

1680. *December 10.* GEORGE DRUMMOND *against* JAMES DUMBAR.

GEORGE Drummond pursues James Dumbar, messenger, upon this ground, That he had delivered to him a caption to be executed against the Laird of Dundas, and that he had taken Dundas, having the caption; and, at his incarceration in the tolbooth of Edinburgh, had set down, in the book of the tolbooth, that he delivered Dundas as prisoner upon a warrant of the council, and upon the pursuer's caption. Yet Dundas having addressed to the council for liberty, they granted the same; so that, if he were incarcerated upon no other account but their warrant, and appointed the same to be inquired by the tolbooth book. Wherein Dumbar's incarceration upon the pursuer's caption being found, Dumbar was examined, and gave in his declaration in writ,—That he had taken Dundas only upon the council's warrant, whereupon Dundas was liberated. Which being false, and he malversant in his office, and by his means the prisoner escaping, he ought to be liable for the debt.

The defender ALLEGED, *1mo.* That he had gotten no money. *2do.* That he had not promised to execute the caption. *3tio.* That his declaration to the council was true; for albeit, when he took Dundas, he had the pursuer's caption upon him, and another of his brother's, yet, having but five persons with him, and many appearing about Dundas's house, he durst not venture, for enforcement, to produce his brother's or this pursuer's caption, but only the council's order, upon which only Dundas would yield himself.

The pursuer ANSWERED, That a messenger's acceptance of a caption to execute was a sufficient mandate to require his diligence. And that it was a frivolous and false pretence that he took Dundas only by the council's order; for, when he was so taken, he might have declared him his prisoner by virtue of these captions. Likeas, he did book him as prisoner upon the pursuer's caption, and did not declare to the council, as he ought, that he had booked him as prisoner by virtue of that caption.

The Lords found the libel relevant, and repelled the defences.

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1680. *December 10.* The LORD BALMERINO *against* The EARL of LOTHIAN.

THE Lord Balmerino,—having filled up the name of John Elphingston in a bond subscribed by the deceased Earl of Lothian, *in anno 1653*,—Lothian suspends, and raises reduction upon these reasons:—*1mo.* That this bond was a defective null paper, blank in the sum, wherein *twenty thousand merks* was filled up, with a distinct hand from the writer of the body, not designed, before the subscription, as filler up; likewise the creditor's name was blank; the lands, where infetment and security were to be taken, was blank; the names and designations of the witnesses were blank: and found in the custody of Sir Thomas Nicolson, advocate, who tested upon all other sums, without mention of this. So Balmerino had no title to it, nor any other person, unless Sir Thomas had filled up and perfected it, and declared to whose behoof it was, and on what terms it was in his hand; which not being done, though Sir Thomas deceased three years

after the date, the bond was unwarrantably delivered up by James Chalmers, who, at the date, was Sir Thomas's servant; and therefore it ought to have been delivered up to Lothian, as a deposited writ, whereof the terms were never known nor fulfilled. Likeas, by several contracts produced, Balmerino gave ease to Lothian in other bonds, and obliged him to pay Lothian sums; which he would never have done if Lothian had been his debtor in this sum.

