

Court, on the 12th of July 1717, "Refused the bill, and adhered to their former interlocutor."

The appeal was brought from "a decree of the Lords of Session of the 16th of November 1716, and an interlocutor of the 12th of July 1717, and several other interlocutors." Entered
23 Dec.
1717.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the decrees and interlocutors therein complained of be affirmed; and it is further ordered, that the appellant do pay or cause to be paid to the respondent the sum of 40*l.* for her costs in respect of the said appeal.* Judgment,
12 Jan.
1719.

For Appellant, Abel Ketelbey. Geo. Leshe.
For Respondent, Rob. Raymond. Will. Hamilton.

James Blackwood, of London, Merchant, *Appellant*; Case 48.
Forbes,
17 July,
1713.
John Hamilton of Grange, - - - *Respondent.*

26th Jan. 1718-19.

Tenor.—The Court of Session having reduced a decree of proving the tenor of a bond, and an adjudication and decree of mails and duties following thereupon, for the reason that it was not proved who were the writer and witnesses: the judgment is, from the circumstances of the case, reversed, the reasons of reduction repelled, and the adjudication sustained.

Damage and Interest.—The Court, in an interlocutor prior to those appealed from, having sustained the adjudication for the principal sum and interest, without all accumulation, penalties, and expences whatsoever, this latter part of their judgment is reversed.

IN 1679, Robert Blackwood, late merchant in Edinburgh, the appellant's father, deceased, brought an action before the Court of Session, against Alexander Hamilton of Grange, the respondent's uncle, then a minor, for payment of a bond, stated to have been granted by John Hamilton of Grange, deceased, the father of said Alexander, and Jane his wife, in the following manner: that John Hamilton and Jane his wife being indebted to the said Robert Blackwood in 1719*l.* Scots, they on the 24th of March 1674, granted him a promissory note for payment thereof; but the note not being paid when it fell due, the said John and Jane, on the 7th of September 1674, instead thereof, granted a bond to the said Robert Blackwood, whereby they obliged themselves, their heirs, &c. to pay 1000*l.* Scots, part of the said debt, at Candlemas then next, and 719*l.*, the residue thereof, at Whitsunday thereafter, with interest of the said principal sum from the date thereof, and a penalty of 300*l.* Scots in case of non-payment. And the said action also contained a conclusion against the minor for payment of a debt of 228*l.* 2*s.* 7*d.* Scots, stated to have been incurred by his father and mother after the date of the said bond. In this action the said Robert Blackwood obtained a decree of constitution in absence against the

minor for payment of the sum contained in the bond, and also for the said other sum of 228*l.* 2*s.* 7*d.* Scots.

Robert Blackwood also brought an action against the said Jane the relict, and Richard Elphinston her then husband, for payment of the sums before mentioned, in virtue of a promise made by her, after the death of her first husband, to pay the same: and in this action he also obtained decree; but this decree was only to take effect against the said Jane, but not against her then husband.

On the 14th of February 1680, the appellant's said father also obtained a decree of adjudication against the said Alexander Hamilton as heir to his father, whereby the lands and barony of Grange, and other lands therein mentioned were adjudged for payment of the said sums then accumulated to 2780*l.* Scots.

Robert Blackwood afterwards brought an action before the Court of Session against the said Alexander Hamilton, for proving the tenor of the said bond, which he stated to have been produced in one of the said actions, and left in the hands of Mr. Mackenzie, one of the clerks, and to have been accidentally lost by a fire which happened in or near Mr. Mackenzie's office. On the 4th of June 1698 the Court "Found the tenor of the said bond sufficiently verified and proved, and decerned that the copy thereof inserted should have the same force and effect as if the bond were extant."

In August 1701 the said Robert Blackwood, the appellant's father, conveyed the said debts and decrees to one George Clerk; and this Clerk, in November 1704, conveyed the same to the appellant. And the appellant brought an action of mails and duties, against the respondent (son of John Hamilton, deceased, a younger brother of the said Alexander, who entered to the possession of the said estate after the death of his uncle and father) then a minor, and his tenants of the premises; and decree was obtained for payment of the rents to the appellant and another creditor upon the said estate equally; and thereupon the appellant gave these tenants a charge of payment.

