from which I cannot be debarred, unless, by a new consent subsequent to the building, I had declared that, by a second marriage, I should lose the liferent of that new house; which I have not done.

ANSWERED,—Though it be built since her contract, yet it is almost built on the same foundation, and near to the ground on which the old house stood; and so, *fictione juris*, is as much the same as a ship though repaired all with new planks,—*Arg. l.* 76 *D. de Judic.;* and as *surrogatum sapit naturam ejus in cujus locum subrogatur*, so the identity of the second house with the first must oblige you to remove.

The Lords found this mansion-house being built on the foundation where the former stood, the lady must remove.

But, as to the parks, it was CONTENDED,—That, at the time of her marriage, the same was of a very small circuit, extent, and bounds; but that, since, he had inclosed a very considerable piece of ground; and, therefore, she could remove from no more than what was the park at the time of her contract.

The Lords thought this reasonable, and ordained it to be tried: for what if he had, during the marriage, inclosed a great part of her liferent lands, that clause in her contract could never have afforded action to dispossess her thereof. See *2d February* 1672, *Guthrie* against *Macdougal.* *Vol. II. Page* 621.

1711. *January* 6. JAMES MALCOLM of GRANGE *against* JAMES WEYMS of PITKENNY.

JAMES Weyms of Pitkenny grants a bond, blank in the creditor's name, for 750 merks, *in anno* 1686. James Malcolm of Grange, finding this blank bond lying amongst his brother my Lord Lochore's papers, he fills up his own name in it, and charges Pitkenny for payment; who SUSPENDS on this reason,—That the said bond originally belonged to one Margaret Kinnymond, who lent him the money; but, her husband being in great debt, she was advised, to prevent his creditors' arrestments, to take it blank, and put it in Mr Alexander Malcolm her advocate's hands, for her use; and that she afterwards assigned this bond to one Clark, who married her daughter, who recovered a decreet against Pitkenny for the sum before the sheriff of Fife; on which distress he had made payment, and obtained his discharge; and so could not pay twice.

ANSWERED,—He opponed his clear liquid bond; which, though blank, yet, being in my Lord Lochore's cabinet, was his evident; and he, as his nearest of kin, might warrantably fill up his own name therein, and could not be taken away by such extrinsic stories.

The Lords allowed Pitkenny, before answer, to prove, *prout de jure*, that his bond was put in my Lord Lochore's hands for the use and behoof of Margaret Kinnymond, in trust; and that she had assigned it to Clark, her son-in-law, and who, upon payment, had discharged it.

Upon this, a probation being led, one Hutcheson DEPONED, That he was present when Mistress Kinnymond gave the bond to my Lord Lochore, to prevent its being affected by her husband's creditors; and that he heard Lochore say, he should give her up the bond whenever she called for it. And one Glassford depones, that he heard Doctor Malcolm, after Lochore's death say, he be-

lieved his brother had no interest in that bond, and that he would not be so base as fill up his name therein; though, after the Doctor's decease, his brother James did it. And sundry others deponed, That it was the common voice of the country that Margaret Kinnymond had a bond lying in my Lord Lochore's hands. It was likewise instructed, That Pitkenny gave her a free house in his land, and paid her the annualrent of that sum; which must be ascribed to the debt in this bond, unless they instruct that Pitkenny owed her another sum besides this.

Against this probation, it was ALLEGED,—There was nothing more destructive to our securities than to evacuate and annul bonds by such frivolous, weak, and strained presumptions: and all the testimonies resolve into nothing but *super auditu alieno*, mere hearsay; except Hutcheson, an illiterate fellow, who can neither read nor write, and so is not an instrumentary witness; and who is too circumstantiate and perquire in his lesson to beget belief. It might have been Arabic, or any thing, rather than a bond, for him. And Grange, the charger, always told Pitkenny, if the instrumentary witnesses should affirm it was Margaret's money, God forbid he should seek it; but there were none of them examined, but only mean extraneous fellows. And the transaction betwixt him and Clark was a mere sham and collusion, who accepted of a small thing, and he was *in pessima fide* to take a discharge from him without getting up his bond, when he knew well enough where it was lying.

