

to a captain than to a lieutenant : whereas the former's ordinary pay is but about a half more than that of a lieutenant. Nor was the same proportion allowed to all captains ; but to some more, and to some less, according to their influence. 3. It is absurd for the defender to fancy that she, as representing her husband, could not be liable for his intromission with the pursuers' money, upon pretence that he gave some part of it away to others ; for, by the same rule of reasoning, a robber or a depositary might plead exoneration, as to what they gave away to their associates.

The Lords found the pursuers might still claim their shares of the L.1200, conform to the establishment, as the true and only rule of division ; and that the Brigadier was *in mala fide* to make any payments conform to the other cast.

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1706. June 26. SIR WILLIAM SHARP of Stoniehill *against* The late ARCH-BISHOP of GLASGOW.

SIR WILLIAM SHARP having charged the late Archbishop of Glasgow, to make payment of L.33. 6s. 8d. Sterling, contained in a bond granted by Mr. Robert Mortimer as principal, and him as cautioner, to John Beddel, merchant in London, the charger's cedent ; the bishop suspended upon this ground, That the bond charged on is a relative writ, bearing *in gremio* this clause, that if payment be made of the foresaid sum of money, by virtue of a bond English form, signed and sealed by me the principal party, of the date of my subscription, then this obligation shall be null ; which clause liberates the cautioner, unless the charger could produce the principal bond to which the Scottish bond relates. For when a bond cannot be produced, *instrumentum penes debitorem*, or which cannot be shown, *præsumitur solutum* ; unless there be a clear evidence that it could not be satisfied : as, the term of payment was not come, or some *casus amissionis*, viz. *incendii, raptinæ*, or the like libelled and proved. And the charger was *in mala fide*, to accept of an assignation to the bond after the Scottish form, without getting up the principal English bond, with a conveyance thereto. For as the principal debtor, had he been charged upon the Scottish bond, might have required up that which he signed after the English form, unless it were lost, and the *casus amissionis* condescended on and proved ; in which case the principal debtor would have been secured by caution : so this is much more competent to the suspender, his cautioner, who, for want of the principal bond, wants a part of the security he should be assigned to for his relief ; seeing the English bond would afford summary diligence and execution in England, which is not allowed on a Scottish bond. But then again the assignee could not discharge the principal English bond ; in respect he had no right to it.

ANSWERED for the charger,—The bond charged on is valid and obligatory of itself, without the support of any other writ. 2. The most that in law or reason can be inferred from the above mentioned clause, is, that if the first English bond was paid, the bond charged on is null ; which payment must be proved by the

suspender, who founds upon it. For to presume that the English bond is paid, because not produced by the charger, is *sine lege loqui*. And why might not he take assignation to the one, without inquiring after the other, or whether it was extant or not at the time; seeing the bond, wherein the suspender is bound, is an absolute, complete, and valid right; as well as indorsations use to be taken upon one of two bills of exchange for the same sum, without calling for the other?

The Lords repelled the reasons of suspension, unless the suspender would offer to prove payment of the bond granted by the principal after the English form.

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1706. July 11. ROBERT BROWN of Carsluith, *against* THOMAS MAXWELL of Cuill.

The deceased HUGH MAXWELL of Cuill having, in anno 1660, married Anna Boyd, relict of Robert Brown of Carsluith, whom he found in possession of the whole estate, he continued the said universal possession, although his wife had only right to a yearly liferent of 1400 merks. In the year 1667, he acquired an apprising of the estate from one James M'Gowan; and in anno 1680, transferred the same in favours of Robert Brown, now of Carsluith, his stepson, for advancing his marriage with Crawfordstoun's sister. Which translation, after narrating the apprising at M'Gowan's instance, and his disposition to Cuill, bears, "That Cuill, for certain sums of money, transfers and disposes the said heritable right by virtue of the foresaid disposition and assignation, &c. Together with the hail sums of money, principal, annual-rents, and expences, and sheriff fee contained in the foresaid apprising assigned by M'Gowan to him; and all right, title, interest which Cuill had, has, or may have thereto in time coming, &c. with power to call for the mails and duties thereof, as also the hail sums of money, principal, annual-rents and expences above transferred, which were disposed to him by M'Gowan, &c. Whilk Cuill obliges him to warrand from his own proper fact and deed allennarly; that is, that he had not done nor yet should thereafter make any other assignation, translation, disposition, renunciation, or any other security of the premisses to no other person or persons, &c." Upon this translation the said Robert Brown pursued Thomas Maxwell of Cuill, as representing his father, granter thereof, for his father's intromissions with the rents of the lands appraised preceding his conveyance of the foresaid apprising in favours of the pursuer, in so far as they exceeded his wife's life-rent.

ALLEGED for the defender,—He cannot be liable for any of his father's intromissions before translation of the apprising; because any intromission he had was allennarly, by virtue of his wife's life-rent right, and not by virtue of the apprising, which he never made use of, but, after it had lain long dormant beside him, disposed it to the pursuer *talis qualis* as it was. 2. The warrandice in the translation from fact and deed, is expressly qualified and restrict-