

1667. *January 16.* Laird of POLWART *against* Laird of HALYBURTON.

No 600.

A bond, for a considerable sum, was done away, by strong circumstances inferring payment.

THE Laird of Polwart, as heir to his father, pursues Halyburton for payment of a ticket of 250 merks due by the defender to the pursuer's father, and for a composition paid by the pursuer's father, for receiving him in certain lands disposed to him by the defender, wherein he was obliged to obtain him infest. The defender *alleged* absolvitor from payment of the ticket, because it must be presumed to be paid on these grounds; *1st*, Since the ticket the defender sold land to the pursuer, so that it must be presumed it was counted and included in the price, and albeit that presumption were not sufficient alone, it is fortified by these two, viz. that it is twenty-eight years since the bond was granted, and no word ever heard thereof; and that umquhile Polwart in his testament, gave up an inventory of the debts owing to him, wherein no mention is made of the bond. It was *answered*, That a writ could not be taken away by witnesses proving payment, much less by the presumptions; and as to the taciturnity, which is the main one, umquhile Polwart died about seven years after the bond was granted, and the pursuer was minor most of the time since. It was *answered*, That presumptions have been oft-times sufficient to take away writs, as was found in the case of the Lady Trabroun, See APPENDIX.

THE LORDS found the presumptions not relevant, and that they were nothing so strong as those of the Lady Trabroun, which were thus: Trabroun granted a bond of 5000 merks to Alexander Peebles, which was taken away on these presumptions, that thereafter Trabroun had granted a bond of 10,000 merks to the said Mr Alexander who was his advocate, with whom he had many affairs; and therefore it was to be presumed the last bond included the first, especially seeing Trabroun decaying in his fortune, Mr Alexander apprised his lands upon the last bond, and not upon the first, which he might have done with the same expense, and that he never moved any thing thereupon all his life by the space of twenty-six years, and in the inventory of his testament he made no mention of it; and that his executors being examined *ex officio*, did acknowledge they had found it amongst old cast papers. The defender further *alleged* absolvitor from the composition, because he was never required by Polwart to procure the infestment from the Earl of Hume, which he could easily have done gratis, he being his uncle, especially seeing there was no term in his obligation to perform; and therefore interpellatio tantum inducit moram.

THE LORDS found the defence relevant and assolizied from the composition, albeit it was alleged that Polwart for several years had not componed, that the composition was much less than a year's rent, and that Halyburton was not in good terms with the Earl of Hume, which was not respected, seeing Halyburton was not required.