

1707. June 14.

GEORGE LIVINGTON of Midfield, *against* Mrs. MARGARET MENZIES, Daughter  
to CULTERALLERS.

## No. 130.

A remote substitute in a first tailzie revoked by a second, not sustained a witness for proving that the second tailzie was elicited from the granter on death bed by importunity or undue insinuations when his judgment was disturbed by sickness, although the said substitute was content to renounce his expectation by the first tailzie.

In a competition for the estate of Saltcoats betwixt George Livington, who founded on a tailzie granted to him and others therein substitute by the deceased George Livington of Saltcoats; and Mrs. Margaret Menzies, who pleaded that the granter of that tailzie had revoked it by a declaration under his hand, and made a posterior tailzie in her favours; George Livington being allowed to adduce what probation he could for instructing that the revocation of the first tailzie, and the second tailzie in favours of Mrs. Margaret Menzies, were elicited from Saltcoats by importunity, or undue insinuations, when his judgment was disturbed and weakened by sickness; and for proving thereof having produced Alexander Aikenhead as a witness; Mrs. Margaret Menzies alleged, that he could not be admitted, because he is a substitute in the first tailzie, which is revoked by the second, and so has too great an interest in the affair to be allowed to depone as a witness.

Answered for Mr. Livington: That Aikenhead was but a very remote substitute in the first tailzie, and had so very little expectation thereby, that he was content to renounce the same. Besides, this being a probation of the condition a person was in upon death-bed when only friends could be supposed to have been about him, one may be sustained as a necessary witness here, who might perhaps be excepted against in other cases, where *copia* of indifferent witnesses may be had.

Replied for Mrs. Margaret Menzies, That Aikenhead's forwardness in offering to qualify himself to be a witness, by renouncing his expectation by the first tailzie is so far from being a tolerable ground of admitting him, that it affords a shrewd presumption of his being too much interested in the affair.

The Lords sustained the objection against the witness, and refused to admit him.

*Forbes, p. 168.*

\* \* See No. 69. p. 3261. *voce* DEATH-BED.

1707. June 19.

THE FEUERS and MERCHANTS of the TOWN of FRAZERBURGH *against* WILLIAM  
LORD SALTOUN.

## No. 131.

In the declarator at the instance of the Feuers and Merchants of Frazerburgh against the Lord Saltoun, the pursuers having cited Alexander Gordon, Clerk of the said Burgh, to exhibit the court and council books, who first compeared and deponed before extracting of a second diligence against him, and again came up and deponed after it was extracted; the Lords refused to allow him the expenses of his second journey, in respect of the second diligence; but allowed him

expenses for his first journey, and granted summary warrant to apprehend and incarcerate the pursuer's agent till payment thereof were made. No. 131.

*Forbes, p. 170.*

1708. November 23.

WILLIAM SYM and ROBERT SCOT, *against* JOHN DONALDSON, Notary in BANFF.

William Cruickshanks, merchant in Banff, having disposed his whole estate to Jean Cruickshanks his daughter, Robert Scott writer in Edinburgh, assignee under trust to William Sym, heir to the said Jean Cruickshanks his mother, raised reduction and improbation of a disposition granted by the said William and Jean Cruickshanks, with consent of Patrick Sym her husband, to John Donaldson, upon this ground; that the disposition quarrelled bore only, that William Cruickshanks subscribed by two notaries and four witnesses, and the pursuer offered to improve the subscriptions of the witnesses (whereof the said William Sym was one) by their oaths. William Sym (who being an instrumentary witness, was allowed *cum nota* to depone, notwithstanding his interest in the cause) disowned his subscription. Another of the witnesses acknowledged his, but did not remember that he heard or saw William Cruickshanks give warrant to the notaries, or that he saw Patrick Sym or Jean Cruickshanks subscribe, or own that they had subscribed it, being ten or twelve years ago, but said he knew their subscriptions, and was sure he would not have subscribed witness, except in presence of the parties. A third witness was dead; and the fourth deponed, that it was like his subscription, though he could not be positive. The pursuer contended, That the disposition was not only null as to the subscription of William Cruickshanks, for want of four witnesses; but also was null *in toto*, in respect, *1mo*, The subscriptions of William Sym and Jean Cruickshanks, who subscribe as consenters, must fall as accessories with the subscriptions of William Cruickshanks the principal disponer; because, the whole four witnesses being indefinitely adhibited to the subscriptions of the parties and notaries, the controlling two of them weakens the faith of the other two; especially seeing the dead witness's deposition is only presumptively probative, and the other who owned his subscription is not positive, that he saw the parties subscribe, or heard them own their subscriptions, in the terms of the act of Parliament 1681, which annuls his testimony. *2do*, The disposition is null; because, not sidescribed by the parties at the juncture of the sheets; for albeit there was no positive law before the year 1696, requiring sidescription, *ita invaluit usus et consuetudo*, for preventing the cutting of a writ, and affixing new sheets of a different tenor to the last. Again, the act 1696, appointing every page to be signed as margins were before, implies, that sidescribing was necessary by our law. And by an act of sederunt July 18, 1691, all signet letters were ordained to be sidescribed, as was done by Clerks of Session in their extracts; consequently sidescribing is far more necessary to principal extrajudicial writs, that have no warrants upon record to check the tricks of unjust men.

No. 132.

An instrumentary witness was admitted *cum nota* to depone for improving a party's subscription, although he was to have been a gainer by annulling the writ.