assignation before Cockburn's right; or if he did, that Mr David Thoirs did not get delivery of Haddo's assignation before Cockburn's intimation. No 173.

Fol. Dic. v. 2. p. 148. Stair, v. 2. p. 56.

*** Gosford reports this case:

COCKBURN, as assignee made by Bailie Mercer to a bond of Craigivar's of 4000 merks, having charged thereupon, Craigivar did suspend on this reason, That before the charger had intimated his assignation, he had obtained from the Laird of Haddo an assignation to a bond of Bailie Mercer's for the sum of 3000 merks, which he had likewise intimated before the charger had made any intimation to him of his assignation. It was *answered*, That any assignation made by Haddo to the suspender was without his knowledge, as likewise the intimation thereof, and was a contrivance betwixt Haddo and Mr David Thoirs, who was his advocate, of purpose to prefer Haddo to Cockburn, Bailie Mercer being *lapsus bonis*, so that Craigivar knowing nothing thereof, it did not liberate him from being debtor to Bailie Mercer, and so he might make a valid assignation to the charger. It was *replied*, That in law, *quilibet potest acquirere alteri etiam ignoranti vel absenti;* and so the assignation being delivered to Mr David Thoirs, in name of Craigivar, and intimated, was a valid right, whereof he might now make use.

THE LORDS did repel the reason of suspension, and found, that unless Mr David Thoirs had a special mandate whereby he might oblige Craigivar to accept of the assignation; and that, unless he had known and accepted thereof, by giving warrant to intimate the same, he could not thereafter make use thereof to the prejudice of Cockburn, who had done diligence by intimation before his knowledge, seeing that were to put it in his power who is debtor, to prefer one creditor to another, notwithstanding of the first diligence; and that, until he had accepted of Haddo's assignation, and become debtor to him, he was never liberated from the common debtor. Thereafter, it was offered to be proved by Craigivar's oath, and Mr David Thoirs', that he had given a special mandate to procure an assignation from Haddo, and to intimate the same before Cockburn did intimate his right, which was sufficient to extinguish Craigivar's debt to Bailie Mercer, and to make him debtor to Haddo; which the LORDS did sustain, albeit it was alleged, that it was only probable *scripto*, that Craigivar did agree thereto, seeing that were to prove Craigivar's allegeance by his own oath, which was hard.

Gosford, MS. No 455. p. 236.

1677. *July* 12. BAYNE *against* M'MILLAN. No 174.

Delivery of a bond not necessary to make it effectual.

MR JOHN BAYNE having charged Alexander M'Millan for payment of two bonds, he suspends on this reason, that he never borrowed any money from Mr

No 174. tual where a debtor took it in his creditor's name, it being reputed as in security to that creditor.

John Bayne, but that he granted these two bonds to Sir James M'Donald and his son, for cattle bought from them, and gave the bonds blank in the creditor's name, which thereafter were filled up with Mr John Bayne's name, and he charged thereupon; but before the charge, the creditors of Sir James MacDonald, and his son, arrested in his hand, and obtained decreet for making forthcoming, whereupon he made payment, and referred to Mr John's oath that he received the bonds from Sir James M'Donald and his son, and that they were blank the time of the arrestment. Mr John depones, that one of the bonds was sent to him blank after the arrestment, but depones, the other was filled up before it was sent to him; and that by letters sent with it, it was signified, that in respect he was a creditor, the bond was taken in his name. At advising of the oath, it was *alleged*, That though the bond was taken in Mr John's name, and had never been blank, yet M'Donald, who got the bond for his cattle, was the true creditor, and not Mr John Bayne, whose name was only made use of under trust, for M'Donald's behoof; and therefore whoever takes a bond in another man's name, is not presumed to gift to him the sum, but to make use of his name under trust, and with confidence that he would denude in his favour when desired; and, therefore, the Lords did lately sustain process upon that account, though the creditors of the persons entrusted did vigorously oppose it. It was *answered*, That suppose the filling up of a third party's name who had no interest, might be presumed only a trust, yet that presumption is excluded by a stronger presumption, viz. when a creditor's name is made use of by his debtor, it is presumed to be in security to that creditor; and here Mr John Bayne was creditor to M'Donald before he made use of his name in this bond; and it is most frequent for debtors when they sell lands, to take bonds for the price in name of the creditors, who might by exhibition recover the bonds; and if the debtor did pursue them to denude, they would exclude him upon that presumption, that the bond was granted to them in security. It was *replied*, That so long as the bond was undelivered to the creditor in whose name it was taken, the receiver of the bond was still master of it, and so was a true creditor, and it was to be affected for his debt.

The Lords found, that a bond taken in the name of a creditor was not presumed to be in trust for the behoof of the procurer of the bond, but in security to that creditor, and could not be warrantably given up by the procurer of the bond, or affected with his debt, although it was not delivered to the creditor in whose name it was taken.

Fol. Dic. v. 2. *p.* 148. *Stair, v.* 2. *p.* 537.

1685. *January.* Lady Hissleside *against* Littlegill.

No 175.

Found that a debtor granting assignation to his creditor, and causing intimate the same in the creditor's absence, but retaining the assignation and in-