

No 79.

A bond for a sum, subscribed by a principal and cautioner, was left blank in the creditor's name in the hands of the principal, to be a fund of credit. After the term of payment he delivered it to his own creditor. Found that the receiver was not bound to exhibit it, as *instrumentum penes debitorem*, in a process of exhibition at the instance of the cautioner.

1708. July 7. The LORD SALTON *against* Sir JAMES of ELPHINGSTON of Logie.

IN a process at the instance of the Lord Salton against Sir James Elphingston, for exhibition and delivery of a bond blank in the creditor's name, granted by Mr John Buchan as principal, and the pursuer as cautioner in the year 1690, for the principal sum of 1000 merks, with annualrent and a penalty, which had been delivered to the defender by Mr Buchan after the term of payment, for security of a considerable sum owing by him to the defender; which bond the pursuer contended was null, as being *instrumentum penes debitorem*; and to allow bonds to be delivered by the principal debtor after the term of payment, would be of dangerous consequence; seeing at that rate, one having retired a bond, might keep it up uncanceled several years, and thereafter becoming insolvent, re-deliver it to the creditor whose name is inserted, or if blank, to any creditor.

*Answered* for the defender; He cannot be obliged to exhibit the bond libelled; in regard it was his own evident for an onerous cause, and could not be taken from him but *scripto* or *juramento*. *Perinde est* at what time the bond was delivered, whether before or after the term of payment, since the pursuer acknowledges, that he signed the same, to be a fund of credit to Mr Buchan, as his occasion should require.

*Replied* for the pursuer; Though he for an *interim* was content to become cautioner for Mr Buchan; it was never his meaning or design to afford to him an everlasting fund of credit; and the bond having remained in Mr Buchan's custody sometime after the term of payment, the pursuer had reason to look upon it as a retired bond.

THE LORDS found, That Sir James Elphingston is not bound to exhibit the bond, and assoilzied him from the process.

*Fol. Dic. v. 2. p. 138. Forbes, p. 59.*

1710. January 4.

BRUGH & JENKINS *against* SCOT.

No 80.

A woman's own agent having borrowed money from her, altho' he had his bond in his own possession, an investigation was ordered to see what probability there was he had paid it.

JOHN SCOT, writer in Edinburgh, having borrowed 1000 merks from Jean Brugh, when a widow, upon his own bond, she being now married to one Jenkins, and craving the annualrent, he shifted a long time, then sought a sight of his bond, which she, after search, could not find, and thereon pursues him, and offers to prove the debt by his oath; in which process he compares, and produces the bond in his own hand, and so pleads liberation on the common ground of law, that *instrumentum apud debitorem repertum præsuntur solutum*. *Answered*, Your having of the bond is indeed a *præsumptio juris* of its having been paid and retired, yet it is not a *præsumptio juris et de jure*, which admits of no probation in the contrary, but may be cancelled and redargued