1676. *February* 22. BROWN *against* LAWRIE.

No 94.
Witnesses inserted in a bond were examined *ex officio*, whether the bond, which bore for borrowed money, was in renovation of a former bond.

JAMES BROWN pursues the reduction of a bond of 300 merks granted by him to Matthew Lawrie, on this reason, that Matthew having married the pursuer's sister, he and his mother were bound in the contract of marriage to pay 500 merks of tocher, whereof 200 being paid, his mother gave bond for the remanent 300 merks, which she thereafter paid, and got the said Matthew his discharge; but after her decease, the said Matthew presented the said bond of 300 merks to the said James Brown, as being granted by his said mother, which the said James renewed by the bond in question, bearing borrowed money, and cancelled his mother's bond without taking a discharge, and now produceth the defender's discharge of the pursuer's mother's bond of 300 merks, and therefore craves that this bond, being obtained by circumvention, it might be reduced, and offered to prove by witnesses inserted in the bond, that the cause thereof was the mother's bond, which was cancelled when this bond was granted and subscribed. The defender *alleged*, That the witnesses inserted could not be admitted to take away this writ, bearing borrowed money, and to ascribe another cause thereto, which would overthrow that great security of the lieges, that writ cannot be taken away by witnesses, which hath no exception of the witnesses inserted, who, though they may be adduced for clearing any dubious expression in the writ, what was communed or meant by the parties, yet cannot alter the clear substantials thereof, by proving there was no borrowed money, but another cause, seeing it was the pursuer's fault and neglect to insert any other cause than the true cause, if it were so, but he might and ought to have inserted the true cause, as being a renovation of his mother's cancelled bond. It was *answered* for the pursuer, That the defender being commonly held to be *malæ famæ*, he dare not refer the whole reason to his oath, but offers to prove by his oath, that the cause of the bond was not borrowed money, as it bears, and by the oath of the witnesses inserted, that the true cause was the mother's bond which was cancelled, whereof he produceth a discharge, and therefore humbly craves that the Lords, *ex nobili officio*, would examine the witnesses accordingly.

Which the LORDS granted in this case, upon the reasons foresaid.

Fol. Dic. v. 2. *p.* 221. *Stair, v.* 2. *p.* 419.

1677. *January* 16. FORDEL *against* CARIBBER.

No 95.
A writ may be done away by reduction *ex capite justus, doli,*

IN a reduction at the instance of the Laird of Fordel, against Monteith of Caribber, of a disposition granted by Monteith of Randyfurd to Caribber, upon that reason, that the said disposition was not delivered, but was lying by the

defunct in his charter-chest, and blank in the name and date, and that the defender intromitted with the same unwarrantably, and filled up his name ; No 95. *aut minoris ætatis.*

THE LORDS ordained certain persons, who were going to France, to be examined before debate, reserving to themselves to consider what their depositions should work.

Though it may appear hard, that a writ should be taken away by witnesses, yet the reason being relevant, and in fact, and resolving in dole and fraud, it may be proved by witnesses.

1677. *January* 17.—THIS day again, in the case above mentioned, Caribber *contra* Fordel, the LORDS did find, upon a bill given in by Caribber, that albeit writ cannot be taken away but by writ directly, and that a disposition could not be taken away but by a renunciation or some other writ, where there is no question as to the validity and formality of the same, yet it may be taken away by a reduction *ex capite metus et doli*, and *minoris ætatis* and lesion; and that in such pursuits, the reasons being in fact, and libelled either upon force or circumvention and fraud, are probable by witnesses; and that the reduction at Fordel's instance upon that reason, viz. that the disposition in question was found among the defunct's papers the time of his decease, and was intromitted with and filled up by Caribber, is *ex eodem capite doli.*

Clerk, *Hay.*

Fol. Dic. v. 2. *p.* 217. *Dirleton, No* 427. *p.* 211. *& No* 432. *p.* 213.

*** A similar decision was pronounced, 16th January 1677, Stewart against Riddoch, No 74. p. 11406, *voce* PRESUMPTION.

1678. *November* 30. M'KENZIE of Suddy *against* GRAHAME of Drynie.

No 96.

THE LORDS refused to sustain this reason of reduction of a decreet, That the clerk had drawn the interlocutor contrary to the testimonies of the witnesses; for this would bring all decreets overhead, by fixing a pretended guilt on the clerks. Thereafter the Lords renewed their act for sealing the deposition; but, before extracting the decreet, the LORDS will not refuse to review, as in Tweedale and Drummelzier's case.

Fol. Dic. v. 2. *p.* 223. *Fountainhall, MS.*

1679. *February* 13. CATHCART *against* LAIRD of CORSCLAYS.

No 97. Although delivery of a writ, is presumed by

UMQUHILE Mr Hugh Cathcart having disponed all his estate, both heritable and moveable to Hugh Cathcart of Carletoun, his brother's son, and apparent heir to John Cathcart now of Carletoun, as heir to his father, pursues Corsclays