

1714. November 18.

CHRISTOPHER IRVINE, and the CHILDREN of the deceased BAILIE REID in Dumfries, *against* The CHILDREN of COMMISSARY CHARTERS.

THERE being a company of merchants in Dumfries engaged in a co-partnery, there was borrowed by warrant from the company 4000 merks from the Countess of Nithsdale; and six of the partners granted bond conjunctly and severally for the sum, whereof Irvine of Drumcoltrain and the said Bailie Reid were two. The Countess having assigned the debt to Commissary Alves, these two, with the deceased Commissary Charters, another co-partner, who was also factor for the others, borrowed 4400 merks from Sir David Cuninghame, which exactly answered to the sum borrowed from the Countess, with the bygone annual-rents thereof; and they granted bond for the same at Dumfries; and three days thereafter, the money was paid to Commissary Alves, and a translation obtained, blank in the assignee's name, by Mr Patrick Richardson, their doer: Which translation was transmitted to Commissary Charters in a letter; but he dying some short time thereafter, the translation was found among his papers blank.

Christopher Irvine, assignee by Drumcoltrain, and Bailie Reid's children, insist against Commissary Charters' children, for having it declared, That the translation, though found blank, yet was for their behoof for two-third shares, and that the Commissary was only a *custos*.

There being an act before answer allowed by the Ordinary in the Outer-house, for proving the qualifications condescended on by the pursuers; and the said Mr Patrick Richardson deponing, That he received the money from Sir David Cuninghame, and applied it for payment of Commissary Alves, and thereupon obtained the blank translation, for the common behoof of the obligants in Sir David's bond, and that he sent the same, with the other papers thereto belonging, to Mr Reid or Drumcoltrain, under cover to Commissary Charters; and Commissary Alves having also deponed, That the same was paid to him in ready money and the translation therefor got, to the best of his memory, by Mr Richardson, as trustee for the persons bound in the original bond; and that he had heard the said money was borrowed from Sir David Cuninghame, but knew it only by hearsay:

It was *alleged* for the pursuer, That the money wherewith the Countess's bond was purged, was by the joint credit of Drumcoltrain, and the Bailie, and the Commissary, and that the blank translation was the effect thereof; and that from the following qualifications, *1mo*, Because of the date of the blank translation at Edinburgh, being no more than three days after the date of the bond to Sir David at Dumfries; so that they were upon the matter to be reckoned of the same date, and therefore very presumable that the one was the cause of the other; *2do*, Because of the agreement of the sums; *3tio*, From Mr Richardson's oath, wherein he was positive, that Sir David's money was paid to Com-

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An explication by circumstances was allowed, whether a blank deed in the repositories of a defunct, was a trust conveyance or not.

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missary Alves by his management ; *4to*, From Commissary Alves, his own oath, where he says he had this by hearsay ; *5to*, That the blank translation came into Commissary Charters's custody, not by way of appropriation to himself, but as a common evident for the behoof of the three ; and that from the following circumstances ; *1mo*, It was necessary it should have been taken blank, because the persons concerned were at a distance, and had not determined in whose name it was to be filled up ; and had it been Commissary Charters's by appropriation, presumable he had filled up his name in it ; *2do*, This appeared from Mr Richardson's deposition above-mentioned, which is not to be looked upon as a single testimony ; for, besides that he was intrusted by all, he had the foregoing circumstances, and the nature of the thing to bear weight to his deposition ; for if it was the joint bond of the three, that procured the blank writ, law presumes that it was transmitted as a common evident, the persons themselves not being present, but acting by a common agent. And this the *initium possessionis* being documented, viz. the manner how it came into Commissary Charters's hands ; law and reason presume it remained such as he got it ; for though a blank writ is presumed to belong to him who has it, yet if it be once documented, that he came to it, *non titulo proprietatis, sive alienationis, sed titulo depositarii*, law will presume it remained in that condition, unless it were proven that innovation was afterwards made.

