

No 603.

another bond or another cause. It was *answered*, That a solemn bond can only be taken away by a discharge or oath, but by no presumptions or adminicles; and that the taciturnity was by the minority of the pursuer.

THE LORDS found the presumptions and adminicles sufficient to prove the satisfaction of the minute, and that the discharge was sufficient to elide the bond of 4000 merks, unless a bond of 3000 merks could be shown, both bond and minute being so ancient, and the minute without annualrent, and extreme diligence used for the bond of 4000 merks which bore annualrent; likeas umquhile Napier's count-book bore payment to have been made, all written with his own hand, he having died long before this pursuit.

Fol. Dic. v. 2. p. 268. Stair, v. 2. p. 65.

No 604.

1676. February 17. ABERCROMBIE *against* ACHESON and LIVINGTON.

A TAVERNER, after she had removed from her master's service and was married, was pursued to count and reckon for ale and wine, which the pursuer offered to prove was laid in in his cellars.

THE LORDS found, That the pursuer ought to libel and prove that the debt was yet resting; seeing it was to be presumed, that servants of that quality did count weekly with their masters, and the pursuer would not have suffered the defender to go out from his service before she had counted and made payment; and it appeared that there had been former decisions to that purpose.

Reporter, *Lord Justice Clerk.*

Dirleton, No 340. p. 162.

1681. December 15. MERCER of Clavage *against* LADY ALDIE.

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The Lords presumed a bond paid upon strong circumstances of taciturnity, &c.

IN the action pursued by Mercer of Clavage against the Lady Aldie, it being *alleged* for the Lady, That the bond was an old bond, being granted *in anno* 1643, to the deceast William Mercer, Clavage's grandfather, never heard of now by the space of 38 years, and the creditor being in a poor and mean condition, and the debtor being solvent, it was presumed to have been paid, and that in Aldie's charter-chest there was a missive letter importing a discharge, which was lost when the charter-chest was brought over to Edinburgh, in a debate betwixt the heir male and the said Lady, as heir of line; and that she offered to prove that there was money paid by Sir James Mercer, equivalent to the sum contained in the bond, and that the creditor William Mercer declared that Sir James was not resting him any thing. THE LORDS having examined witnesses *ex officio* upon the foresaid points, they found the bond paid, and as-

soilzied the Lady, in respect of the taciturnity of the debtor, and other circumstances above written, proved by the depositions of the witnesses. No 605.

Fol. Dic. v. 2. p. 269. P. Falconer, No. 8. p. 4.

* * * Fountainhall reports this case :

THE case Mercer *contra* ——— Mercer, Lady Aldie, was decided this day in the Inner-house : “ And the LORDS, on a concurrence of violent and pregnant presumptions, assoilzied from the bond pursued on, though no discharge of it was produced, because the creditor was Aldie’s door-neighbour, and was silent 33 years, never claiming it, and was poor, and got charity from Aldie, and in all his claims never counted this bond as a debt; and witnesses deponed, that they had read and seen letters which imported a discharge, and that the creditor confessed and acknowledged the payment in their hearing; all which, and other adminicles being conjoined, the LORDS found amounted to a discharge.” But some thought this a dangerous latitude, to take away written bonds by presumptive conjectures, or by witnesses.

Fountainhall, v. 1. p. 167.

* * * Harcarse also reports this case :

SIR JAMES MERCER having, *in anno* 1643, granted a bond bearing annual rent, to Mr William Mercer for 2300 merks, on which no process or diligence was raised, till after Sir James’ decease, a process was raised against his heir, about the year 1674.

Alleged for the defender; That the bond is presumed to have been paid, from Mr William’s neglect to seek after it for so long a time, when the creditor was opulent, and himself under great wants and difficulties, and not leaving it in the inventory of his debts, though the bond was lying by him at his death. Besides, it appeared from the depositions of some who had inspected the charter-chest of Aldie some years ago, by warrant from the Lords, that there was then found a letter, under Mr William Mercer’s hands, importing a discharge of the money; which letter is now abstracted.

