

No 72.  
not produced  
by the person  
in whose fa-  
vour it was  
granted, but  
by a third  
party.

livered evident, either to the father or to the son; but two blanks subscribed by them both were put in the hands of notary, to fill up the bond and disposition; but, before delivery, both parties resiled, and desired the notary to cancel and destroy them, yet eight or nine years after the notary gave them up to this pursuer, and neither to the father nor to the son; and the question being how this should be proved;

THE LORDS, before answer, ordained the notary, and witnesses inserted, to be examined *ex officio*, which being done, their testimonies proved as is alleged before. Then the question was *in jure*, whether the depositions of writs could be proved any other way, than by the oath of the party in whose favour the writs were conceived, he having the same in his hands.

THE LORDS found, that seeing these two writs were not produced by the father, nor the son, by and to whom they were mutually granted, but by a third party, in whose favour a clause therein was conceived, in that case, the deposition probable by the writer and witnesses inserted, and by the said testimonies found the writs null.

*Fol. Dic. v. 2. p. 217. Stair, v. I. p. 122.*

1662. July 19.

FIDDES against JACKS.

No 73.  
A proof al-  
lowed that a  
person had,  
by a public  
calamity, lost  
money he had  
in charge.

FIDDES pursues Jack for payment of a bond of 500 merks, which Jack acknowledged to have received in custody from Fiddes to be kept as his own. Jack *alleged*, That he had but the custody, and did conform to his obligation; he sent the money to Dundee *in anno 1650*, where he lost both it and much more of his own at the plunder of Dundee. The pursuer *answered*, No way granting that his money was lost at Dundee, yet it ought not to liberate the defender; because he oft-times required and desired the defender to pay him his money before the plundering of Dundee, and seeing he did not then give it, it was lost upon the defender's hazard. The defender *answered*, That any requisition was made, was but verbal, without instrument, and that it was made to the defender, being in Edinburgh, after this money, and the defender's whole means, was sent to Dundee for safety, and that at the time of any such desire, he shows the pursuer so, and bid him send for it to Dundee when he pleased and he should have it.

THE LORDS, before answer, having ordained witnesses to be examined, *hinc inde*, and having advised the same, found that the pursuer did desire his money, and at that same time the defender told him it was at Dundee, and said he might have it when he pleased to send for it; and witnesses also proved that he was at Dundee, and was in esteem as a man of good means then, and that he was there at the plunder of Dundee, and ever since was in a poor miserable

condition; and some of them deponed that he had a considerable sum of money, far above this in question, there.

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The question was, whether this probation was sufficient to assoilzie; albeit none of the witnesses did particularly depone, that they knew the pursuer's money to have been at Dundee, and lost there.

THE LORDS found that the probation was sufficient, the pursuer giving his oath in supplement, that it was there, and lost there; for they considered, that at the time of the pursuer's requisition, the witnesses proved, the defender declared it was there; and that *ex natura rei*, it was hard to prove particularly, this money being a fungible, to have been lost there, but that it behoved to be presumed so, seeing the man lost his whole means there, and hath been poor ever since.

*Stair, v. I. p. 130.*

1665. June 15.

AIKMAN against \_\_\_\_\_

AIKMAN having charged upon a bond of borrowed money \_\_\_\_\_ suspended, and *alleged*, That the charge was truly for a prentice-fee, for a boy to a writer, who was obliged to educate him three years, and it is offered to be proved by witnesses that he beat the prentice, and put him away with evil usage, within a year and an half, and so can have no more at most than effeired to that time. The charger *answered*, That he could not divide the probation, in one single defence, both by oath and witnesses, and that he could not take away writing by witnesses in whole or in part.

THE LORDS sustained the probation by oath and witnesses, as proponed.

*Stair, v. I. p. 282.*

No 74.

Probation of a defence against payment of a bond admitted partly by oath and partly by witnesses.

1666. February 27. CREDITORS of Lord GRAY against Lord GRAY.

CERTAIN Creditors of the Master of Gray's, being infest in annualrent out of certain of his lands, pursue pointing of the ground. It was *alleged*, for the Lord Gray his son, absolvitor, because he has right to an apprising, and infestment of Alexander Milne, which is expired, and prior to the pursuers' infestments. It was *answered*, That the apprising was satisfied by the umquhile Master of Gray, and a blank assignation thereto was taken, which was amongst the Master's writs, and this Lord filled up his name after the Master's death. This being unquestionably relevant, the difficulty was concerning the manner of the probation.

THE LORDS, before answer, ordained witnesses *ex officio* to be examined; whereupon the Lord Gray's brother was examined, who acknowledged he saw the blank assignation by his brother; and Mr Robert Prestoun being examined,

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A proof by witnesses allowed, that an apprising was satisfied.