The respondent and his curators afterwards perceiving that the bond, which was the foundation of all the decrees before mentioned, as the tenor thereof was proved by the appellant's said father, wanted writer's name and witnesses, for which blanks were left in the decree for proving the tenor; they therefore brought an action against the appellant before the Court of Session for reducing the said bond and decrees following upon it. In this action they stated that the decree of constitution in 1679 was obtained in absence against Alexander the minor, who had neither tutors nor curators, nor any guardian assigned to him, not only for the sum in the bond, but also for another sum, being the value of merchant goods; and so little care was taken in this affair of the minor, that though the pursuer in that cause did not prove that the goods were furnished, yet judgment was given against the minor for them, because the pursuer referred the furnishing to the minor's oath; and that though in law he could not depone,
yet

yét he was holden as confest, and judgment therefore given against him. They stated also, that the action was brought against Jane the widow, and Elphinston her second husband, not because she had executed the bond, but because she had during her widowhood promised to pay the debt. In this action, the appellant made defences, and the Court, at first, upon report of Lord Cullen Ordinary, on the 12th of February 1713, “ Repelled the reasons
 “ of reduction proponed against the said decree of constitution,
 “ and sustained the adjudication foresaid against the heir (there
 “ being no competition of creditors) for the principal sum and
 “ interest without all accumulation, penalties, and expences
 “ whatsoever.”

The respondent reclaimed, and the Court ordered the original probation made use of in the action for proving the tenor of the bond, with the decree therein, to be laid before them; and having considered the same, the Court, by an interlocutor on the 26th of June 1713, by a majority of one vote “ Found it not proved, that
 “ the bond had writer’s name and witnesses subscribing, and
 “ therefore found the tenor as proved null, and reduced the ad-
 “ judication following thereon.” The appellant reclaimed, and the Court again, by a majority of one vote, on the 17th of July 1713, “ Refused the desire of the petition, and adhered to their
 “ former interlocutor.”

The appeal was brought from “ several interlocutors of the Lords
 “ of Session in Scotland of the 26th of June and 17th of July
 “ 1713, and of so much of the interlocutor of the 12th of February
 “ 1713 as takes away the accumulations, penalty, and expences.”

Entered,
 1 Dec. 1717.

Heads of the Appellant’s Argument.

There never was the least exception against the justice of this debt; when the decree of constitution was obtained against the said Alexander, the bond was produced and was sufficient to prove the said debt, and needed not any further proof by his oath: and the passive title which subjected him to the payment thereof was also proved without his oath; for he was lawfully charged to enter himself heir to his father within the time prescribed by law, viz. 40 days; and his tutors and curators were duly summoned, and he or they for him, not refusing or renouncing his being heir to his father, the decree against him proceeded upon that presumed passive title, according to the constant practice in such cases.

The decree of adjudication was also had against him before the bond was lost, and became a real charge upon the estate: and the decree for proving the tenor of the bond did not pass of course on contumacy of absent parties, but upon mature and solemn consideration of the whole Court in presence, and upon as full and pregnant proofs and other corroborating evidence as could possibly be expected or were ever required in a case of the like nature. 1st, By the debt-book or ledger of the said Robert Blackwood the appellant’s father, wherein was a memorandum of his own

hand-writing, that he had received a ticket or promissory note, written by the said John Hamilton the grandfather, and signed by him and his lady, and that he had afterwards received the said bond in place thereof, particularly expressing the manner and times of payment, and that Patrick Mac Gregor, and Alexander Campbell, servants to the said John Hamilton, were witnesses thereto. 2d, By the decree of constitution against the said Alexander Hamilton, wherein the said bond is mentioned to have been produced, and it is not to be supposed, that the Court would have given judgment thereon if it had wanted the writer's name or witnesses. 3d, By the decree in the action against the said Jane the relict, who appeared and made defence, wherein the bond was also produced, and if those requisite essentials had been wanting, her lawyers must doubtless have taken notice thereof. 4th, By the depositions of several credible witnesses, who proved the *casus amissionis* by fire.

