

1639. February 20. LORD CARDROSS *against* EARL MAR.

No. 251.

A bond executed by a father, obliging himself to infest a younger son in certain lands, and lying by the granter the time of his decease, found effectual.

Durie.

* * This case is No. 118. p. 11440. *voce* PRESUMPTION.

1661. December 13.

JOHN BOYD *against* The LAIRD of NIDDRIE and EDMONSTON.

No. 252.

A discharge not delivered before arrestment, ineffectual.

John Boyd, as assignee constituted to a bond of 1,000 merks by Wolmet, charged Niddrie the debtor, who suspends on double pouding; in which comppearance was made for John Boyd; who having declared upon oath, that the assignation was to his behoof, for the satisfaction of the sum of £1400, and that the remainder was to Wolmet's own behoof, according to which he had granted back bond to Wolmet, and thereafter granted a second back-bond to Major Biggar; obliging him to make the sum forthcoming to Biggar, which was done before any arrestment; but depones, that he knows, at that time his first back-bond was given, and that a discharge of his first back-bond produced, was by a mistake, kept up by Major Biggar, and not delivered up to him till within these few days: Upon this oath, the Laird of Edmonston, who had arrested all sums due to Wolmet in Niddrie's the suspender's hand, in June 1658, alleged, That he ought to be preferred to Biggar, because it is clear, by the oath, that the superplus of the sum was to Wolmet's behoof, and he having arrested it before the discharge of John Boyd's first back-bond was delivered to John Boyd, or expressly delivered to John Boyd's behoof, or otherwise, that the first back-bond was re-delivered, no deed that John Boyd could do without Wolmet's express consent, could prejudice Wolmet's creditors. It was alleged for Biggar; that albeit the first back-bond was not delivered back to John Boyd before the arrestment, nor the discharge delivered to him, yet Wolmet having subscribed the discharge, and delivered it, albeit it came not to John Boyd's hands, it was sufficient to take away the first back-bond.

The Lords preferred the arrester, and found the discharge could operate nothing, unless it were delivered to John Boyd, or some person to his behoof, before the arrestment; for they thought if discharges by creditors put in a third party's hands, not delivered to the debtor, should be sufficient, it would enervate all arrestments, unless the delivery were expressed to the debtor's behoof.

Stair, v. 1. p. 69.