

S E C T. III.

Gbirographum apud debitorem repertum.

No 73.

1623. June 26. MONKTON against CARMICHAEL.

AN exhibition of a bond being pursued against a cautioner in the bond, it was *alleged*, No process against him, because *hoc ipso momento* that he conveneth him as haver, it liberates him; because *instrumentum creditoris apud debitorem repertem præsumiter solutum*: Which was sustained, except the pursuer would offer him to prove *quod dolo desiisset possidere*.

Fol. Dic. v. 2. p. 138. Spottiswood, (EXHIBITION.) p. 123.

* * * Durie reports this case :

RICHARD CARMICHAEL being heir and executor to umquhile James Carmichael his brother, to whom there was an obligation of 2000 merks made by William Carmichael principal and George Hay of Monkton his cautioner, pursues the said George Hay of Monkton as haver of the obligation, at least who had, or hath put the same away, and the said principal for his interest, for production of the same, and delivery to him, as heir or executor to his said umquhile brother. The principal being absent in the process, the cautioner, who was convened as haver, compeared and alleged, that he ought not to be compelled to exhibit or deliver the said obligation, seeing the pursuer would not offer to prove that the defender had the bond libelled since the intending of this process; and where the pursuer would allege it to be sufficient to say, that he was haver thereof at any time before, he ought to condescend how he had the same, and how the same came in his hands, and how the pursuer's self *desiit possidere*. For *answer* whereto the pursuer offered to prove, That the obligation libelled was made to his umquhile brother, as said is, and that the same remained with him since the time of the making thereof, to the time of his decease, after whose decease William Carmichael, principal debtor, being tutor to this pursuer, who then was pupil, intromitted with the same, and delivered it to the excipient, being cautioner, so that he ought to be answerable to him now therefore. The defender *duplicated*, seeing the principal debtor had recovered the obligation, and had sent the same to him, it was lawful to him, who was cautioner, to take his own name out of the bond, as is the constant use of the country for all cautioners to do in the like cases, when the principals sends bonds to their cautioners to that effect, nam *instrumentum cancellatum apud debitorem repertum præsumit liberationem debitoris*; and so he ought not to deliver it, nor exhibit, it being cancelled, and his name taken out.

thereof; after the which taking away of his name, he sent back the bond again to the principal, which was all the meddling he had therewith. The LORDS found the exception for the cautioner relevant, and assoilzied from the pursuit, without any probation of the exception, in respect of the circumstances and presumption of the law; and found it not necessary to the defender to prove the exception anent the delivery of the bond by the principal, and that he sent it back again, after his own name was taken out by him; neither was it found necessary to prove, that the bond was delivered, either to the principal or cautioner, by consent or allowance of the pursuer; without whose consent, the pursuer contended, that his bond could not be made unprofitable to him, seeing the same was never satisfied, neither by principal nor cautioner, and that the presumption of the law alleged by the excipient had no place, but where the creditor delivered his bond to the debtor himself, which could not be alleged in this cause; all which was repelled by the LORDS, seeing they found the cautioner might cancel his bond, which was given to him for that effect, by him who was obliged for his relief, and that he might have done the same whether the principal had paid the debt or not, which the defender had no necessity to inquire anent.

Act. *Aiton & Russell.*

Alt. ———

Clerk, *Gibson.**Durie p. 66.*

* * * Haddington reports this case:

RICHARD CARMICHAEL, as heir and executor to umquhile James Carmichael his brother, pursued the Goodman of Monkton to exhibit and deliver to him a bond of a L. 1000, made to the said umquhile Richard by William Carmichael, and the Goodman of Monkton his cautioner. Monkton *alleged*, That he could not be decerned to deliver the bond, unless it had been libelled that he had it, or had fraudulently put it away; for, if it were in his hands, it would infer presumption that the debt was paid, and if the pursuer pleased to take his oath, he could declare by his oath qualified that Mr Carmichael principal debtor sent the bond to him to rive out his name. It was *replied*, That the bond was in James Carmichael's hands the time of his decease, and was intromitted with by William Carmichael, debtor, who fell tutor to the defunct's brother and sisters, being minors, and so he could not abstract or destroy his own bond to free himself, and his cautioner, or prejudice the pupils. THE LORDS, considering the frequent custom to give back the bonds when the sums are paid, and that many parties, when they pay their debt, seek no other acquittance but re-delivery of the bond, they found the exception relevant *quod instrumentum apud debitorem cancellatum infert præsumptionem soluti debiti*, unless the pursuer would offer to prove that his bond was destroyed by force or fraud, and that Monkton was partaker of the fraud.

Haddington, MS. No 2870.