

No 107. to be of the nature of a promise, and so not relevant to be proved by witnesses, but only *scripto vel juramento*.

*Fol. Dic. v. 2. p. 220. Fountainhall.*

\* \* \* This case is No 19. p. 8342, *voce* LITIGIOUS.

No 108.

Witnesses were, *ex officio*, examined, whether a bond of provision had been deposited, and upon what terms.

1703. December 30. STEWART *against* BLACKHALL.

SIR ARCHIBALD STEWART of Blackhall, in the disposition of his estate to his son, reserved a faculty to burden the estate with L. 20,000 for provisions to his younger children; and, in prosecution of this power, Mr John Stewart, younger of Blackhall, gave a bond to Anabella Stewart, his sister, for 8000 merks, but put it in his father's hands; and he gave it in keeping to Birsbane of Bishopton, his son-in-law; but Anabella coming by the bond, she marries one Fergusson, without consent of her father and other friends, far below her own quality and degree; and she charging, Blackhall suspends, That it was never a delivered evident, but only consigned and depositated, first, in her father's hand, and then by him in Bishopton's, on this express condition, that it was not be given up without the consent of Blackhalls, elder and younger; and yet she had, *viis et modis*, got it out of Bishopton's cabinet, and so ought to put it back again there. *Answered*, The bond being now in my custody, you cannot take it away but by my oath; and if you found on a depositions that is not probable by witnesses, but only by my oath; and if I acknowledge it, then the terms may be cleared by the depositar's oath; and if it were otherwise, then bonds, and the clearest securities, may be taken away by the depositions of witnesses, contrary to the uncontroverted principles of our law. *Replied*, That bonds to extraneous persons, once come into their hands, cannot be taken away, but *scripto vel juramento*; but in bonds of provision to children, where the father alive, and the child not yet married, the presumption runs stronger that it was not delivered, especially considering her gross misbehaviour; and, in many cases, the Lords have allowed witnesses *ex officio*, to be examined anent the delivery of writs, and on probation have found them null and extinct, 14th February 1629, Farquhar against Wallace, Div. 1. § 6, *h. t.*; 25th November 1631, Douglas against Lauder, Div. 5. § 7, *h. t.*; and 15th December 1681, Mercer against the Lady Aldie, *IBIDEM*, marked by President Newton; for though witnesses cannot take away a writ, yet they may be adduced to clear circumstances in the matter of fact. Some of the Lords thought the depositions could not otherwise be proven but by her oath; and if she confessed it, then the depositar might be examined what were the terms; and if she denied it, and owned she came fairly by the bond, there was an end of it; for they thought parents might obviate this, either by making it only payable, she marrying with their consent, or by reserving a power to alter; but the plurality ordained the witnesses in the bond with Blackhall and Bishopton to be examin-

ed *ex officio*, if there was any depositions, and what were the terms and conditions on which it was made, and how it came out of their hands, which was looked on as a great preparative, if it should be followed in other cases.

*Fol. Dic. v. 2. p. 217. Fountainhall, v. 2. p. 207.*

No 108.

1706. January 15.

JOHN SPENCE, Procurator-fiscal of Brechin, against CHRISTIAN DUNCAN, Relict of Mr William Chaplain, now Spouse to Mr Andrew Geddie, Minister at Farnall.

THE deceased James Carnegie of Balnamoon being confirmed executor to his father, who died in April 1700, John Spence, Procurator-fiscal of Brechin, his creditor, in L. 1000, confirmed himself in the terms of the act 41st Parliament 1695, executor *ad omnia* to the father, and pursued Christian Duncan, as executrix testamentary to Mr William Chaplain, for the crop 1699 of the lands of Balnamoon, omitted by the young Laird out of his father's testament, and intromitted with by Chaplain.

This defence being proponed for Christian Duncan, That her husband was only a servant to the Lairds of Balnamoon; and as he had intromitted with the rents of that estate, so he had counted and cleared, and made *bona fide* payment to, and obtained a general discharge from the last Balnamoon who was heir and executor to his father;

*Alleged* for the pursuer, The discharge being relative to particular fitted accounts, can only exoner, in so far as is stated in these accounts; and that, notwithstanding of a general clause in the said discharge, discharging all other accounts and intromissions whatsoever; in regard the last Balnamoon having no direct right to the crop 1699, unconfirmed in his father's testament, could not, in prejudice of creditors, discharge at random all intromissions by a general clause; though the charge be sustained, as to what is instructed to have been particularly counted for upon the pretence of *bona fides*, in paying to one who had a shew or colour of right. And the pursuer offered to prove super-intromission by Chaplain, over and above what is contained in the fitted accounts, *prout de jure*, as intromission with rents and bargains of victual are probable.

*Answered* for the defender, Mr Chaplain having intromitted as servant to both the old and young Balnamoon, by their verbal order, and not *suo nomine*, that was not properly his, but Balnamoon's intromission by him as the hand, for which the defender cannot be liable, although her husband had obtained no discharge, since he is presumed to have delivered the rents to his master as he received them; and far less can she be liable, when he was honourably dismissed by his master with a general discharge, November 25. 1671, Irvine *contra* Falconer, No 95. p. 11424.; February 17. 1676, Abercromby *contra* Atchison, Div. 5. § 7. *b. t.* And though witnesses be competent to prove receipt of victual, where usually, for commerce-sake, writ is not interposed, and the

No 109.  
Super-intromission over and above what was contained in fitted accounts allowed to be proved *scripto*, but not by witnesses.