1713. *July* 3.

Mr WILLIAM COCHRAN of Kilmaronock and GEORGE NAPIER of Kilmahew *against* Sir JOHN HOUSTON of that Ilk and ROBERT CUNNINGHAM.

No 609.
A bond reduced in consequence of circumstances, from which payment was inferred.

KILMARONOCK, who stood obliged to relieve Kilmahew of all debts he might be subject to as heir to Sir Patrick Maxwel of Newark, raised reduction and declarator of extinction of a bond for 17,800 merks of principal bearing annualrent from the date, subscribed by Sir Patrick blank in the creditor's name, in the year 1670, and assigned by Robert Cunningham to Sir John Houstoun for an onerous cause; which bond the pursuer *contended* should make no faith, but ought to be reduced, and declared void, for the reasons following; *1mo*, The bond continued blank in the creditor's name, and was never heard of by any representing the debtor for 39 years; and though there be instances that a bond for some time upon certain considerations hath been kept blank in the name of the creditor, yet there is no instance that a bond of this consequence has gone about by legerdemain so long without ever being so much as heard of, or any evidence given what steps it has taken, or by what hands it has come about at any one period; *2do*, Sir Patrick Maxwell, subscriber of the bond, and his first heir, had an opulent fortune, and were in that condition that they could not probably have suffered this bond to stand out unpaid, to an uncertain creditor; *3tio*, Robert Cunningham, in whose hand it seemed first to appear, being ordained to shew the manner how he came by it, said he found it among Agnes Montgomery his mother-in-law's papers when she died in the year 1689, which Agnes Montgomery lived and died in a poor condition, without any possible means of acquiring such a sum; and though she lived to a great age, and died of a lingering sickness, never made any settlement or conveyance, or the least mention of this debt; *4to*, Again Robert Cunningham for about eighteen years after his mother-in-law's death concealed it, viz. till the year 1708, when it was forced into light by this process; albeit he was not only conscious of the necessity of doing diligence in the interim if he had a mind to secure his money, Patrick Maxwell the last heir's estate becoming then mightily encumbered, after whose decease he was called and compearing as factor for the estate in all the processes, wherein it was wholly discussed and sold; nay, he did not produce or found upon such a bond in a pursuit against him at the present heir's instance, wherein he was decerned for and paid a great sum, which he might have avoided in a great part by founding upon his interest in the bond. And to what could this be attributed, but only a design to keep things quiet till the writer and instrumentary witnesses were all dead who could tell tales, and give light in the matter, as they now are? *5to*, Robert Cunningham had many occasions of getting this bond into his hand from among the writs of the family of Newark, where probably it lay undelivered, or retired, he being many years factor, trustee, and manager for the said Patrick Max-

No 609. well, an easy interdicted person, and having after his death possessd the house where the charter-chest stood, which suffered manifest alterations and handling in that time; now a blank writ in a servant's hand is understood in law to be the master's, unless he not only condescend but prove how he came to the possession of it; 6*to*, He used other writs belonging to the family, to the prejudice thereof. Nay, further, he had threatened that this, though the first, should not be the last blank bond he would attack them with; from all which circumstances of fact, the pursuer *pleaded*, That the presumption of verity, solemnity, and delivery with which law hath favoured completed writs out of the granter's hand, is taken off; so that not delivery, or retiring, or any thing, is rather to be presumed, than that a writ liable to much suspicion, should have the authority and force of a binding obligation.

Answered for the defenders; All the qualifications urged for annulling the bond in question, are at most but vagrant and uncertain *præsumptiones hominis*, which, however they may create suspicion in the mind of a judge, can never elide the *præsumptio juris* for delivery of a writ, by its being out of the hands of the granter; for otherwise all presumptions should be rendered equal, that is equally uncertain, and at the arbitrement of the judge; whereas *præsumptio juris* can only be taken off by a contrary positive proof, and doth not depend solely upon the Judge. Facti quæstio in potestate judicantium, juris auctoritas non est, L. 1. § 4 D. Ad senatus. Turpil. L. 15. in fin. Pr. D. Ad Municip. Cum Judex Legis sit Minister legis opinionem et præsumptionem sequi debet, Vinn. in Not. ad Wesemb. tit De Probat. In the opinion of all lawyers *præsumptio judicis*, which at most is but *semiplena probatio*, or *suspicio*, must cede to the presumption of law, *Mascard*, *conclus.* 1227, § 4. *Menoch. De præsumpt. Lib.* 1. *Quest.* 29. In the next place the presumption of law for the delivery of a writ, from its being out of the granter's hand, is yet stronger in the case of blank writs, than in those where the creditor is fixed from the beginning, blank writs being intended to circulate as ready money, without any such incumbrance in their transmission by writ and witnesses, as other writs labour under. The proof of delivery in the case of blank writs is absolutely impracticable, and can least of all be required by the debtor in the blank writ, who must know that he is bound to every haver, and can object nothing, but against the validity of the writ itself. The objections against the bond are particularly *answered*, thus, 1*mo*, The bond's being near prescribed before it was founded on, is of no moment, seeing prescription is not run, and there might be other causes for not seeking after the debt sooner, than a suspicion or doubtfulness of the justness thereof; as it, being a blank bond passing from hand to hand, might have been short time in any one person's possession; during the lifetime of Sir Patrick and Sir George Maxwell the havers might have thought their money well secured, and many accidents might have hindered a prosecution against Patrick Maxwell. Agnes Montgomery's silence about the bond