The pursuer ANSWERED, That there was no defect in the bond in any essential, seeing the debtor and sum were expressed; and though there was a blank for *hundred* merks, for filling up the odd hundred merks above the 20,000, that could do no more but scoring up the blank, which was done; and the blank for the infestment of annualrent was declared, by a schedule about the bond, written by Cockpen's hand; and the witnesses being Cockpen and David Murray, they were both known, and had deponed conform to the bond. *2do.* It imported nothing that the creditor's name was blank; that being most ordinary, and doth ever import the haver of the bond to be creditor, and passeth from hand to hand, as current money, without assignments. Nor needs the haver prove the delivery thereof, more than if his name had been filled up *ab initio*: but the burden lies upon the debtor to prove that it was gotten out of his hand unwarrantably. And, in this case, Lothian has never pretended any rational cause upon which the bond was put in Sir Thomas Nicolson's hand; but Balmerino hath both condescended and instructed, that, when this bond was delivered, bonds, extending to a greater sum, were given up to Lothian. And it is beyond question, that there was rolled about the bond a schedule, all written with Cockpen's hand, who was known to be the Earl of Lothian's greatest confidant: and it is not controverted, but if this schedule had been Sir Thomas Nicolson's hand, it would have made the bond to have belonged to Balmerino; for it bears Balmerino's name to be filled up in the bond, and bears the lands to be filled up in the blank for the security; which is equivalent, and rather more than if the schedule had been Sir Thomas's hand: whose declaration might have been suspected, he being Balmerino's great confidant; but Cockpen's could never be suspected for Balmerino against Lothian. And any presumption, through the not completing of the bond, is fully taken off by Balmerino's oath, upon Lothian's desire, and interrogatories how Balmerino got this bond, and for what cause; who has deponed, That the cause of the bond was a greater sum in other bonds delivered to Lothian, as his friends told him when they made the agreement, when he was in England; to which James Chalmers's oath and Cockpen's do agree; so that an oath, being the end of all controversy, there is no more place for presumptions or conjectures. And as to the inferences from posterior contracts with Lothian, they are taken off, by considering Balmerino's condition: whose father was engaged in the most part of the public debts; and his estate being at the ports of Edinburgh, all the creditors fell upon him, and forced him to flee, and did arrest all his sums, wherever they could be found; likewise, Bedford pursued him for vast sums of money; so that it was his interest to conceal this bond, and to let it ly in the hand of his confidant for preservation, in case his estate had been swallowed up. Likeas, Cockpen acknowledges, that, at closing of accounts of the filled-up bonds, Lothian desired a general discharge; which Balmerino refused, upon account of concealing this bond; which hath been the cause, though not mentioned, lest the design might have been thereby prejudged.

It was REPLIED for Lothian, That the bond being blank in the creditor's name, and in Sir Thomas Nicolson's custody, not owned or disposed of by him, nor amongst his other writs, but in another box, in his closet; no man could claim right to it, unless Sir Thomas, the depositary, had declared the terms of the deposition. And no schedule by Cockpen's hand could be equivalent; and, if it could have any effect, his oath could not be refused, to declare upon what terms the bond was granted. And, as to Balmerino's oath, if litiscontestation had been made on any peremptor referred to his oath, and sworn, it had been something; but there is no such thing here, but only an oath *ex officio*, whereupon Balmerino was interrogated how he came to this bond, and if he delivered money at the subscribing of it.

The Lords having, *ex officio*, examined the Lord and Master of Balmerino, James Chalmers, and Cockpen; Balmerino's oath did bear,—That, at the subscribing of this bond in question, he being then absent, his friends who transacted for him, did declare to him, that there being many bonds due to him, by Lothian, for the price of Fairnieherst lands, containing 32,000 merks, or thereby, which were delivered up to Lothian, in place whereof the bond in question was granted. James Chalmers depones, That he found this bond, after Sir Thomas Nicolson's death, in a box, in his closet, with some papers of Balmerino concerning Fairnieherst; and this schedule of Cockpen's about it; which he delivered to the Master of Balmerino, as belonging to his father. Cockpen deponed, That bonds about 30,000 merks were given up to Lothian, by Balmerino's friends, about the time of this bond; and that this bond was trusted to Sir Thomas Nicolson: but the cause of the bonds of 30,000 merks was, that some part of the lands of Fairnieherst, disposed by Balmerino to Lothian, to which Balmerino had not sufficient rights; and that this bond, in question, was intrusted to Sir Thomas for relieving Balmerino of the public debt,—for which he was conjunct with Lothian,—and for Lothian's concurrence with Balmerino against Bedford.

The Lords found, by the evidences adduced, That the bond in question was not delivered to Balmerino, but deposited in the hands of Sir Thomas Nicolson; and that no terms of deposition were proven, warranting the giving of the bond to Balmerino: and, therefore, suspended the letters *simpliciter*; and declared the bond null and void.

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1680. *December 15.* The LADY KINGLASSIE *against* MR JAMES ALEXANDER.

THE Lady Kinglassie pursues a declarator against Mr James Alexander, for reducing his right of Kinglassie's estate, upon a contravention of a clause in it, upon which he is obliged to call his children Ayton: he did propone a defence, which was sustained upon the 26th day of November last,—That the executions were null, not designing the defender.

The cause being again insisted in, and a new execution produced, bearing his designation, which he was allowed to see in the clerk's hands; he did now ALLEGE, That, having excepted against a summons with the first execution, and his dilator defence sustained thereupon, he was not obliged to answer upon any new execution; but was, in effect, assoilyied *ab hac instantia*, till he were sum-