

1793. February 21.

ALEXANDER SMOLLET *against* BELL and RANNIE, and Others.

## No 128.

It is competent to prove by facts and circumstances, that one of two joint obligants in a bond is only cautioner for the other, so as to entitle him to a total relief out of the bankrupt estate of the co-obligant.

ALEXANDER SMOLLET and the late Alexander Pentland were joint obligants in a bond for L. 300. The whole sum was paid by Smollet, who, in the ranking of Pentland's creditors, stated a variety of circumstances in order to establish that the bond was granted solely for behoof of the latter, and craved a total relief.

The Creditors, on the other hand, *contended*, That Mr Smollet being *ex facie* of the bond a joint obligant, the presumption thence arising against him could only be removed by a writing equally formal with the bond itself; Erskine, B. 4. Tit. 2. § 21.

The Court had no doubt of the competency of a proof by facts and circumstances; and found "it sufficiently instructed, that the joint bond, granted by the pursuer and Alexander Pentland, was a cautionry obligation, undertaken by the pursuer for Mr Pentland; and remitted to the Lord Ordinary to proceed accordingly."

Lord Ordinary, *Ankerville*.  
D. D.

Act. *Honyman*. Alt. *Wight*. Clerk, *Menzies*.  
*Fol. Dic. v. 4. p. 157. Fac. Col. No 32. p. 65.*

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 S E C T. IV.

Payment and Consignation how relevant to be proved.

1605. June 19.

A. *against* B.

## No 129.

In an action pursued by a man in Edinburgh for eight score two pounds, as the price of certain barrels of herring, exception was proponed of payment of a hundred and two pounds. *In termino probatorio*, it was said, the exception could not be proven but by writ or oath of party. It was *answered*, That the pursuer could not have proven his summons but by witnesses; and so it was lawful to the defender to prove his exception after the same manner. THE LORDS found, that they would not admit the exception to probation by witnesses, if the pursuer likes rather to prove his summons by writ or oath of party; otherways they would admit the exception to probation by witnesses.

*Fol. Dic. v. 2. p. 224. Haddington, MS. No 824.*