

must be presumed to have been written either without her warrant, since it was produced in process, or else to have been done *spe numerandæ pecuniæ*.

REPLIED,---Memorials, though unsubscribed, are probative, especially writs in count-books, or notes on the backs or foots of bonds, though not written with the parties' own hand, nor subscribed by them ; as Stair observes, *Institut. book 4. tit. 42.*

The Lords thought this case singular, and were inclining to sustain the discharge on the back of this bond to assoilyie from the 200 merks, in regard it was of a very old date, more than thirty years ago, and never quarrelled all that time : But it being suggested that the creditrix in the bond died shortly after the date of the said discharge, therefore they remitted to the Ordinary to try when she died, and if it was ever questioned in her lifetime.

*Vol. II. Page 138.*

1702. *January 15.* JAMES NASMITH *against* SIR ALEXANDER COCKBURN of LANGTON'S CREDITORS.

MR James Nasmith of Dawick, advocate, gives in a petition, representing that he, being a considerable creditor to Sir Alexander Cockburn of Langton, had raised a process of sale of that estate ; but George Lockhart of Carnwath, another creditor, having also raised a sale, the petitioner then lay by : but Langton having transacted with Carnwath, his process ceased ; so that the petitioner has now wakened his summons, and is ready to insist and prove the rental, which Langton, with much industry, has darkened ; and this, being the joint interest of all the creditors, ought to be carried on upon the common expense, and not on the private charges of one single creditor ; therefore craving that a sum of money, suitable to that exigency, may be advanced to him by the factor, for which he is willing to hold count.

The Lords considered, Though this used to be granted in all roups, yet here they remembered that there had been sundry modifications given already for carrying on this sale, and therefore it was hard to burden either the debtor or the creditors with new advances till they saw how the former was expended, or if it was yet extant in Carnwath's hands, ungiven out ; and, if his sale expired, whether he, or his creditors, should be at the loss of that expense now terminated by his transaction ; therefore they ordered that to be first tried.

*Vol. II. Page 138.*

1702. *January 27.* ALEXANDER WEIR *against* JAMES SIMPSON.

ALEXANDER Weir, as procurator-fiscal for the manufactories, having seized on some prohibited stuffs, conform to the late Act of Parliament, in the house of James Simpson, merchant in Edinburgh, he pursues a declarator to have them confiscated and burnt, as falling under the prohibition. Simpson, the defender, craved his oath of calumny, if he had reason to pursue that libel. Weir CONTENTED,---That, in thir popular actions, he was not obliged to swear *de calum-*

*nia*, no more than the King's Advocate is ; especially where he produces the thing itself before the judge, and, by ocular inspection, it is confiscable, as wanting the seal appointed for English goods.

ANSWERED,—Parties are not obliged to give their oath *de calumnia* on the major part of the summons, because that is, *injure*, founded on the Acts of Parliament or principles of law ; but, as to the subsumption arising from the fact libelled, every pursuer is bound to give his oath of calumny, if required, according to the 125th Act 1429 ; *illud juretur quod lis sibi justa videtur* ; and he may allege that his case falls not under the prohibition of the Act of Parliament ; for it might have been brought into his house, and left there to trepan him, though none of his.

REPLIED,—If defences be proponed, then the pursuer will be bound to give his oath of calumny thereon ; such as, if he has reason to deny that thir stuffs were sealed according to law, though now they be worn off ; but, in general, to give an oath of calumny, is both ensnaring and discouraging to such pursuits.

The Lords found no specialty ; but that he was bound to give his oath of calumny, if he had just reason, and believed that he had cause to pursue this libel. This does not import that a party is obliged to give his oath *de calumnia juris* as to the legality or relevancy of his allegations *in jure*, (which belongs to the judge's determination,) but only on the fact resulting from the point of law, whereon the subsumption of his libel stands. *Vol. II. Page 140.*

1702. *January 29.* NICHOLAS DUNBAR and SIR CHARLES HAY of PARK *against* MACDOUALL of FREUGH.

NICHOLAS Dunbar, daughter to Mochrum, and relict of Baillie of Dunraggat, and Sir Charles Hay of Park, her assignee, pursue Macdouall of Freugh on the passive titles, on this ground, That his father is burden-taker for her husband, in their contract of marriage, to procure her infest in her jointure-lands therein mentioned, in respect her husband was then minor, and Freugh was one of his curators ; and therefore, her husband's estate being now evicted by creditors, and she not infest, that he may be liable.

ALLEGED,—This contract consists of two sheets of paper ; and though Freugh signs the last sheet at the bottom, yet he has not sidescribed the margin at the juncture of the two sheets ; and therefore, his father's obligation to see her infest being in the first sheet, it cannot be obligatory ; especially considering that there is nothing in all the second sheet that looks as burden-taker, but allenary his pure consent as a curator ; so there may be suspicion that the first sheet has been loosed, written over again, and altered.

ANSWERED,—The statute law of this kingdom speaks of nothing but subscribing ; and sidescribing is only introduced by custom, which was not so universal and uniform at the time this contract was made ; and our decisions do not require it, as appears, *June 28, 1673, Arnot against Scot* ; and *14th January 1674, Ogilvie against the Earl of Findlater*, where a cautioner was found bound, though he had not subscribed the juncture at the margins.