

exception from that rule, as appears from Mackenzie's Criminals, the case of Captain Barclay, where the witnesses were punished *alienarly* upon their own evidence, and several others, and especially by the act 1681, which supposes that the evidence must be by the witnesses own testimonies, because regularly the indirect manner of improbation is not competent while the direct *per testes insertos* is extant, and till the deed be improven, there can be no punishment of the witnesses. However, the Lords thought it better to give no judgment upon that matter, and therefore passed them over without notice.

No. 11. 1738, July 27. PROCURATOR-FISCAL OF ADMIRALTY *against* M'KENZIE.

See Note of No. 17, *voce* JURISDICTION.

(Erratum in the text,—instead of “general” read “generic.”)

No. 12. 1738, Dec. 12. CHARTERIS *against* DAVIDSON.

The Lord sustained the objection, that one of the instrumentary witnesses to the contract between Redpath and this suspender Charteris was within the age of 14 years, notwithstanding the suspender acknowledges that the contract was signed by him; and repelled the allegiance of homologation, for they did not find the acts condescended on sufficient to infer homologation, *me referente*.

No. 13. 1738, Dec. 12. DR ARNOT *against* ELIZABETH YOUNG.

See Note of No. 4, *voce* PROOF.

No. 14. 1740, July 24. LEITH of Leithhall *against* GORDON of LAW.

See Note of No. 5, *voce* COMPENSATION.

No. 16. 1742, July 22. THOMSON *against* BORTHWICK, *alias* STRAITON.

IN a suspension and reduction of a bond by a principal and cautioner, by the cautioner, as granted by him in minority, when he had curators, and without their consent; and it being alleged, that, at granting the bond, he said he was major, and both parties allowed to prove;—upon the proof, the minority and having curators was proved, though he was within six months of being major. For proving the allegiance, that *majorem se dixit*, the creditor adduced the instrumentary witnesses to the bond, who were his own father and brother, and proved, that the creditor not being to be present when the money was to be paid, wrote to his father that he doubted if the cautioner was of age;—that he put the question to him, and he said he was of age. Two questions occurred, 1st, Whether this was proveable by witnesses? because of a decision in Durie, 27th February 1637, (Dict. No. 156, p. 9025.); 2dly, and chiefly, Whether the creditor's father and brother, though instrumentary witnesses, were habile? (for they were adduced before Commissioners, and the objection referred to the Court;) and it carried that they were not. In which I did not vote, for I doubted much whether they were not necessary witnesses to

every part of the transaction at granting the bond, as well as to the signing; and I thought the lending the money upon the faith of that security strongly adminicled their testimonies. Then another question was, Whether it was not proveable by the party's oath, to which the creditor referred it,—notwithstanding a proof by witnesses had been adduced, since they were found inhabile? The Court was much divided in this. I thought it was competent, in the same way as if that proof had not been received, and in form it should not have been received, and the objection determined before hearing their testimony; but at last the suspender agreed to depone.

No. 17. 1743, June 22. SHAW *against* ISOBEL ANDERSON.

I was in the Outer-House. A relict and executrix of Lizards a farmer, pursuing a meal-maker for the price of victual furnished by her husband, which she was to prove by witnesses; the defender owned that for many years the defunct had been in use of furnishing corn, and he always paid the price when it was ground, without any writing on either side, and offered to prove payment of the victual in question by witnesses, and which in part appeared by the relict's acknowledgment,—but neither party kept books. The Commissaries found payment of money proveable only *scripto*; and two bills of advocacy were refused; but on a reclaiming bill, the Lords remitted to the Commissaries, with instructions to allow a proof by witnesses before answer. *Vide* Act of Sed. 8th June 1597.

No. 18. 1743, July 2. LORD BRACO *against* MR ADAMS.

THE question was, Whether the Dean of Faculty, Mr James Graham, and Mr Hay of Montblairy, could be admitted witnesses to prove a communing with Mr Adams concerning his claim against Lord Braco before raising the process, since they were now Lord Braco's lawyers and agent in this cause? But it carried that they could not, and we refused Lord Braco's bill reclaiming against our former interlocutor. In this question great stress was laid on their being both employed in this cause and acting in that communing for Lord Braco, and in his absence to prevent the process. For the interlocutor were President, Royston, Justice-Clerk, Minto, Drummore, Kilkerran, Dun, Leven. Arniston absent.

No. 19. 1743, July 12. HELEN RAMSAY *against* DAVID LINDSAY.

A QUESTION occurred, the very same to my apprehension as we decided the second instant, Lord Braco against Adams, (*supra*). The question was anent proving that a testament executed by a young boy in favour of his mother was explained to him so as he understood, or that it was drawn and extended at his desire. We were told that Mr James Graham, jun. and Mr Ramsay, writer, were advised about this testament, *i. e.* to extend it, during the boy's life, and when he was under the management of his mother. And that testament being now quarrelled by his nearest of kin, the mother employed Mr Graham and Mr Ramsay for her in the cause, and now adduced them as witnesses for her. But the Lords refused them; and this day on a reclaiming bill and answers adhered.