

1679. *February 19.* SWINTOUN *against* The LAIRD of TOFTS.

UMQUHILE Mersingtoun gave an infestment of relief to Tofts and others : and now there is a declarator of extinction raised of that infestment, at the instance of Mersingtoun, and Mr Alexander Swintoun, his successor, upon satisfaction of the sums for which it was granted by the creditors, or by Tofts himself; and particularly by a bond of 2000 merks addebted by Tofts to Mersingtoun *in anno* 1639, bearing Tofts to have borrowed that sum from Mersingtoun; and obliging Tofts to retire a bond, due by Mersingtoun to some of his creditors, for the like sum, or otherwise to repay the same.

It was ANSWERED for Tofts, That Mersingtoun was addebted to him in other 2000 merks, with which he craved to compensate; and, for instructing thereof, condescended upon a provision in the infestment of relief, bearing, “But prejudice to Tofts of another bond of 2000 merks, due by Mersingtoun to him.”

It was REPLIED, That this reservation could not instruct the debt, unless the bond reserved were produced; it being the common custom of this kingdom to extinguish bonds by payment, retiring and cancelling thereof without a discharge, unless it had been registrate, or infestment following thereon: and, therefore, no subsequent writ, narrating or reserving a prior bond, can instruct the debt to be resting, without production of the bond; which, otherwise, law presumes to be satisfied and retired. For it is impossible for parties to remember or provide against narrations, or reservations of such writs, either in missive letters, or posterior securities, but do confidently retire the principal bond, upon payment of the sum.

It was DUPLIED, That though narratives *non probant contra tertium, nam non creditur referenti, &c.* yet they prove against the narrator; but much more a reservation.

It was TRIPLIED, That, though these prove, against the narrator, that the debt was due the time of the narration or reservation, yet it will not prove that the debt continues and remains due. And that parties behoved to take discharges to meet such reservations or narrations: or otherwise none could be secure, by securing principal writs, who could not possibly remember or know what posterior letters they had written relating to such bonds, or narrations, or reservations they had made thereof in posterior writs.

The Lords found the reservation did not instruct the debt to be now resting, unless the bond reserved were produced; in respect of the known custom, to satisfy and retire principal bonds without discharge: for, in that case, *chirographum non repertum apud creditorem præsumitur solutum.*

*Vol. II, Page 697.*

---

1679. *February 19.* The LAIRD of PITCURR *against* The LAIRD of DUN.

THE Laird of Fullertoun being taken with caption at the instance of Pitcurr, the Laird of Dun interposed, and gave bond with him to present his person prisoner, in the tolbooth of Dundee, upon the 1st day of February last, or else to pay the debt: Fullertoun appeared in the tolbooth the said day, between ten