mitted the ſaid blank tranſlation to Drumcoltrain and Bailie Reid, under cover to Commiſſary Charters; and finding no evidence nor documents that the Commiſſary did ever ſatisfy or pay the ſaid Drumcoltrain or Bailie Reid, of their ſhares in the ſaid Counteſs's bond, nor that he ſtated the ſame, as paid for the co-partners, in the books of the co-partnery, nor in any liſt of his own private eſtate; they ſuſtained the qualifications founded on. No 16.

For Charters, *Isla.* Alt. *Boswel.* Clerk, *Alexander.*

Bruce, No 6. p. 8.

1742. *December* 21.

ELIZABETH CAIRNS *against* CREDITORS of GARROCH.

No 17.
A deed of ſettlement, originally blank in the ſubſtitution, filled up after the death of the granter, was conſidered as ſtill blank.

JAMES CAIRNS of Minnibuie, having two ſons, Alexander and William, did, in March 1694, lend the ſum of L. 600 Scots to Alexander Cairns of Garroch, taking him bound, by his holograph bond, to repay the ſame 'to him, the ſaid 'James Cairns, he being in life; and failing of him by deceaſe, to William 'Cairns his lawful ſon, heirs or aſſignees, ſecluding executors.' From ocular inſpection it appeard, that the bond had been written out with a blank for the name of the ſubſtitute, and the words, 'William Cairns his lawful ſon,' are filled up in a hand different from that of the debtor, who was the writer of the bond. James Cairns the creditor ſurvived both his ſons, the bond remaining in his poſſeſſion till his death; and then Elizabeth Cairns, Alexander the eldeſt ſon's only daughter, made up a title to the ſame by a general ſervice as heir of line to her grand-father. Upon that title, having firſt obtained a decree of conſtitution againſt the repreſentatives of Garroch the debtor, and thereafter an adjudication, ſhe produced her intereſt in a ranking of Garroch's creditors.

The *objection* moved againſt this intereſt was ſuſtained, viz. That the ſervice of Elizabeth, as heir of line to her grand-father, could not carry the bond; but that her title ought to have been a ſervice as heir of proviſion. Elizabeth Cairns reclaimed againſt this interlocutor; and, among other particulars, having ſuggeſted the above mentioned fact, that the ſubſtitution in the bond appeared to have been originally blank, and to have been filled up with a different hand from that of the writer of the bond, the Court pronounced the following interlocutor: 'Having conſidered this petition with the anſwers thereto, and bond in queſtion, find, That the ſame was originally blank in the ſubſtitution; and that it does not appear to have been filled up by the debtor, the writer of the bond, and ſo muſt be held ſtill as blank in the name of the ſubſtitute: And therefore find that the right to the ſaid bond is eſtabliſhed in the petitioner's perſon, by her ſervice as heir in general to James Cairns the original creditor; and repel the objection to the adjudication at her inſtance.'

As the bond in queſtion did not fall under the ſanction of the act 1696, concerning blank deeds, which has no retroſpect, the following is a ſummary of the

No 17. arguments uſed by the creditors in reclaiming againſt the ſaid interlocutor. The checks which have from time to time been introduced in our law with regard to writings, ſuch as deſigning the writer and witneſſes, the ſubſcription of the witneſſes, &c. are all of them calculated for the ſole end of guarding the lieges from being made liable upon falſe or forged deeds. If it be aſcertained, that the deed is true and honeſt, with regard to the debtor, there is no occaſion for any check with regard to the creditor; becauſe there cannot readily occur any impoſition upon him. The caſe of blank bonds is a plain proof of this propoſition. A bond blank in the creditor's name, while it remains in that ſhape, is obviouſly null; for there can be no obligation without a creditor, more than without a debtor. But this objection is eaſily removed by filling up the poſſeſſor's name as creditor, or any other name the poſſeſſor pleaſes; and it never has been reckoned of any conſequence what hand is employed to fill up this blank. The firſt ſtatute requiring the writer to be deſigned, is in 1593, probably before blank bonds were known: If, by this ſtatute, the inſerter of the creditor's name muſt be deſigned, ſuch a regulation would be a total bar to blank bonds; for ſurely a bond cannot be better where the creditor's name is left blank, than where it is inſerted by whatever hand. In a word, the creditor's name is none of the eſſentials of the deed, to require the hand of the writer of the deed; but, before the act 1696 diſcharging blank deeds, might be filled up *a quocunque*. And if ſuch was the practice, notwithſtanding the ſtatute 1593, appointing the writer's name and deſignation to be inſerted in the body of the writ, the ſtatute 1681 could make no alteration, ſince it goes no further than to declare, that the want of the deſignation of the writer and witneſſes ſhall not be ſupplyable; and, in fact, blank bonds continued current after the 1681, as well as before.

