

1702. November 13. DAVID WALKER *against* JAMES CLERK in Dury.

No 40.
In an exhibition of a bond against the debtor as haver, he was bound to qualify in his oath, how it came to be retired by him.

IN the exhibition pursued by David Walker against James Clerk in Dury, the defender deponed, and confessed, that he was owing by bond to the defunct 400 merks, but that, when she was on death-bed, she sent for him, and gave him back his bond, and took his promise to bury her honestly, for which cause she gifted the debt in this bond, and he carefully performed the condition, and was at the expense of her funerals. *Alleged*, She had assigned to the pursuer long before that, all sums of money, goods, and gear, under which generality this sum fell, and so she was denuded. *Answered*, That was only a general clause, and carried no more but what sum was due to her at her death, and this assignation was never intimated to him, and he was *in bona fide* to receive his own bond, which the LORDS found. But it was contended, that it was an extrinsic quality, and ought to be *aliunde* proved. THE LORDS found the calling for him, and giving him up his bond intrinsic, but what he further adjoined of his having expended all the charges of her funerals, and so had implemented the condition was extrinsic, and needed probation. Then it was urged, that he could have allowance of no more than what he had actually wared out on her burial, which was but L. 40 or 50 Scots, and the remanent of the bond belonged to the pursuer as assignee. THE LORDS found it was *legatum liberationis*, and that she had given him the whole.

Fol. Dic. v. 2. p. 298. Fountainhall, v. 2. p. 159.

1708. June 24.

JEAN PRINGLE Relict of George Rutherford, Bailie in Dunbar, *against* ISOBEL MANDERSTOUN.

No 41.

THE said Jean Pringle, as executrix to her husband, pursued Isobel Manderstoun for L. 98 contained in her bond granted to the defunct, who proponed a reason of compensation or payment, by two horses to the value of L. 90 given to the defunct, and offered to prove the same by the pursuer's oath. She having deponed, acknowledging the receipt of such horses, but adding, that they were received in payment of an account of furnishing to the defunct, and in fortification of the quality, produced the defunct's count-book containing the same inserted; the LORDS found the quality of the oath intrinsic, and decerned to pay the bond.

Fol. Dic. v. 2. p. 298. Forbes, p. 253.

1710. January 5.

PATRICK MORTIMER in Cowper, *against* JAMES ARCHIBALD, and Others.

No 42.
Intromission with a defunct's move-

IN the cause at the instance Patrick Mortimer, as executor confirmed to Agnes Wilkie, relict of Fotheringham in Kennoway, against James Archibald, and others, for repetition of goods and money belonging to the de-