

1681. *June 16.*ELLIS *against* The DUKE and DUTCHESS of HAMILTON.

No. 89.

A witness in the proving the tenor of a bond, having, in answer of a letter of the pursuer's, acknowledged that he had seen the same, was examined *cum nota*.

Mr. John Ellis having insisted in the probation of the tenor of a bond granted by the Earl of Lanark and others, and craving Alexander Gelly to be examined as a witness. It was alleged, that he could not be a witness in this cause, because of a letter produced subscribed by him after intenting of the cause, acknowledging to have seen the bond in question, which letter bears to be in return of a letter of the pursuers, and is after the intenting of the process, and therefore it is *proditio testimonii*; for this witness having subscribed the point in question, he is no more an equal and unsuspected witness, being biassed by his letter; for if he should depone contrary thereto, it would encroach upon his honesty and fidelity, and is a tentation upon him to swear conform to his letter; and the same ground that excludes a witness who is prompted, must exclude a witness who is pre-engaged by his subscriptions; for whatever a witness may say *verbo*, it will not bias him to depone as a letter, *nam litera scripta manet*, whereas words are not extant and may be mistaken, and no witness could be put to depone what he had said *verbo*; and if such a preparative should be approved, it would encourage parties to pre-engage their witnesses under their hands. It was answered, that *proditio testimonii*, is only after a witness is cited, where he declares what he will depone, but this witness is not yet cited; *2do*, This person is a necessary witness, because he was a servant of the clerk's at that time, and had the bond in his hands by his office.

The Lords sustained the objection, and found this witness not to be above exception, yet being the clerk's servant, who had the bond in his hand, they ordained him to be examined *cum nota*, reserving to themselves to consider what it should import.

Stair, v. 2. p. 875.

1681. *November.*SIR JOHN AYTOUN of Aytoun and MACHANY *against* STUART of Innernytie.

No. 90.

It being objected against a witness adduced for proving the delivery of a bond of 4,000 merks, and assignation thereto, that 1000 merks of that sum was payable to the witness; and so he was a party;

Answered: The witness objected against was the defunct's servant, and so was necessary, though not inserted.

The Lords ordained the witness' oath to be taken *ex officio*, and to be sealed by itself, in case he should die; and declared they would consider at advising, whether or not to make use of the deposition.

Harcarse, No. 781. p. 220.