

No 79.

A bond for a sum, subscribed by a principal and cautioner, was left blank in the creditor's name in the hands of the principal, to be a fund of credit. After the term of payment he delivered it to his own creditor. Found that the receiver was not bound to exhibit it, as *instrumentum penes debitorem*, in a process of exhibition at the instance of the cautioner.

1708. July 7. The LORD SALTON *against* Sir JAMES of ELPHINGSTON of Logie.

IN a process at the instance of the Lord Salton against Sir James Elphingston, for exhibition and delivery of a bond blank in the creditor's name, granted by Mr John Buchan as principal, and the pursuer as cautioner in the year 1690, for the principal sum of 1000 merks, with annualrent and a penalty, which had been delivered to the defender by Mr Buchan after the term of payment, for security of a considerable sum owing by him to the defender; which bond the pursuer contended was null, as being *instrumentum penes debitorem*; and to allow bonds to be delivered by the principal debtor after the term of payment, would be of dangerous consequence; seeing at that rate, one having retired a bond, might keep it up uncanceled several years, and thereafter becoming insolvent, re-deliver it to the creditor whose name is inserted, or if blank, to any creditor.

*Answered* for the defender; He cannot be obliged to exhibit the bond libelled; in regard it was his own evident for an onerous cause, and could not be taken from him but *scripto* or *juramento*. *Perinde est* at what time the bond was delivered, whether before or after the term of payment, since the pursuer acknowledges, that he signed the same, to be a fund of credit to Mr Buchan, as his occasion should require.

*Replied* for the pursuer; Though he for an *interim* was content to become cautioner for Mr Buchan; it was never his meaning or design to afford to him an everlasting fund of credit; and the bond having remained in Mr Buchan's custody sometime after the term of payment, the pursuer had reason to look upon it as a retired bond.

THE LORDS found, That Sir James Elphingston is not bound to exhibit the bond, and assoilzied him from the process.

*Fol. Dic. v. 2. p. 138. Forbes, p. 59.*

1710. January 4.

BRUGH & JENKINS *against* SCOT.

No 80.

A woman's own agent having borrowed money from her, altho' he had his bond in his own possession, an investigation was ordered to see what probability there was he had paid it.

JOHN SCOT, writer in Edinburgh, having borrowed 1000 merks from Jean Brugh, when a widow, upon his own bond, she being now married to one Jenkins, and craving the annualrent, he shifted a long time, then sought a sight of his bond, which she, after search, could not find, and thereon pursues him, and offers to prove the debt by his oath; in which process he compares, and produces the bond in his own hand, and so pleads liberation on the common ground of law, that *instrumentum apud debitorem repertum præsuntur solutum*. *Answered*, Your having of the bond is indeed a *præsumptio juris* of its having been paid and retired, yet it is not a *præsumptio juris et de jure*, which admits of no probation in the contrary, but may be cancelled and redargued

by your oath, by which I offer me to prove, that you neither got the bond delivered up to you by me, nor any having my warrant or order, and that it is still resting owing, and that you never paid it to me. *Replied, Nullo modo relevat*, that I did not pay the money to you; for is there any thing more ordinary than to trust a friend or a servant with a bond, and order them to receive the money and deliver it up to the debtor; and though it be surer to take a receipt on the back of it, yet there are a vast deal of payments made in Scotland, singly on retiring principal bonds without any more; and to disturb parties by reviving these debts, and referring them to their oaths, might be a very bad preparative, and put the lieges to much unnecessary expence. *Duplied*, You was my agent and doer in all my business, and had access to my papers, and so might *viis et modis* make yourself master of the bond; and there is nothing more reasonable, than that you should tell how you came by it. THE LORDS considered he was an agent about the Session, and was trusted by this ignorant woman, and therefore ordained him, before he should depone, to give in a condescence, who it was that brought the bond to him; to whom he paid the money; who were present; and in what place; with the other circumstances, to see what resemblance of probability his relation has, before he come to depone. There may be a difference between bank-notes and bonds; in the first case, one may safely pay the haver of the note without farther inquiry; but if one has stolen my bond from the creditor, or has found it when accidentally lost, I am not so absolutely secure to take up my bond from such persons, till I know their commission from the creditor, especially when they live in town.

*Fol. Dic. v. 2. p. 138. Fountainhall, v. 2. p. 550.*

No 80.

1710. January 26.

ROLLO of Powhouse against SUSANNA SIMPSON & Mr DUNCAN WHITE.

IN a competition of the Creditors of Simpson of Stonehouse, there was produced an heritable bond by Alexander Simpson of Stonehouse to William Simpson, his brother, *in anno* 1657, with an infeftment following thereupon, with an assignation *in anno* 1679 to Susanna Simpson, his brother the debtor's daughter, for 2000 merks principal, and to Patrick and Alexander Simpsons, her younger brethren, for the remainder.

It was *alleged* by Rollo of Powhouse, another real creditor, That William Simpson's bond was extinct, in so far as the same, with the assignation thereto, were found among the debtor's writs, and so presumed to be paid; and Mr Duncan White got these papers into his hands in manner following, viz. John Simpson, the debtor's son and heir, being a weak man, suffered Mr Duncan White to come into the closet where his father's writs were when he was searching for some papers, and the said John Simpson having the foresaid bond,

No 81.

A bond with a sasine, and an assignation thereto, found among the debtor's papers after his death, held to be extinct.