No 13. the act of indemnity, the meaning thereof can be no more than that parties who acted shall be in no worse case than they would have been with that party whom they followed. As to the second member, the pursuer *answered*, That what was done by others, by the defender's father's commission, must be his intromission, seeing it is all one to do by himself, or by another; and seeing it cannot be called omission, it must be intromission; 2*do*, Though command or warrant is ordinarily probable by writ or oath; yet there are *casus excepti*, as whatsoever is done for any party in his presence, is by all Lawyers said to be " ex mandato, et inde oritur actio mandati, et non negotiorum gestorum;" so that the presence, or tolerance of a person not only having power, but being obliged for diligence, must much more infer his power or warrant; and, albeit he was not always present, yet the deeds being public, and near the place of his abode, it is equivalent.

THE LORDS inclined not to sustain the first member, both in respect of the act of indemnity, which bears in itself to be most amply extended, and in respect that the pursuer had no right to the personal obligation or diligence; but, as to the second member, the LORDS were more clear as to what was done in the defender's father's presence; but, in respect it was more amply proponed, the LORDS, before answer, ordained witnesses to be examined by the pursuer, whether or not the woods were publicly cut, and whether or not Lambertoun was at any time there present, and applied any thereof to his own use; and witnesses also for the defender to be examined, whether a part was cut clandestinely, and other parts by persons having no relation to Lambertoun, and to whom he used any interruption.

Stair, *v.* 1. *p.* 441. & 450.

1673. *November* 28.

JEAN CAMPBELL and her Spouse *against* ALEXANDER CAMPBELL.

No 14.
Between conjunct persons, if a bond bear for borrowed money, the oath of party is sufficient to support the deed, but if there is a disposition bearing for an onerous cause, the onerous cause must be instructed, otherwise than by oath.

THE said Jean being provided by her contract of marriage with Donald Campbell to the half of the moveables that should belong to her husband at the time of his decease, and two hundred merks out of the first end of the other half, she did pursue the said Alexander for payment of the half of a legacy, which was left by the said Donald's father to him, and intromitted with by the said Alexander, by virtue of a disposition made to him by his brother. It was *alleged* for the defender, That he could not be liable, because by the disposition he did acknowledge himself debtor to him in a thousand merks, and for satisfaction thereof disponed to him the said legacy and moveables, which was lawful to him to accept of, being a lawful creditor as said is. It was *replied*, That the disposition being granted by one brother to another, the law presumes it to be fraudulent, unless that he can prove *scripto*, and otherways than by the said disposition, that his brother was truly debtor in the said sum; specially the

defender having given a back-bond of that same date, whereby he was obliged never to regret the said bond and disposition, bearing a receipt of the money, and an obligement to make payment, and an assignation of the moveables, for farther security, was sufficient to instruct the debt, and he was not obliged to prove it otherways by writ, being content to give his oath, that the bond was for sums of money truly delivered. THE LORDS found that there was a difference betwixt a disposition made for an onerous cause only, and a bond of borrowed money bearing a special sum, and an obligement to pay, which liberates from the necessity to prove otherways *scripto*, that a brother was debtor, whereas in the first case they must condescend on a special onerous cause, and instruct the same otherways then by his own oath; and therefore they found it sufficient the defender should make faith, that the borrowed money was a true debt, and had no respect to the back-bond on any presumption founded thereupon, that the bond was simulate, seeing it did only contain a forbearance of execution, which might be easily granted by one brother to another. No 14.

Gosford, MS. No 639. *p.* 371.

1677. *November* 15. THOMSON *against* ROSS. No 15.

THE LORDS in this affair took summar trial, upon a bill of a forgery and circumvention, in hatching up a false execution of a charge of horning, because in a poor man's cause. 2*do*, They allowed to take a party's oath in an act of fraud, though the witnesses had proved nothing of it, and though two manners of probation are not consistent, nor is it usual to take a party's oath for proving a forgery, whereunto he has accession, or where he has used the false writ.

Fol. Dic. v. 2. *p.* 13. *Fountainhall MS.*

1678. *July* 24. GORDON of Seton *against* CRUIKSHANKS. No 16.

A decreet arbitral was reduced, because year and day were expired, between the submission, and it. Then *alleged* absolvitor because the pursuer invaded him. THE LORDS found invasion relevant to be proven either by his oath or by witnesses, though the invasion was already judged by the Sheriff and they fined for it.

1679. *January* 23.—IN a riot pursued by one Cruikshank, against James Gordon of Seton, both merchants in Aberdeen, the council found James Gordon the first aggressor, and therefore fined him in 400 merks.

Fol. Dic. v. 2. *p.* 13. *Fountainhall, MS. & v.* 1. *p.* 36.