foro*, least their decreets should be obnoxious to that prejudice, that even when they are *in foro*, they may be questioned and altered. Some of the LORDS were of opinion, that the great consideration the Lords should have, is to do justice, and that the party having omitted nothing upon his part, neither before nor after pronouncing of the same, and upon the matter, the reason of suspension as to the point of justice and law being unanswerably relevant, it was hard that a party should be grieved upon a pretence of form, there being a singularity in this case upon which the honour of the Lords may be saved, viz. that the said decreet was extracted with too much precipitation.

Dirleton, No 225. *p.* 105.

1676. *January* 18. CUNINGHAME *against* BROWN.

No 93.
The law of England, whereby the first person named in bonds, as co-principal, is understood as principal, and the rest as cautioners, found probable by the attestation of the Judges of the common pleas.

ANDREW CUNINGHAME pursued Brown as heir to his father, for fulfilling a bond of his father's, obliging him to relieve the pursuer of all cautionries for which he was obliged for Robert Cuninghame, and particularly of a bond granted by the said Robert and Andrew Cuninghames to Captain Lavrock in England, after the English form of a double bond. The defender *alleged*, That this English bond did not prove Andrew Cuninghame to be cautioner for Robert, because they are thereby bound as conjunct principals. It was *answered*, That in English bonds, the person first exprest is always understood principal, and the others but as cautioners.

THE LORDS found the allegeance relevant, and for proving thereof, granted commission to the Judges of the Common Pleas, to declare what was their law in the case.

Stair, v. 2. *p.* 401.