

nesses only, that a man had the private knowledge of a deed ; for knowledge is an act of the mind, and witnesses may differ in their opinion as to what will infer such knowledge. It would be going very far to refer private knowledge even to the oath of party ; for he might say, " I did know so and so ; but I relied on the law, which, by assignation intimated, puts me *in mala fide*, but not otherwise." It might be difficult to divide this oath. The case of proving by witnesses is still narrower.

GARDENSTON. It would be dangerous to controvert the principles just now delivered. It is a valuable part of our law not to give credit to witnesses in matters of debt. A debt cannot be created by witnesses. You might as well prove the assignation as the intimation by witnesses.

PRESIDENT. It would hurt the law extremely, if this evidence were received. Homologation may, in some cases, be proved by witnesses, because valid and effectual acts of homologation are such, that they cannot be applied to any other case ; whereas private knowledge is a thing uncertain. Because, if there has been any loss here, it has been occasioned by the neglect of the pursuers in not intimating their assignation.

On the 18th January 1776, " The Lords assoilyied ;" adhering to Lord Stonefield's interlocutor.

Act. B. W. M'Leod. *Alt.* W. Nairne.

1776. January 18. WILLIAM SIBBALD *against* JOHN SIBBALD.

WRIT.

What if one of the instrumentary witnesses is dead, and that the only other instrumentary witness gives oath of the subscription by him, as witness, being truly his subscription, but adds, that he did not see the granter of the deed adhibit his subscription.

[*Faculty Collection, VII. 162 ; Dictionary, 16,906.*]

JUSTICE-CLERK. If, after possession has been had for near 40 years on a deed, and one of the witnesses is dead, you will set aside the deed upon the evidence of the other witness's saying, that, at the distance of 40 years, he did not see the party subscribe ; you will overturn half of the settlements in Scotland.

HAILES. What has been just now said, will be confirmed by an observation drawn from the testimony of this old man when compared with the deed itself. He says, that the paper was folded when he subscribed, which concealed the subscription of the principal party ; and as to this fact, he is very positive and distinct. Now, it is plain that he was here speaking at random ; for it is evident, from ocular inspection, that there never was any such fold in the paper as he mentions, and that it would have been scarcely possible to make such a

fold, without covering part of the paper on which the witness himself has wrote.

On the 18th January 1776, "The Lords repelled the reasons of reduction;" adhering to Lord Auchinleck's interlocutor.

Act. A. M'Conochie.

[Petition refused without answers.]

1776. *January* 19. MUNGO MURRAY *against* ALEXANDER BUCHANAN.

WARRANTICE—TACK.

Not pleadable in bar of payment of the rent against a lessor, whose lessee, an artificer, was forced, by authority, to desist from carrying on his trade in the house let, and afterwards deserted by him on account of its being a nuisance to the neighbours, and endangering the tenement.

[*Faculty Collection, VII. 165 ; Dict. 16,636.*]

HAILES. As the defender declines going into a proof, we must hold that the person acting for the pursuer did not know the nature of the looms to be set up. It is proved, by the judgment of the Magistrates, that the house could not bear the weight and motion of those looms: this of itself is pretty good evidence that the latter did not know their nature; but the tenant ought; and, by taking a house for which his work was unfitted, he excluded the chance of another tenant, and must therefore pay the rent.

PRESIDENT. The judgment of the Magistrates must be held as just, for it has not been brought under review. The woman did not know the nature of the looms; but the workman himself ought to have known it.

GARDENSTON. It would be a strange sort of warrantice, that the letter should warrant the house to be fit for the tenant's business. The tenant himself ought to see to that.

On the 19th January 1776, "The Lords decerned for the rent;" adhering to Lord Covington's interlocutor.

Act. Hay Campbell. *Alt.* A. Wight.

Diss. Kennet, Stonefield, Alva.