might have been owing to her ignorance, or to that suspicious humour whereby she concealed from her friends most things that concerned her. Robert Cunningham's taciturnity after the bond came in his hand, can as little derogate from the credit of it, for he knew so much of the circumstances of exhausting the estate by adjudications within year and day, as that diligence then was unnecessary; and it was a pure accident that one or two adjudgers about that time got some share of the price, which he did not foresee. Yea, unless Kilmahew had entered upon his transaction with Kilmaronock, which was as little then in view, the bond would never have appeared, but been looked upon as a lost debt. There is small weight in the presumption drawn from the substantiousness of the debtors, Sir Patrick Maxwell and Sir George his son; for as men of the best condition will sometimes need credit, so it is certain that the family of Newark was under a considerable burden before Patrick Maxwell came to the estate. Again, though Agnes Montgomery was a woman in straits, and the bond might have been a fund of credit and advance of money to Sir Patrick Maxwell at the beginning, yet being blank it might have gone through many hands upon different accounts before it came to Agnes Montgomery; and even if accident brought it to her, it is still good against the debtor. In a question of this kind it is not sufficient to bring presumptions from the circumstances of the haver, without offering something that strikes directly against the bond itself, shewing that it was never binding upon the granter, unless there were a competition betwixt the haver and another creditor claiming right to the blank bond. Thus, though the circumstances of persons who have bank-notes may found a presumption, That they do not belong to them, or were not fairly come by, the bank being debtor, and only concerned to get in the notes, could not thereupon refuse to pay, unless they could prove that the notes were stolen from them. And albeit law hath now discharged blank writs, for preventing prejudice to creditors by clandestine transmission thereof, yet the obligement, whether to a blank person or to one named, is equally binding upon the granter, who still owes the debt, albeit the person who claims it may not be the true creditor. So that the first four presumptions against the bond are sufficiently taken off; albeit the defenders had not lately discovered Sir George Maxwell's missive letter to John Rae writer in Edinburgh his agent, desiring him to search for the bond in question, that they might understand who was creditor, and expressing his trouble about it, for that he knew not how soon it might come upon him, or what rigid creditor might be filled up in it; which letter leaves no ground of doubt about the bond; 2*do*, As to the allegeance, that the general presumption of delivery ought not to take place in this circumstantiate case, of a blank writ appearing in the hand of a factor or servant, this is not to the purpose, for the nature of blank writs excludes all inquiry about the original creditor; and this in question, might have been transmitted through 20 hands before it came into Robert Cunningham's possession, who was not factor till the 1683. Again, Robert Cunningham's being

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No 609. factor can have no influence to presume that the bond was retired, and afterwards taken out of the charter-chest, till such time as it be made appear by some good evidence, that the bond did truly return, and was seen in the charter-chest of Newark, or in the possession of the debtor in the bond. So a factor having a blank writ in his hand, was not presumed to have taken it from among his constituent's writs, until its being there was proved, 9th July 1678, Henderson *contra* Monteith, No 569. p. 12669. And though it were made appear, that the bond was lying retired in the debtor's charter-chest, shall a factor or servant immediately lie under the imputation of dishonesty, because he has a better opportunity for it? this neither law nor charity presumes; but, upon the whole, the presumptions relating to the antiquity of a debt never pursued for, and the quality and condition of the debtor and creditor are overruled by a decision, observed by Dirleton, 7th January 1675, Laird of Luss *contra* Earl of Nithsdale, *voce* Writ.

