

by your oath, by which I offer me to prove, that you neither got the bond delivered up to you by me, nor any having my warrant or order, and that it is still resting owing, and that you never paid it to me. *Replied, Nullo modo relevat*, that I did not pay the money to you; for is there any thing more ordinary than to trust a friend or a servant with a bond, and order them to receive the money and deliver it up to the debtor; and though it be surer to take a receipt on the back of it, yet there are a vast deal of payments made in Scotland, singly on retiring principal bonds without any more; and to disturb parties by reviving these debts, and referring them to their oaths, might be a very bad preparative, and put the lieges to much unnecessary expence. *Duplied*, You was my agent and doer in all my business, and had access to my papers, and so might *viis et modis* make yourself master of the bond; and there is nothing more reasonable, than that you should tell how you came by it. THE LORDS considered he was an agent about the Session, and was trusted by this ignorant woman, and therefore ordained him, before he should depone, to give in a condescence, who it was that brought the bond to him; to whom he paid the money; who were present; and in what place; with the other circumstances, to see what resemblance of probability his relation has, before he come to depone. There may be a difference between bank-notes and bonds; in the first case, one may safely pay the haver of the note without farther inquiry; but if one has stolen my bond from the creditor, or has found it when accidentally lost, I am not so absolutely secure to take up my bond from such persons, till I know their commission from the creditor, especially when they live in town.

*Fol. Dic. v. 2. p. 138. Fountainhall, v. 2. p. 550.*

No 80.

1710. January 26.

ROLLO of Powhouse against SUSANNA SIMPSON & Mr DUNCAN WHITE.

IN a competition of the Creditors of Simpson of Stonehouse, there was produced an heritable bond by Alexander Simpson of Stonehouse to William Simpson, his brother, *in anno* 1657, with an infeftment following thereupon, with an assignation *in anno* 1679 to Susanna Simpson, his brother the debtor's daughter, for 2000 merks principal, and to Patrick and Alexander Simpsons, her younger brethren, for the remainder.

It was *alleged* by Rollo of Powhouse, another real creditor, That William Simpson's bond was extinct, in so far as the same, with the assignation thereto, were found among the debtor's writs, and so presumed to be paid; and Mr Duncan White got these papers into his hands in manner following, viz. John Simpson, the debtor's son and heir, being a weak man, suffered Mr Duncan White to come into the closet where his father's writs were when he was searching for some papers, and the said John Simpson having the foresaid bond,

No 81.

A bond with a sasine, and an assignation thereto, found among the debtor's papers after his death, held to be extinct.

No 81.

sasine, and assignation in his hand, Mr Duncan desired to see them ; which being granted, he refused to deliver them, but carried them away, and produced them in this process ; so they must be considered in the same state they were when in the debtor's hand and custody, and *instrumenta apud debitorem reperta præsumentur soluta*.

It was *answered* ; Moveable personal bonds retired by the debtor are easily presumed paid ; but the presumption can take no place in this case, because this is an heritable bond, whereupon infestment has actually followed, and is produced, which cannot be taken off nor extinguished without a renunciation, being a real right. *2do*, In this case, there is also an assignation granted by the creditor, Susanna Simpson, Mr Duncan's wife, and her two brothers ; so that wherever the bond was found with the said assignation, it was the evident and right of the assignee, which might have been recovered by an exhibition, seeing assignations in the hands of third parties are effectual, and delivered evidents for the behoof of the assignees, more especially in this case, the assignees being the debtor's own children.

It was *replied* ; The bond being retired to the debtor became extinct, notwithstanding of the infestment following upon it ; because the principal bond becoming null, the infestment wants a warrant ; and a bond in the custody of the debtor, though entire, is considered in the construction of law as cancelled and null ; beside, the principal sasine was retired with the bond, and an extract would not defend against an improbation.

*2do*, The assignation makes no alteration in the case, seeing the same was also in the custody of the debtor, and as much presumed to have been cancelled as the bond itself ; for although assignations delivered to third parties disinterested do become the evidents of the assignees, yet a bond and assignation delivered to the debtor, becomes his evident, and extinguishes the debt, more especially in this case, where the assignation bears a clause dispensing with the not-delivery, and a power to alter ; so that indeed it was a disposal of the creditor's affairs ; and the debtor being his only brother and heir by law, his delivery of the bond and assignation to him was an alteration ; and farther, the delivery of the bond and sasine did extinguish the debt, and it was no great matter what became of the assignation.

*3tio*, There is not the least presumption, that the papers were delivered to the father for the behoof of his daughter ; for the assignation being in 1679, the debtor survived his brother the creditor ten years, and this assignation never heard of in his time, nor for 16 or 17 years after his decease, and never heard of all that while, nor would have been heard of but by the weakness of the apparent heir, upon the occasion above mentioned ; whereas the daughter was married in his own time, and he could not have been presumed so false to his trust, as to have cancelled it all his life.

“ THE LORDS found the presumption relevant to extinguish the bond.”

*Fol. Dic. v. 2. p. 137. Dalrymple, No 92. p. 128.*

\*.\* Forbes reports this case :

No 81.

IN the competition betwixt Robert Rollo and Susanna Simpson and her husband, for the mails and duties of the lands of Stonehouse, Susanna Simpson having produced a principal heritable bond of 2600 merks, with an infeftment thereupon in the lands, granted by the deceased Alexander Simpson of Stonehouse to his brother William Simpson, with an assignation thereto from William to Susanna, and to Patrick and Alexander Simpsons their brethren; the LORDS found it relevant to extinguish the bond and assignation, that both were in Alexander the debtor's custody after William the creditor's decease; and *instrumenta apud debitorem reperta* are presumed extinct; and found, That the sasine following upon the bond did not alter the case, seeing the debtor could as easily have taken his name from it, as if it had been a personal bond, whereby the sasine had been null, as wanting a warrant. Nor doth the assignation make any further difference than to change the creditor; and its being put with the bond in the debtor's hand before delivery to the assignees, was equivalent to cancelling.

*Forbes, p. 389.*

1712. June 7.

CHARTERIS *against* CHARTERIS.

MR WILLIAM CHARTERIS, writer to the Signet, being creditor to the Earl of Nithsdale, in 4000 merks, he assigns it to Alexander, John, and Agnes Charteris, his younger children; which debt they assigned to William Charteris, their eldest brother, commissary of Dumfries; and he, in October 1682, grants them a backbond, bearing the assignation was only in trust, that he might do diligence for recovery of it out of Nithsdale's hands; and he dying in 1697, there is a declarator raised by the said Alexander, John, and Agnes, against the commissary's children, to hear and see it found and declared, that the said assignation was merely granted in trust, for their behoof, and that they ought to denude of Nithsdale's debt in their favours. Robert Lauder, writer in Dumfries, having, in obedience to an exhibition, produced the commissary's compt-book, and sundry other writs; it was *alleged* for the pursuers, That the trust was sufficiently evinced and cleared, *imo*, By a backbond, granted by the said commissary, acknowledging the same; *2do*, By his compt-book, bearing a particular article, that the said sum, after deducting his expenses, belonged to the pursuers; *3tio*, The commissary was in use to accept of such trusts, and some of them have been declared against his heirs since his decease. *Answered*, It is no ways denied but the assignation was originally a trust; for the backbond of its date proves that; but the whole question turns on this, if it was so at the

No 82.

A debt was assigned in trust. The trustee granted backbond. This was found in his repositories at his death. Found that the trust was discharged.