

1679. *January 24.* ELPHINSTON, &c. *against* The EARL of Lothian.

No. 18.

Effect of a bond found lying blank in the repositories of a defunct.

John Elphinston having pursued the Earl of Lothian and his tenants for poinding of the ground of the barony of Newbottle, upon an infeftment of annual-rent of a bond of 20,000 merks, granted by the deceased Earl of Lothian *in anno* 1653, Lothian having raised reduction of this bond and infeftment, insisted upon these reasons, That albeit this bond be filled up with the name of John Elphinston, yet it is instructed by his oath, that his name was insert in trust, at the desire of the Master of Balmerino, and by the Lord and Master of Balmerino's oaths, that this bond was blank in the hands of Sir Thomas Nicolson, at his death *in anno* 1659, and that it was delivered to the Master of Balmerino by James Chalmers, who was Sir Thomas' servant about the year 1670, and that from the date thereof it had ever remained blank in the creditor's name, and that the sum inserted was twenty thousand and blank merks, the lands were blank, the designation of the witnesses were blank, and also by Chalmers' oath, that he found it in Sir Thomas' custody, among some papers belonging to Balmerino, concerning the lands of Fairniehurst, with a little schedule about it, which he believes, was Cockpen's hand, and which he delivered with it, and is now produced in process; so that the bond must be, now considered, as in Sir Thomas Nicolson's hand, blank as fore-said, and therefore any imperfect and incomplete writ can have no legal effect, but is altogether null. *2do*, Though it had been perfect in all the substantials, yet by the oaths and processes, it is evident that it was delivered to Balmerino, but was put by Lothian in Sir Thomas Nicolson's hands, who was Lothian's advocate, and therefore could not warrantably be delivered to Balmerino, without Lothian's warrant; especially seeing Sir Thomas Nicolson, to whom it was entrusted, never delivered the same, nor filled it up, nor declared on what terms, or to whose behoof he had it. Compearance was made also for the successors of Sir Thomas Nicolson, who alleged that it being confessed on all hands, that this bond was blank in Sir Thomas Nicolson's study, at his death, law presumes it to be his bond, the delivery to him being unquestionable. It was answered for Balmerino, that he had good right to the bond in question, though it be blank and not delivered to him, seeing it appears by James Chalmers' oath, that he found it in Sir Thomas' study, in a box belonging to Balmerino, containing some of his writs, and that it had in it, or about it, a schedule written with Cockpen's hand, who is filler up of the date and sum, and was Lothian's friend and trustee, employed in all his affairs, which schedule bears, That the bond was subscribed at Newbottle, and that Balmerino's name was to be filled up, and bears the designation of the witnesses; so that if this schedule had been written with Sir Thomas Nicolson's hand, to whom the bond was intrusted, and had been rolled in, or about the bond, it would have unquestionably secluded all Sir Thomas' own pretences, and have made the bond as effectually Balmerino's, as if his name had been filled up *ab initio*; yea, though the schedule had been written with James Chalmers' hand, or by any other