After pronouncing the interlocutor of the 26th of June, the appellant prayed the Court either to reverse the same, or to allow him to amend his libel, or exhibit a new one, which was then offered, expressing the said John the grandfather to be the writer and his said two servants hereinbefore named to be the witnesses, which had been omitted in the said former libel, either because his father's lawyers did not think it needful, or were not apprised of the said memorandum in his debt-book or ledger: but the Court refused the desire of the appellant's petition.

Heads of the Respondent's Argument.

For preventing of frauds in deeds, there are several acts of parliament in Scotland, directing and requiring, that all deeds and securities should have certain solemnities, which are so essential, that if the deeds should be without them, they are declared to be void and null. By an act of parliament, 1593, c. 179., it is expressly enacted, "that all original chartours, &c. shall make special mention in the hinder end thereof, before the inserting of the witnesses therein, of the name, surname, and particular remaining place, diocessie, and uther denomination of the writer of the body of the for-said original writtes and evidentes; utherwise the same to make na faith in judgement, nor out-with in time cumming."

From this act it was insisted for the respondent, that the foundation of the three several judgments was the bond, pretended to have been given by the respondent's grandfather; but this bond not being produced, it was necessary to consider that which was decreed to stand in its place, viz. the tenor thereof which had been proved in the action for that purpose. The bond so proved wants the name and designation of the writer, and witnesses, and therefore it is void by the foresaid act of parliament. If that were not the case, then every person who hath a defective or null bond, or other deed, may throw it away, and allege it is lost, and offer to prove a tenor, wanting writer's name and witnesses,

(which are the solemnities for preventing of frauds,) and thereby carry off a man's estate, to which otherwise they had no manner of pretence.

The appellant contended, that since in the first decree obtained upon the said bond, express mention was made, that the original bond was produced, the law presumed, since a judgment was obtained upon it, that the same was formal and valid. But the presumption runs quite the other way, viz. that the bond was then the same thing it now appears to be in the tenor proved; and if so, then it was null. But if the principal bond was unexceptionable, then the tenor is not proved; or if it wanted writer and witnesses, as the tenor proved does, then it is void. But supposing there had then been a formal good bond produced, yet there being no such formal bond extant, the decree falls to be reduced for want of the necessary grounds and warrants; besides, no argument is to be drawn from a judgment obtained against a minor who is *indefensus*.

As no memorandum in a man's own books can make up the solemnity of a deed granted to him, so this very memorandum does not cure the present evil, since there is no mention of the writer; the want of which is one of the nullities of the bond.

The decree was not given against the widow upon this bond, but upon her promise to pay the debt during her widowhood; so that the merits of the bond never were in question in that action.

If the appellant think the bond was good, he may still go on to prove the tenor of a good bond *de novo*; nor will that be any inconveniency, since all the witnesses are still alive.

After hearing counsel, *It is ordered and adjudged that the said several interlocutors of the 26th of June and 17th of July 1713, and so much of the said interlocutor of the 12th of February 1713, as takes away the accumulations, penalty, and expences complained of in the said appeal be reversed; and as to the other part of the last mentioned interlocutor, the same is hereby affirmed.*

Judgment,
26 Jan.
1718-19.

For Appellant, Rob. Raymond. George Leslie.
For Respondent, Tho. Lutwyche. Will. Hamilton.

The judgment here reversed is given as a precedent in the Dictionary of Decisions, vol. 2. *voce* Tenor, p. 444.; and in Bankton, b. 4. tit. 29. § 6. Erskine, however, b. 4. tit. 1. § 57. was aware of this reversal.

In Fountainhall, 14 June 1707, a decision, *Trotter v. Home*, is reported, which seems of a contrary nature to the judgment of the Court below, in the present case: there, though the writer and witnesses could not be proved, the Court supported a bond.