Thus the whole checks contrived by our ſtatutes, tend ſingly to guard the lieges from being made liable upon falſe deeds, and not to ſecure creditors in the poſſeſſion of the juſt rights they have by deeds done in their favour: A blank bond may be as readily abſtracted, and a wrong name filled up, where it is accompanied with all the checks, as where it is deficient in all. There was no remedy for this evil but care and cloſe repoſitories, till the act of Parliament 1696 prohibiting theſe ſecurities altogether.

The creditors endeavoured to apply this argument to the caſe in hand; by obſerving, that there is no reaſon for any ſolemnity in writing the name of a ſubſtitute, more than in writing the name of the inſtitute or creditor; that there is no law ordaining either to be done with any degree of ſolemnity; and therefore, that the name of the ſubſtitute, like that of the inſtitute or original creditor, may be filled up with any hand; provided only it be done by the authority of the creditor.

There are many inſtances of diſpoſitions *mortis causa*, with the diſponee's name filled up *ex post facto*; not by the writer, but by the diſponer. With regard to ſuch deeds, it has often been made a queſtion, whether it was to be preſumed that the diſponee's name was filled up *in liege pouſtie*, or on death-bed? but it

No 17.

was never imagined to be a nullity, that the blank was not filled up by the writer of the deed. And yet it will be difficult to fix the preciſe boundary betwixt a diſpoſition *mortis causa*, and a ſubſtitution; and no leſs difficult to aſſign a good reaſon for requiring more ſolemnity in inſerting the name of a ſubſtitute, than of a diſponee.

The only objection againſt blank ſubſtitutions filled up by the creditor, or by his authority, is, that were they indulged, the ſalutary law of death-bed would be totally evaded. But, in the *firſt* place, this objection muſt equally ſtrike againſt all blank deeds whatever: A man executes a diſpoſition of his land-eſtate *in liege poustie*, blank in the diſponee's name, the filling up the blank upon death-bed will elude the law of death-bed, as well as the filling up a blank ſubſtitution: An heritable bond blank in the creditor's name may be filled up upon death-bed. And even a moveable bond, blank in the creditor's name, is liable to the ſame objection; becauſe the privilege of the law of death-bed is competent to the children for their legitim, as well as to the heir. And accordingly, if this argument prove any thing, it proves too much; becauſe it ſtrikes againſt all blank deeds whatever. 2*do*, The argument, at any rate, cannot go ſo far, as to void all ſuch deeds upon account of the danger of eluding the law of death-bed: Such a conſideration might be a motive with the legiſlature to make a law, but with a judge can have no further effect, than to infer a preſumption that the blank was filled up upon death-bed; unleſs the contrary be made out from circumſtances, or by evidence. At the ſame time, it muſt be obſerved, that the Court has not even gone ſo far as to eſtabliſh ſuch a preſumption. The caſes that have occurred, have been determined upon circumſtances, inferring, either that the blank has been filled up *in liege poustie*, or on death-bed. For example, in a late caſe betwixt Keith of Bruxie and Mary Seton, (*see* DEATH-BED.) where a diſpoſition, granted in the 1693, of the diſponer's whole eſtate, originally blank in the diſponee's name, and filled up with the name of Thomas Seton of Menzie, being challenged upon the head of death-bed, the COURT, the 25th June 1736, 'Found, that the diſpoſition challenged was, at ſigning, 'blank in the diſponee's name; and in reſpect of the tenor of the diſpoſition, 'and that it did not appear till long after the granter's death, found it not pre-'ſumed to have been filled up or delivered when the granter was *in liege poustie*; 'therefore ſuſtained the reaſon of reduction, unleſs the uſer of the diſpoſition 'would prove, that the ſame was filled up or delivered by the diſponer, or his 'order, while he was *in liege poustie*.'

The petition, notwithſtanding, was refuſed without anſwers. *See* SERVICE and CONFIRMATION. *See* DEATH-BED.

Rem. Dec. v. 2. *No* 36. *p* 57.