Answered for the defenders to the *first*, That Commissary Alves, his oath, is all upon hearsay, and Richardson's is but a single testimony. Besides, that whatever regard may be had to a trustee's oath, when the writs are in his own hands, and while the trust continueth, yet when it is over, the affair is ended, and no more regard to be given to his oath, than that of any other person.

Answered to the *second*, That it cannot be imagined that men of sense and reason would trust another with securities in name of the trustee, that may infer a considerable debt against them and their successors ; that being like paying a debt due by bond, without getting it up, or a discharge. *2do*, The translation being found blank, among Commissary Charters's papers, presumes it is as fully his own, as if his name had been filled up, *ab initio*, by the laws at the time. Nay, by its being blank, it is less capable of being proven to be in trust, than if filled up *ab initio* : For, suppose it delivered by Mr Alves, for the behoof of all three, yet law presumes it his proper evident who has it, since such a delivery was a translation, which needed no further solemnity. *3tio*, Though it had been in trust, yet when Commissary Charters came to compt with the other two, and pay them their shares, and so make the translation truly his own, he needed no writ from them declaring it so, since his having the writ made it fully his own.

THE LORDS found, That the blank translation was purchased with the money of Drumcoltrain, Bailie Reid, and Commissary Charters, obligants in Sir David Cuninghams bond : And found it instructed, That Mr Patrick Richardson transf-

mitted the said blank translation to Drumcoltrain and Bailie Reid, under cover to Commissary Charters; and finding no evidence nor documents that the Commissary did ever satisfy or pay the said Drumcoltrain or Bailie Reid, of their shares in the said Countess's bond, nor that he stated the same, as paid for the co-partners, in the books of the co-partnery, nor in any list of his own private estate; they sustained the qualifications founded on.

For Charters, *Isla.*

Alt. *Boswel.*

Clerk, *Alexander.*

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1742. December 21.

ELIZABETH CAIRNS *against* CREDITORS of GARROCH.

JAMES CAIRNS of Minnibuie, having two sons, Alexander and William, did, in March 1694, lend the sum of L. 600 Scots to Alexander Cairns of Garroch, taking him bound, by his holograph bond, to repay the same 'to him, the said James Cairns, he being in life; and failing of him by decease, to William Cairns his lawful son, heirs or assignees, including executors.' From ocular inspection it appeared, that the bond had been written out with a blank for the name of the substitute, and the words, 'William Cairns his lawful son,' are filled up in a hand different from that of the debtor, who was the writer of the bond. James Cairns the creditor survived both his sons, the bond remaining in his possession till his death; and then Elizabeth Cairns, Alexander the eldest son's only daughter, made up a title to the same by a general service as heir of line to her grand-father. Upon that title, having first obtained a decree of constitution against the representatives of Garroch the debtor, and thereafter an adjudication, she produced her interest in a ranking of Garroch's creditors.

The *objection* moved against this interest was sustained, viz. That the service of Elizabeth, as heir of line to her grand-father, could not carry the bond; but that her title ought to have been a service as heir of provision. Elizabeth Cairns reclaimed against this interlocutor; and, among other particulars, having suggested the above mentioned fact, that the substitution in the bond appeared to have been originally blank, and to have been filled up with a different hand from that of the writer of the bond, the Court pronounced the following interlocutor: 'Having considered this petition with the answers thereto, and bond in question, find, That the same was originally blank in the substitution; and that it does not appear to have been filled up by the debtor, the writer of the bond, and so must be held still as blank in the name of the substitute: And therefore find that the right to the said bond is established in the petitioner's person, by her service as heir in general to James Cairns the original creditor; and repel the objection to the adjudication at her instance.'

As the bond in question did not fall under the sanction of the act 1696, concerning blank deeds, which has no retrospect, the following is a summary of the

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A deed of settlement, originally blank in the substitution, filled up after the death of the granter, was considered as still blank.