

1672. July 26.

GORDON *against* MENZIES.

## No 26.

The body of a deed bore that a party was cautioner.

Consent not inferred by his subscribing as witness. See No 32. p. 5650.

IN a count and reckoning betwixt Mr Arthur Gordon and Menzies, this point was reported by the auditor, viz. that a bond deduced in the account, bearing in the body, Menzies to be cautioner for his mother, was subscribed by him as witness, albeit he was not mentioned as witness inserted, but two other witnesses were inserted, and subscribing; whereupon he *alleged*, that his subscribing as witness could not oblige him, seeing persons frequently subscribe writs as witnesses, without considering the contents, or whether they be inserted witness, conceiving that their subscribing witness imports no more but that they saw the parties subscribe; especially seeing the creditor accepted the bond wherein this person subscribed only as witness. Whereunto it was *answered*, That the subscribing as witness did import consent to the matter, and did infer *presumptive* that the party knew and consented thereto, and that it hath been but by inadvertency of the creditor, in taking the bond subscribed with the adjection of witnesses.

THE LORDS did not find that the subscribing as witness did oblige, unless it were instructed that the bond was read to this party; and therefore ordained the writer and witnesses to be examined thereanent.

*Fol. Dic. v. 1. p. 378. Stair, v. 2. p. III.*

## No 27.

An executor confirming a sum, which was heritable, found not to have thereby homologated the testament so as to be liable for a special legacy of the same sum.

1673. December 23.

MITCHEL *against* MITCHEL.

THERE being a special legacy left in favours of John Mitchel, of a particular sum in a testament, wherein James Mitchel is nominated executor, who was also heir to the defunct; the legatar pursues him as executor to pay the legacy. He *alleged* absolutor, because the sum legated was heritable by infestment, and could not be legated. It was *answered*, He having confirmed the testament containing this legacy, without protestation, he had homologated and acknowledged the same, and could not quarrel it.

THE LORDS repelled the allegiance, and found the confirmation without protestation to be no confirmation of the legacy, to exclude the heir from his right to the sum, such confirmations passing of course without advertance, or search into the condition of the debts.

*Fol. Dic. v. 1. p. 379. Stair, v. 2. p. 246.*

## No 28.

A person subscribed as witness to a right granted

1676. February 1.

VEITCH *against* PALLAT and KER.

WILLIAM VEITCH, as having right to a sum due by James Sanderson to one Nairn, whereupon horning was used against Sanderson, did thereupon reduce