ANSWERED,—That, since the 25th Act 1696, it is acknowledged trust cannot be proven but only *scripto vel juramento;* but this is long prior to that act, when trust was inferred from probabilities and presumptions resulting from matters of fact; as appears from many decisions, and particularly 1*st March* 1623, *Williamson* against *Lamb*; 27*th July* 1624, *Lady Staniepath* against *her Son's Relict*; 6*th February* 1669, *Rule*. And though, *regulariter*, writ is not to be taken away by witnesses, yet trust is an exception from the rule; and, in this case, the bond was a *corpus et depositum*, and so a proper object of our senses. And, *esto* Hutcheson were illiterate, yet no more is required to capacitate him to depone on what he heard and saw, but only to allow him eyes and ears: and some men may be as sagacious as them who have more learning. And, as to such of them as depone *de auditu*, yet, being *in re antiqua*, it is probative, *per l.* 28 *D. de Probat.* et *l.* 2, *sec.* 8, *D. de Aqu. Pluv.* And though they be *testes singulares quoad* time and other circumstances, yet *in idem concurrunt*; and even as happens in the proving possession, where, though the witnesses depone on different acts, yet they are conjoined to make up plenary probation. And, as to the pretended contrivance, *nemo præsumitur jactare suum*. Pitkenny was not so flush of money; neither was it clandestinely done, but in open sunshine at the sheriff-court of Cupar.

REPLIED,—That trust was formerly probable by unexceptionable documents, is not denied; but there is no such convictive evidence here. And the presumptions, on the contrary, preponder; for it is known, when my Lord was advanced from being an advocate to be a judge, he gave back all his clients' papers lying beside him; and so he would have done with this, if it had been Margaret Kinnymond's. And its lying beside him, without any note or cover mentioning the trust, proves it was his own; and cannot be taken from his heirs by such weak and slender presumptions. And such unconnected irrelevant qualifications can never infer such a dangerous article as trust.

The Lords did think the whole conjectural and divinatory; yet, by plurality of votes, found the trust proven by the testimonies and writs produced, and so reduced the bond as it stood in Grange's person, and assoilyied.

Against this interlocutor the pursuer gave in a protest and appeal to the Parliament. *Vol. II. Page* 621.

1711. *January* 23. ROBERT M'BRIAR of NETHERWOOD *against* CHARLES MAITLAND of ECCLES.

THE deceased John Maitland of Eccles having been one of the curators to Robert Macbriar of Netherwood, he pursues Doctor Charles Maitland, now of Eccles, as representing his father on the passive titles; who denying that ever his father accepted the curatory, Netherwood, for proving thereof, produced an extract of the act of curatory, under the Sheriff-clerk of Dumfries his hand, bearing, That, on the 1st February 1672, Robert Macbriar compeared before the Sheriff, and gave in a list of curators, and that they personally present accepted of the office, and became cautioners for one another; in which nomination and acceptance Eccles was one. But this being *in re tam antiqua*, to overtake a gentleman's heirs after thirty years and more, they burdened Netherwood to produce the grounds and warrants of the said act of curatory; and the clerks having omitted to insert a diligence in the act against the Sheriff-clerk, for producing and lending them up, Netherwood was forced to find caution to the clerk for reproducing them before he would part with them. Against which, it was objected by Eccles, that this clandestine way of procuring them was most dangerous and suspect; seeing, at this rate, one may easily forge and make warrants, if the clerk, to whose trust they belong, do not, upon oath, exhibit them. But then, as they are, they appear to be most defective, unformal and null; for the minor's nomination has neither date nor witnesses; the precept for summoning the nearest of kin on both sides does not design the witnesses; and the name of the officer-executor is scored, and vitiated. Next, the signature authorising the curators is neither signed by judge nor clerk; and though this be prior to the Act of Parliament 1686, ordaining all judges' interlocutors to be signed, yet this is of a different nature from those *in jurisdictione contentiosa;* but is rather an *actus legitimus* in face of court, where both judge and clerk are *contestes*. And further, the curators' acceptance and binding for one another wants witnesses, and so is absolutely null: besides, they produced a testificate of his age, that he was born in 1659, and so, at the electing of his curators, he was only thirteen years old; which is a plain nullity, being then incapable of naming curators. And to bring such a vast exorbitant sum as his claim, extending to 100,000 merks and upwards, on his heirs, after so long silence, is a most unreasonable thing. And, if he can prove actual intromission against their father, they are willing to repay it *cum omni causa;* but he never meddled with a groat of Netherwood's estate. And to bind them to pretended omissions were most unfavourable.

ANSWERED,—He opponed the act of curatory bearing his father's acceptance; so that the pretended defects in executing the precept, or in the list, are all purged, and fully supplied by his personal compearance before the Sheriff, ac-