Answered for the pursuer; That a bond cannot be taken away by witnesses; otherwise there would be no security.

“ THE LORDS having considered the presumptions of payment, found the same sufficiently proved, and assoilzied the defender from the pursuit.”

Harcarse, (BONDS.) No 169. p. 37.

* * * Sir P. Home also reports this case :

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MERCER Clavage having pursued the Lady Aldie for payment of the sum of 3200 merks, and annualrent thereof, contained in a bond granted by her father to William Mercer, the pursuer's grandfather, in the year 1643, and the LORDS, in respect of the concurrence of so many strong qualifications, and presumptions that the debt was paid, ordained witnesses to be examined *ex officio* for either party. The grounds and reasons adduced for the defender that the debt was paid, were, that it was an old debt, and no diligence done upon the bond for the space of 37 years; and the pursuer's grandfather, to whom the bond was granted, in a most necessitous and indigent condition; and the defender's father, the debtor, was always in a good condition, and it appears by the depositions that he did several times supply the pursuer's grandfather, to whom it was alleged the bond was, for charity as his poor cousin; and he was in sick necessitous condition; that he having only one child, a daughter, when she was to be married, he was not able to give her a portion; but the defender's father, and two of the friends, did contribute and made her up the sum of 2000 merks; and it is to be presumed, that if he had been owing any debt to the father, that he would voluntarily contribute for the daughter's portion, but would first have paid his own debt; as also the pursuer's father was debtor to the Lady's father in the sum of 5000 merks by bond, for which he was infest in an yearly annualrent out of his estate, which the Lady, since her father's death, did renounce; and it cannot be imagined, that if there had been any such debt due, the pursuer's father would have gotten allowance of the same at the time, and after her father's decease, the heir male having pretended right to the estate, he made application to the Lords of Privy Council, upon which there was a commission granted to Sir Gilbert Stuart for the Lady, and to one Davidson for the heir male, to sight the charter-chest, and send it over to Edinburgh; and accordingly, the charter-chest was sighted, when there were several of the persons, near relations, present, but no person for the Lady, but only Sir Gilbert, who not taking notice to cause inventory the papers, but only caused tye them up in bundles, and marked them only with the figure, but did not consider upon the particular papers; and when the charter-chest was thereafter delivered up to the Lady, she had a great loss by not inventorying of the papers; and, at that time, if there had been any such debts due, the discharge thereof might have been abstracted; and it will appear by the depositions of the witnesses, that there was a letter in the charter, written by the pursuer's father to the Lady's father, whereby he acknowledges the receipt of the particular sums therein mentioned from her father, and in general, that he had gotten satisfaction of these, and all other debts due to him, which was some short time after that pretended debt; which letter, with several other papers, are abstracted; as also, it is clear by the depositions, that the defender's father paid to the