hand, but found within, or rolled about the bond, it would have declared for whose use Sir Thomas had it, or to whom it belonged, there being nothing more ordinary than that parties to whom other men's writs are entrusted, do by a note in, or about the writ, express the terms they had it upon, which nothing can controul but their oath, or an authentic writ, or the writ, or oath of the party, for whose use the bond was delivered; for any person subscribing, and delivering a writ, either to a creditor or a third party, if nothing be expressed, the law presumes that the writ is delivered for the behoof of the creditor, who may by exhibition obtain it out of the hands of that person, and his oath will not prove it to be depositate on conditions, or *ad effectum*, different from its tenor; for otherwise no man could recover his writs from the haver, unless he proved that the writ was first delivered to himself, which can very seldom be proved, and is ever presumed by law, unless depositions appear by the creditor's oath, or writ, at least that it was never delivered to him. And for the imperfections alleged, there is no substantial warrant, for the sum is filled up with Cockpen's hand, twenty thousand merks, although there be a blank, which cannot exceed 990 merks, and that Cockpen's schedule bears the sum to be calculate, which cannot encroach upon the sum filled up, and doth necessarily import, that this bond was for some other bonds or debts, whereof the gross was evident to be 20,000 merks, but the excesce was to be adjusted, and so cannot be but lost, and remain blank, because that excrecence cannot now be cleared; and although the bond were yet in Sir Thomas Nicolson's own study, with the note about it, Balmerino might by exhibition, recover the delivery of it, both against Sir Thomas' successors, and against Lothian, for the schedule would exclude Sir Thomas; and it cannot be pretended that ever he owned this bond as his, or put it in any inventory of his debts, or amongst his own writs, or by his testaments, or provisions which were not special, and lately produced and debated before the Lords, did ever mention this bond, which with the annuall-rents thereof, would have been the half or third of his estate. It was replied for Lothian, that his defence stands still relevant, that the bond was still imperfect, and never calculated, and Cockpen had no power to have ordered the filling up of it, or delivery of it, unless his warrant had been proved by Lothian's writ or oath, nor is there any more but James Chalmers' single testimony that this schedule was about it when he found it. *2do*, Besides the incompleteness of the writ, the presumption is pregnant, that there was no delivery for Balmerino's use, but that this bond was put in Sir Thomas' hand, for some use, which took no effect, for Balmerino acknowledges by his oath, that there was no money paid, and cannot declare the true cause of this bond, but that his Lady said, that about that time he delivered bonds to Lothian of 32,000 merks, and in lieu thereof got this bond, whereas it will appear by the oath of the Lord Jedburgh, that the bonds given up at that time were for evictions, and the lands of Fairniehurst, sold by Balmerino to Lothian; and by a transaction betwixt Lothian and Balmerino, wherein Cesnock is communer by consent of both parties, there was a bond of 10,000 merks remaining, of which Balmerino gave a considerable ease; and it was ac-

No. 18. knowledged then that that was the last bond due by Lothian to Balmerino ; and seeing there was no mention or notice of this bond for the space of seventeen years, it must have been upon some design that took not effect, which Lothian after so long a time did not remember, nor doth Balmerino know the true cause, but pretends his Lady's relation to be the cause which may be improved. There were also many allegiances on either hand, as to the delay of making use of the bond.

The Lords found, that albeit this bond was lying blank by Sir Thomas Nicolson, at the time of his death, that the grounds adduced were sufficient to clear, that he had no interest therein : and as to the defences, for Lothian, which resolved into two, the incompleteness, and undelivery, and the being put in Sir Thomas Nicolson's hand for some design that took not effect, the Lords before answer thereto, ordained Cockpen and the other witnesses subscribing the bond, to be examined *ex officio*, where the bond was subscribed, how it came to be delivered to Sir Thomas Nicolson, if it was sent to him by the Earl, and what he expressed when he sent it ; and also the Lord Jedburgh to be examined, whether *in anno* 1653, there were bonds given up by Balmerino to Lothian, and what was the cause of giving up thereof ; and also Cesnock to be examined, if he was a communer betwixt the parties, and if there was any transaction anent an 10000 merk bond, and if there was any mention of this bond, or if the 10000 merk bond was treated as the remainder of the sums due by Lothian to Balmerino.

*Stair, v. 2. p. 679.*

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1679. February 11. FORBES *against* The LAIRD of BOYN.

No. 19.  
What adm-  
niculations  
sufficient to  
instruct that  
a gift of  
escheat was  
in trust ?

The Laird of Blackhall standing in the right of the estate of Balvenie, did, with advice of the Lord Salton, grant a disposition thereof to young Philorth, now master of Salton, who granted a back-bond, That the estate should be redeemable upon payment of £.38.000, whereof a part was employed for purchasing to Philorth an apprising at Kinminnitie's instance. In Philorth's back-bond, he is obliged to compone with the vassals of Balveny, whose feus were questionable by Blackhall's right, and to lift the compositions already made by a commission from Blackhall to the Lord Salton himself and others, and to grant confirmations to the vassals, and to apply the compositions for satisfying of the said sum of £.38,000. Arthur Forbes having a right to this back-bond, pursued a declarator against Philorth, that the sum was satisfied by the compositions of the vassals, and his intrusions with the rents ; in which process Sir Charles Erskine, Lord Lyon, having obtained the gift of the escheat of the late Lord Salton, competing did allege, that he had right to the bonds granted by the vassals, as being to the behoof of the Lord Salton, when he was at the horn, and therefore Philorth could not apply them for payment of his wadset, but behoved to make them forthcoming to the donatar. It was answered, That the gift of the escheat, though it was in the Lord Lyon's name, was to Philorth's behoof, and therefore he could not con-