Replied for the pursuer; Blank writs are most suspected by our law and lawyers, Stair Lib. 3. tit. 1. § 5. Gibson against Fife, No 5. p. 9980. And therefore wherever any cause or doubt occurred concerning the filling up of blank writs, the Lords have allowed expiscations and trials, and have preferred inhibiters, donatars, arresters, to persons whose names have been filled up in blank assignations, bearing dates anterior to the rebellion, arrestment or inhibition; and at length the act of Parliament 1696, declared blank bonds void. The defender's title is not founded on presumed delivery, which properly speaking cannot agree to a blank or no body; the havers of blank writs are presumed to have them as theirs, as possession presumes property in moveables; and as the latter is elided by contrary presumptions, Stair, Lib. 4. tit. 45. § 8, so may the presumed interest of the haver of a blank writ; besides, the defenders are in the weakest case of havers, seeing their title is derived from a place, and not from a person in any form of direct conveyance or delivery; It was found among the papers of Agnes Montgomery, and no better than that of such as find stollen or strayed goods. The weakness that attends blank writs may be further confirmed by the subscribed opinion of Messieurs Van Muyden, and Van Dyck, Professors of civil law in the University of Utrecht, which runs thus: "Censemus (supposita factorum veritate) rationes et præsumptiones ex circumstantiis personarum, temporis, aliisque deductas, quibus instrumentum de quo quæritur a Roberto Cunningham productum, falsum vel supposititicum esse contenditur, adeo esse fortes et luculentas, et tot præjudiciis ac argumentis firmatas, ut illas conjunctim sumptas pro indubitatis probationibus habendas existimemus. Nec dubitamus quin ut alia quælibet instrumenta, ita et illa quæ scripta sunt in carta vacua sive blanca, etiam postquam testes vitam cum morte commutaverunt, in dubium vocari, et ob tot ac tales, quot et quales, in hac facti specie cumulantur fraudis et falsi suspiciones omni probandi et obligandi vi ac potestate destitui et privari possint. Quare si in hac lite essemus judices, sine ulla hæsitatione omnino pro Domino Kilmaronock, contra Rober-

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tum Cunningham ejusque socios, pronunciaremus; eumque ab hac injusta ac calumniosa petitione absolveremus. The presumption of delivery of a writ out of the granter's hand being only *præsumptio juris*, may be taken off by a contrary probation, and it cannot be denied, that *præsumptiones hominis* are a species of proof equally strong as any presumption of law, that admits of contrary evidence; as the learned Voetius Menochius and Afflictus observe, and the Lord Stair Instit. Lib. 4. tit. 45. § 18, 23, tells us; and the golden rule in these cases is expressed in L. 3. D. De Testibus. Again, by the current of our former decisions, bonds and other rights have been annulled by violent strong presumptions, as of latency, and lying long dormant, and the quality or condition of the debtor and creditor, February 6th 1668, Chisholm *contra* Rennies, No 80. p. 12314.; February 27th 1666, Creditors of Lord Gray, *contra* Lord Gray, No 75. p. 12311.; 18th February 1697, Sir Robert Grierson *contra* the Earl of Annandale, *voce* TRUST; December 15th 1681, Mercer of Clavadge *contra* the Lady Aldie, No 605. p. 12708.; December 17th 1684, Lindsay *contra* Cuninghamhead, *voce* WRIT; and in a late case 1688, betwixt the Duke of Hamilton and Cuningham of Auchinharvie, the Duke and Duchess were assoilzied upon evidences given, that it was convincingly improbable that the bond pursued for could be truly resting, though the creditor was a person of entire reputation, and the bond had been publicly owned, and passed through several hands by legal transmission; which evinceth that the Lords have still been in use to balance the presumption of bonds being out of the debtor's hands, with satisfying evidences that they could be truly resting. THE LORDS have also found blank writs in the hands of factors and servants to belong to their masters, and obligations filled up in a servant's name to be due to their master, December 1682, Cornwall of Bonhard *contra* Burrel, See APPENDIX; February 8th 1710, Maclaren and Din *contra* Executors of Major Chiesly, *infra* Sec. 13. As to the practick 1675, betwixt the Laird of Luss and the Earl of Nithsdale, *voce* WRIT, the same hath been either altered, or the plea sopited by an agreement; because it is omitted out of the Viscount of Stair's collection at the time, and observed by no other hand, nor any mention of it upon record. Again, the bond was not blank, but filled up with the creditor's name, which law presumes was originally so, though the ink appeared different; it having been usual to make bonds blank in the creditor's name, and fill them up *ex intervallo* at signing; besides, the qualification in that decision comes not up to what is pleaded in Kilmaronock's case, from the bond's being not only in the hands of a factor, but a manager with the greatest powers, even to the transacting of the granter's debts, who had constant access to all the granter's writs, and gave many of them up to third parties, and pretends not to be creditor in the bond, but a bare finder. The letter from Sir George Maxwell to Rae, doth not support the bond in question, for Sir George was not granter of the bond, but only his heir, and the letter imports only, that be understood from uncer-

No 609. tain accounts, that there might have been such a bond, but was in doubt as to the whole contents. It is *petitio principii* for the defenders to allege, that a blank bond being out of the granter's hand cannot be quarrelled by his representatives, for a bond filled up *ab initio* may be quarrelled upon pregnant presumptions, and much more a blank bond.

