

No 6.

What proof of
deposition?

1685. December. M'INTOSH and DRUM *against* RANDESTOUN.

It being *alleged* for Humbie's interdictors, That they consented to an alienation of lands, upon condition, that they should have power to dispose of the price, and prefer creditors as they thought fit, and that the disposition was deposited in Sir John Cunningham's hands, not to be delivered to Sir William Primrose, until they had destined the price to what creditors they pleased :

THE LORDS found the deposition only probable *scripto vel juramento*, and not by witnesses instrumentary, or others, in respect the disposition was now in the hands of the buyer, and the price payable to the interdicted seller, and the disposition bore no qualified consent of the interdictors reserving power to apply the price, but a simple consent.

Harcarse, (DEPOSITION,) No. 415, p. III.

No 7.

A person with whom a bond had been deposited, was forced, by warrant of a magistrate, at at the instance of a third party, to give it up. He was notwithstanding liable to the person from whom he received it.

1696. November 7.

BRAIDY *against* Gow.

In a concluded cause, Braidy *contra* Gow, for exhibition and delivery of a bond for 1000 merks, granted by Corsehill to her father, and deposited in his hand by him for the behoof of the pursuer, his daughter, providing she accepted it in satisfaction, and gave up her mother's contract of marriage; Gow, in his deposition, acknowledged he had received the said bond from Braidy, to be given up to the pursuer on the terms aforesaid; but that in 1683, he was called before the bailies of Glasgow by one Robertson, an apothecary there, alleging right to the bond, and was summarily incarcerated, and was forced to deliver up the bond to Robertson, on his receipt of the same, ere he could obtain his liberty. The question, at advising of this oath, was, whether this was an intrinsic quality, and if the force was such a legal and warrantable force, as he was bound to obtemper and acquiesce in without seeking farther redress. The Lords considered that a common haver of a writ by the act of sederunt is bound no farther, if he depone that he had it not since the citation, and put it not fraudulently away at any time; but here it was a *depositarius*, who ought to be faithful to his trust; and if he had been forced to give it up by way of a judicial legal process, that it might have exonerated and assoilzied him; but being called for by a summar warrant, and imprisoned, till he gave it up, this cannot be a legal force, nor *metus licitus*, nor done *auctore prætoris*; but he ought to have applied for a suspension, that all parties might have debated their rights; which he having neglected, it was not such a *vis major* as could liberate him; else any depositary may by collusion suffer himself to be imprisoned, to afford a pretence to deliver up the writ to the prejudice of them in whose favour the deposition was made; and though a *depositarius* in law *tenetur tantum de dolo et lata culpa*, and there could be no fraud here qualified against Gow,

yet THE LORDS thought he should not have given it up, till he had tried a suspension, else any fide-commissary might evacuate his trust; and therefore THE LORDS found he ought either to deliver up the bond to the pursuer, on her renouncing, *ut supra*, or pay the sums therein contained *nomine damni*, reserving his recourse of warrandice and relief against Robertson's heir.

Some thought this interlocutor hard, in regard illiterate burgesses think themselves obliged to obey their magistrates, and know not when they proceed legally, and when not, and will not lie in prison till they get a suspension; and the bailie ought rather in that case to be punished for abusing his power; and here *non constabat* she had any right to the bond, it being acknowledged by all to have been conceived in the father's name, and there was an assignation of it to her; and Gow being interrogate, whether the bond bore a substitution to her, he declared he could not tell; and the naked deposition could not convey a right, and so she wanted a title; but if the bond had been extant, that would have been soon cleared. Then Robertson's heirs *alleged* they had the best right to it, having affected it by an arrestment, and obtained a forthcoming. THE LORDS declared they would hear them further on this defence. THE LORDS afterwards granted diligence to recover the bond, and to examine witnesses anent the tenor of it, and sundry particulars, to clear the matter of fact.

Fol. Dic. v. 1. p. 234. Fountainball, v. 1. p. 732.

1711. January 9.

WATSON against M'KENZIE.

ROBERT WATSON of Muirhouse and his partners sent in 1706, two several barks to the isle of Lewis, with a great quantity of Spanish salt, casks, and other materials for the herring-fishing; but it proving very bad and insufficient that year, they leave the salt and materials with Alexander M'Kenzie of Applecross, then at Stornoway in the Lewis, and take two several receipts from him; the 1st was in these terms, that he shall either re-deliver the salt, or else the equal quality and quantity at the port of Leith, when demanded. The 2^d obligation to the other skipper precisely bore, that he should keep the salt therein mentioned as he did his own, and dispose of it as they should order. This lying over till 1709, that the price of salt rose considerably, they require Applecross to deliver back their salt. He having disposed upon it by curing herrings, offered to pay them such current rates as salt gave at the time he received it; which they judging unreasonable, raise a process against him either for the salt itself, or the prices it gave in 1709, when they required it, and for their damages in wanting it so long. *Alleged*, The first ticket contained a plain alternative either to restore the salt, or the like quantity upon demand, which gave Applecross his election either to preserve the individual salt, or use it as he pleased: So from a *contractus depositi* it turns a *mutuum*; and this is clear from

No 7.

No 8.

A person introumitting with goods deposited, without permission of the owners, was found liable for the market price at the time of requisition.