

1626. December 13.

E. ROTHES' DONATAR against L. GRANT.

No 22.

IN a declarator of non-entry, pursued by the E. of Rothes as donatar against L. Grant, an exception being admitted, bearing, that the Earl of Rothes had subscribed a precept of *clare constat* in favour of the defender, which was delivered to the defender, and so thereby become his evident; the defender thereafter delivered it to the pursuer, to the effect he might append the Earl's seal thereto, which was in the pursuer's keeping; which exception the LORDS found could not be proved by witnesses, but only by the Earl of Rothes's oath, or else writ, seeing it tended to make up an evident, and which could not be lawfully done by witnesses; albeit the defender *alleged*. That this might as well be proved by witnesses, as the having of evidents in actions for delivery of writs, or as in actions of proving of tenors, which are proved by witnesses; which the LORDS found not alike, seeing this, as said is, tended to make up an evident, which is not the intent of actions of delivery of writs, where the having is only to be proved; and in actions to prove tenors, there are ever relevant adminicles required, besides the witnesses, and a relevant cause of omission, besides the verity of the deed, and a specific tenor of the writ.

Act. Aiton.

Alt. Belbes.

Clerk, Gibson.

Fol. Dic. v. 2. p. 216. Durie, p. 245.

1627. December 14.

HEPBURN against LYLE.

UMQUHILE George Lyle being obliged by his bond to pay a sum to Francis Lyle his brother, Mary Hepburn, relict and executrix of the said Francis, pursues the son of the said George, as lawfully charged to enter heir to him, for payment thereof; and the defender *alleging*, That the sum contained in the bond was vitiated and superinduced, as might be seen to the Lords by ocular inspection, for the sum was made 500 merks, whereas truly the same was less; the Lords having seen the bond, and by inspection finding the letters of five to be superinduced above some other letters, whereof the vestiges yet appeared, and were seen unto the Lords, whereby it was likely that the sum was less than five; therefore they ordained the pursuer, user of the bond, to approve, either by some writ, or by the witnesses inserted in the bond, or by some other lawful adminicle, that the sum of five was the true sum owing, and contained *ab initio* in the obligation; which probation the LORDS found necessarily was incumbent, and lay upon the user of the bond, seeing it was seen by the Lords to be superinduced; and found it not necessary, that the defender should be obliged to improve the same, albeit the pursuer abode at the same.

Act. ———.

Alt. Craig.

Clerk, Gibson.

Fol. Dic. v. 2. p. 214. Durie, p. 321.

No 23.  
A bond being vitiated in the sum, the defender was not obliged to bring impro- bation, but the pursuer was obliged to ascertain the sum by adminicles.