No 260.

wise, that it was not universally observed in the very town of Inverness, did find, That Culloden's infeftment was valid, upon these grounds, that feu-holdings, and the solemnities of conveying the same, were to be judged according to the standing and inviolable custom of the place where they did lie, and that many heritors who held feu of the burgh, held no otherwise; so that if Culloden's sasine were declared null, many other persons would suffer; and that the sasine being recorded in the register of the burgh, all parties that had to do with Duncan Forbes might know his condition; as also, that the comprising led at Duff's author's instance, no diligence was done thereupon, but against one Bailie, who did subscribe the sasine, with the clerk only, and so had no other solemnity than Culloden's sasine; neither could the posterior ratification make it valid, if it had been *ipso jure* null. But the Lords, as to the future, did declare, that such infeftments should not be sustained as to the lands held of the representatives of the burgh royal, as superiors, but that the charters or precepts of sasine should be subscribed by the Magistrates and Council of the burgh; for which they did make an act of sederunt, and ordained the same to be publicly intimated.

Thereafter, it was *alleged*, That Culloden's infeftment was fraudulently conveyed, in so far as he had dealt with the clerk not to let the same be known, and that he suffered his brother to continue in the possession after his infeftment, and to set tacks, which was offered to be proved by witnesses. It was *answered*, That the engaging of the clerk to commit fraud *per nudam emissionem verborum* was only probable *scripto vel juramento*. The Lords did sustain it only probable *juramento partis*, albeit the rest of the qualities of the fraud *quæ cedunt sub sensum*, they found probable by witnesses.

Gosford, MS. No 424. *p.* 213.

No 261.

Found that a bond granted by a woman who could not write, subscribed by a notary and four witnesses, being assigned for an onerous cause, could not be reduced upon fraud, to be proved by the subscribing witnesses and communers.

1671. *December* 21. John Melrose *against* Isobel Douglas.

John Melrose being assigned to a bond granted by the said Isabel to her son, Robert Gibson, for payment of 300 merks yearly during her lifetime, and having charged thereupon, she did raise suspension and reduction, upon this reason, that the bond was not subscribed by her, but by two notaries and four witnesses, she being an illiterate woman, and was never read over to her before she gave order to subscribe for her, and wherein she was circumvened, in so far as it was offered to be proved by the communers who treated betwixt her and her son, that she had only condescended, and gave order for drawing the bond for payment of 300 merks during her son's lifetime only, but not her own; whereupon she desired the communers to be examined *ex officio* before answer. It was *answered*, That the charger being a lawful creditor, and made assignee for an onerous cause to a bond, which was as valid by act of Parliament as if it had been subscribed by the party granter, it could not be taken

away by the deposition of the communers now after the cedent's decease. THE LORDS assoilzied from the reason of reduction, unless that they would prove, that the assignee was *particeps fraudis*, or refer the verity thereof to his oath. No 261.

Fol. Dic. v. 2. p. 233. Gosford, MS. No 430. p. 222.

1681. *January* 5. BORTHWICK *against* YOUNG.

No 262.
What proof that a party affirmed himself major?

A REDUCTION of a bond on minority and lesion. *Answered*, It was for the balance of an account, and *in re mercatoria*, minority is not respected for the benefit of commerce. This the LORDS repelled, because the suspender was but a cautioner, and was not a merchant granting bond for his own traffic. Then *answered*, 2*do*, Offered to prove by the witnesses, *omni exceptione majores*, inserted in the bond, he affirmed himself to be major, and so could not be restored, C. L. 3. T. 43. *Si minor se majorem dixerit.* THE LORDS found this affirmation was not probable by witnesses, but only *scripto vel juramento* of the minor, because it might be of dangerous preparative if the sum were great; 2*do*, That a promise is not probable *per testes* being *nuda emissio verborum*; 3*tio*, That then the oath of a minor, swearing he was major, might be so proved; 4*to*, They had a remedy by inserting the affirmation in the bond, which being omitted, *sibi imputet.*

Fol. Dic. v. 2. p. 234. Fountainhall, MS.

*** Durie reports a similar case, 28th February 1637, Wemyss against ——, No 156. p. 9025, *voce* MINOR.

1683. *February.* GRANT of Kirdels *against* WILLIAM GRANT.

No 263.

IN a declarator of expiration of the legal of an apprising, it was *alleged* for the defender, That the pursuer had intromitted with the mails and duties of the apprised lands, equivalent to the sums apprised for, while he had both an assignation to the apprising, and a wadset right in his person; and apprehending, that his intromissions would be ascribed to the apprising, and not to the wadset, he, after expiring of the apprising, gave back the old assignation, and took a new right posterior to the intromission; and this was offered to be proved by famous witnesses.

THE LORDS, in respect the allegeance was fraud, allowed the witnesses to be examined *ex officio*, albeit the pursuer contended it was only probable *scripto vel juramento.*

Fol. Dic. v. 2. p. 233. Harcarse, (COMPRISINGS.) *No* 286. *p.* 67.