pursuer's father, sums equivalent to the sums due by this bond ; and the defender's father, who is known to be a man of great ingenuity and integrity, did declare to Mr Alexander Ireland, minister at Fasquha, (within which parish Aldie lies), that he was owing no sum of money to William Mercer, the pursuer's father, and that after this pretended bond, which was never made use of so long as the Lady's father, Sir Gilbert Stuart, and others that were present at the sighting of the charter-chest were alive, who saw the said letter, nor was there any such debt alleged to be due when the Lady did renounce infetment of annualrent for the 5000 merks ; and there was several bnods that the Lady's father had granted to his creditors, that albeit they were paid, yet she neglected to retire them ; but the creditors knowing they were paid, did voluntarily deliver them up, all which being conjoined, is sufficient to instruct the payment of the debt ; and the Lords many times takes away debts upon such pregnant presumptions, especially personal debts, as was decided in the case of Colonel Fullarton Crawford and Lithgow, and The Laird of Polmais against Glorat, and Stark of Kellermont *contra* Napier, and The Master of Balmerino against the Earl of Lothian ; and albeit the pursuer produces a discharge of an yearly annualrent of the sum alleged contained in the bond, about a year after the granting thereof, yet it does not follow, but that it might have been thereafter paid, and it is a discharge wanting witnesses, and is produced by the pursuer himself ; and if it were a true discharge, it is rather a presumption that the debt was paid, seeing there are no more discharges produced ; and whatever that discharge might militate, in case the bond were offered to be improved, yet it does not follow, but that the debt was paid, which is sufficiently instructed by the foresaid presumptions and qualifications. *Answered*, That it is a principle in law, that a debt being constituted by writ, cannot be taken away, but by writ or oath of party ; and the bond being still extant in the creditor's hands, it cannot be taken away by presumptions ; and the pursuer's father cannot be supposed to be in a necessitous condition, he being an advocate to his employment ; and any thing that was given to him by the Lady's father, was only as his lawyer ; and he being the Lady's father's cousin, and near relation, was a sufficient presumption why he did not use diligence against him upon the bond in his own time ; and the discharge of a year's annualrent, does not only evince the truth of the debt, but also is a presumption that the debt is still due, unless it could be instructed by writ or oath of parties, that it was paid ; and it will appear that the foresaid practicks do not meet this case, seeing in all these cases there were some adminicle or document in writ, that did in some manner clear the payment of the debt ; and that it was never sustained by our law, that the payment of money or discharge of a debt could be proved by witnesses ; and all the witnesses declares anent the discharge, is only that they heard there was a letter importing the discharge of the debt ; and albeit there had been such a letter, yet no such testimony of witnesses could be regarded ;

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for, albeit, in the proving of the tenor of writs, the testimony of witnesses will be received, that saw the tenor of the writ libelled, but witnesses cannot be received upon the import of a writ. for that were to make them judges rather than witnesses; it being only proper to the judge to consider the importance of a writ, how far the same does operate; and albeit in the case of forgery, the LORDS do reduce writs upon the testimonies of the instrumentary witnesses when they refuse there subscription, as also writs may be improved by indirect articles and extrinsic testimonies, the question there being *de veritate auctores* which is *facti*, or in the case of fraud, circumvention, force or extortion, which arise all from facts, and are inferred from deeds that fall under sense, where writs neither are nor can be interposed, and therefore cannot be supposed to be instructed *scripto*; or in the case of exubrated trust, where the design of the party is to conceal to whose behoof a right is conveyed; and therefore a person, out of entire trust and confidence, will rest upon another's faith without taking his obligation; or in the case of dubious clauses in writs, where the comuners and witnesses are inserted will some times, before answer, be examined anent the meaning of the parties, and will be generally admitted, in every case that falls under sense; since where writs use not to be adhibited, but in all cases where writ uses and is adhibited, and particularly in relation to the payment of sums and discharges, witnesses, though above all exception, cannot be received. THE LORDS found the foresaid presumptions accumulated together, sufficient to instruct, that the sum contained in the bond was satisfied and paid.

Sir P. Home, MS. v. 1. No 20.

1697. July 7.

HOUSTON against HOUSTON.

No 606.
The Lords found that certain presumptions, tho' pregnant, were not sufficient to do away a bond, and that nothing arbitrary should be done in such a matter.

THE LORDS heard and advised the debate in the declarator pursued by Andrew Houston, late of Garthland, against Houston of Drummaston, for extinction of a bond of 1200 merks, dated in 1662, upon sundry presumptions; such as, that shortly thereafter the creditor, by a missive letter to the debtor, craved his delay for paying 800 merks he owed him; which he would never have done if he had been resting the said 1200 merks; for he had no more to say, but you are owing me more, et frustra petis quod mox es restitutus. I will compensate you. *2do*, The debtor sold the creditor a piece of land after the bond, and it cannot be imagined but the sum in the bond was retained in the fore-end of the price. *3tio*, By a diary exactly kept, the debtor had marked, that this bond was in that way satisfied; and there has been a long silence and taciturnity. *Answered*, He opposed his clear liquid bond; and as to the first presumption, it was no wonder he did not mention the 1200 merk bond, seeing the term of payment was not then come; and if it was so soon paid, then