Duplied for the defenders; The cumulative presumptions urged out of my Lord Stair's Institutions, are chiefly in matters of fraud and trust, which indeed are to be proved only in that manner; and so do the decisions produced by the pursuer in support of his qualifications, land all in effect into cases of trust and fraud or payment, and are founded upon plain proof of such circumstances, as leave no room with the Judge to doubt of, termed in law, *indicia imdubitata et Luce clariora, ubi circumstantiæ ita factum premunt ut moraliter sit impossible rem aliter se habere.* The authority of the decision 1675, betwixt the Laird of Luss and the Earl of Nithsdale, cannot be disputed, because not found in my Lord Stair's Collection; for it is observed by a Judge of great learning and exactness, whom nobody will presume to have imposed upon the world any thing fictitious; and it cannot be imagined, but that among the accurate and far greater number of decisions collected by the Lord Stair, severals might have escaped his Lordship's observation; but, which is more, the decreet itself in that matter stands recorded in the low Parliament house. Wherever writs have been called in question as abstracted, and not fairly delivered, it was constantly found necessary in the first place to prove, that such writs were in the custody of the persons, from whom they are alleged to have been abstracted; upon this plain ground of law, *non potest videri desiisse habere, qui nunquam habuit, L.* 208, *D. De Reg. Juris.* And whatever suspicion may remain of Agnes Montgomery's not having this bond, the Lords will remember, as a learned lawyer *ad L.* 14, *Cod. De Probat.* observes, That *licet suspicio alii sufficiat, judici tamen non sufficit, quia judex ex sacramento ligatus est, secundum allegata et probata judicare.* As to the opinion of the two foreign lawyers procured by the pursuers, the defenders do not doubt their being persons of repute in their profession; but at the same time, it may be observed, 1*mo*, However the nature of presumptions may be very well known from the Roman law, yet little or nothing of blank writs (which crept in afterwards for the benefit of commerce) is to be known from that fountain; 2*do*, Had Kilmaronock and Houston jointly stated the Query, and given the honorary to these lawyers, their answer perhaps would have been in other terms; 3*tio*, The lawyers were not informed of the missive letter now produced, which very much alters the case; so that upon the whole, little weight can be laid upon this foreign emendicated opinion.

The Lords sustained the qualifications and reasons of reduction, relevant to extinguish the bond, not only *quoad* the cedent, but also found the assignee to be in no better case than he, as to the competency of the reasons of reduction,

in respect the assgnation was made after the bond was quarrelled by reduction and improbation. No 609.

Fol. Dic. v. 2. p. 270. Forbes, p. 691.

1749. *November* 24.

WILLIAM MILLER *against* JAMES BAIRD and JAMES GRAY.

No 610.
A creditor having two persons bound to him, one of whom he knew to be a cautioner, taking his payment out of the principal debtor's effects, to the prejudice of other creditors, found not bound to assign against the cautioner.

CHARLES GRAY merchant in Auchingiech, was debtor by bills to William Miller and Company, and conjunctly with James Gray of Wellflat his brother, to James Baird and Company; Baird first, and then Miller arrested a debt due to Charles Gray; and, in the competition, it was *pleaded*, for Miller, that if Baird craved preference, he behoved to assign his other security, to wit, the accepted bill of James Gray.

Answered, He cannot be obliged, in equity, to assign; considering he knows with certainty, that James Gray was only a cautioner, and has a plea to be free of the debt, it being paid with the principal's effects; and appearance was made for James Gray, and this pleaded in his behalf. A proof was led of his being a cautioner, by the oaths of the Company creditors in the bill.

Pleaded for the pursuers; The defenders have no interest to make this objection; if they recover their own payment, they ought to assign any further security; and if James Gray has a defence, it will be competent to him to propone it when he is called.

2do, The allegation cannot be proved by witnesses, especially by these defenders, who have so much interested themselves in the question.

Pleaded for James Gray, An assignation is a demand in equity, and ought not to be granted when the equity is as strong on the other side.

2do, In a question betwixt conjunct acceptors, the evidence of the drawer would be good, to shew the cause of a bill; and this question is betwixt one acceptor and the creditors of the other.

Observed, That it was fixed a person having two securities on his debtor's effects, and choosing to draw out of one of them, was bound to assign the other to the creditors, postponed on that out of which he took his payment; but when he had another person engaged, or a subject not belonging to the common debtor, an assignation had been found not due; but if an assignation here were competent, the defence ought to be sustained, as the demand was of equity; and the contrary equity might be shewn by a proof, which would not cut down a legal obligation.

THE LORDS found the creditors not bound to assign.

Reporter, *Justice-Clerk*. Act. *R. Craigie*. Alt. *H. Home*. Clerk, *Forbes*.

D. Falconer, v. 2. No 102. p. 117.