

1665. June 21.

BRAIDY *against* LD FAIRNY.

A HOLOGRAPH bond proves not its date against an inhibitor.

No 498.

Fol. Dic. v. 2. p. 258. Stair. Gilmour.

*** This case is No 27. p. 12275.

1668. November 14.

MARGARET CALDERWOOD *against* JANET SCHAW.

No 499.

MARGARET CALDERWOOD pursues Janet Schaw to pay a bond, as heir to John Schaw, granted by him, who *alleged* absolvitor, because the bond is null, wanting witnesses. The pursuer offered him to prove holograph. The defender *answered*, That holograph could not prove its own date, so that it is presumed the bond was granted on death-bed, unless it be proved that the date is true as it stands, or at least that it was subscribed before the defunct's sickness. The pursuer *answered*, That holograph proves its date, except *contra tertium*, but it is good against the granter or his heir, who cannot be heard to say that his predecessor's deed is false in the date. The defender *answered*, That an heir might very well deny the date of a holograph writ, otherwise the whole benefit of the law (in favour of heirs not to be prejudged by deeds on death-bed) may be evacuated by antedated holograph writs on death-bed. The pursuer *answered*, That he was willing to sustain the reason founded on death-bed, which was only competent by reduction, and not by exception or reply. The defender *answered*, That where death-bed is instantly verified by presumption of law, and that the pursuer must make up a writ *in rigore juris* null for want of witnesses, he ought without multiplication of processes, both to prove the bond holograph, and of date anterior to the defunct's sickness.

Death-bed sustained by exception against a bond without witnesses, and alleged to be holograph.

Which the LORDS found relevant.

*Fol. Dic. v. 2. p. 258. Stair, v. 1. p. 562.**** Gosford's report of this case is No 71. p. 2737, *voce* COMPETENT.

*** A similar decision is reported by Stair, 24th June 1681, Dows *against* Dow, No 158. p. 11477, *voce* PRESUMPTION.

1672. January 20. BELL *against* FLEMING and WILLIAMSON.

No 500.

JOHN BELL having arrested all goods and sums belonging to Smith his debtor in the hands of Williamson and Fleming in Aberdeen, and pursuing for making forthcoming, they depone, that the time of the arrestment they had only in their hands some pieces of English cloth, a part whereof was impignorated to Williamson for payment of a sum conform to a ticket produced, and that Smith being debtor to them in several other sums, Williamson assigned his

Holograph bond does not prove its own date against an arrester.

No 500.

sums to Fleming, who pursued Smith before the Magistrates of Aberdeen, and having obtained decret, did point the cloth, both in Williamson's hand, and in Fleming's own hand, for the same debts. At the advising of the cause it was *alleged* for Bell, That these decreets being posterior to the arrestment, and obtained by collusion, to prevent the pursuer's more timely diligence by arrestment, no respect ought to be had thereto, seeing the persons in whose hands the arrestment was made did neither intimate to the arrester, that a pursuit was moved upon the said debates, whereby Bell might have raised double pointing, nor did they raise double pointing themselves, which if they had done, he would have been preferred, and excluded any posterior diligence; for albeit pointing may be used after arrestment, yet where there is collusion by the person in whose hand the arrestment is made, to prefer one creditor to a more timeous diligence of another, that collusion can neither hurt that prior creditor, nor prefer the posterior; as if after arrestment laid on by the Lords' precept, and pursuit before them, another creditor should arrest by the precept of a Sheriff, or Bailie of a burgh, and obtain decret before them, before decree could be obtained before the Lords by the most exact diligence, if upon the said decree of the inferior court, the goods arrested were pointed, the party in whose hands arrestment was made, would not be thereby liberated, unless he had raised double pointing *debito tempore*, which might have prevented the pointing; much more in this case where the defenders assign their sums, that the pursuer's arrestment may be anticipated by pointing of the goods in their own hand. It was *answered*, That the defenders had done no wrong, to endeavour their own preference, the assignee having pursued no process against them, but against Smith the common debtor for payment, and thereupon had pointed.

THE LORDS found that the foresaid pointing proceeded by collusion in favours of the parties themselves, in whose hands the arrestment was made upon holograph tickets granted by the common debtor, which prove not their dates to be prior to the arrestment; and therefore notwithstanding thereof ordained them to make forthcoming, except in so far as concerned that piece of cloth that was hypothecated, prior to the arrestment, and allowed the sum upon which the impignoration was made.

Fol. Dic. v. 2. p. 258. Stair, v. 2. p. 52.

1674. November 7.

BOYD against STORIE.

No 501.

A DISCHARGE to a tenant sustained upon the master's bare subscription, and that against an onerous assignee, the tenant making faith, that he received the same from his master before the assignation.

Fol. Dic. v. 2. p. 259. Stair.

*** This case is No 297. p. 12456.