

No 6.

In order to free the cautioner, he must present the debtor in terms of the bond, and take instruments.

1695. *November 22.* ALEXANDER PITBLADO *against* ISOBEL MAYNE.

ON a petition given in by Alexander Pitblado writer, against Isobel Mayne in Dumfermline, it fell to be argued, where a prisoner in the messenger's hands grants a bond of presentation, with a cautioner, to sist himself such a day, or else pay the debt; if it be sufficient to exoner the cautioner, to allege that none for the creditor or messenger appeared at the diet prefixed, to accept or require the prisoner, and to take instruments on his absence or not compearance; or if it be incumbent on the debtor to attend at the time limited in the bond of presentation, and to enter his protest on his readiness to deliver himself to the messenger and his employers, and take instruments in their absence, and so protest that the cautioner must be free of his bond—THE LORDS found, though the messenger did not attend, yet that did not excuse the other party's absence; but the cautioner, for his liberation, ought to present him at the place and time appointed, and take instruments if there be none to receive him; even as it would be no excuse to say in an order of redemption, I needed not come and offer the money, because I can prove you, nor none for you, were present to have received it, though I had come; for it was your duty to have attended, and you could not divine whether the other party would come or not.

Fol Dic. v. 1. p. 114. Fountainhall, v. 1. p. 680.

No 7.

The debtor being said to be sick on the day fixed for presenting; the cautioner was found liable, not having offered to produce him when recovered.

1704. *February 12.* CALLANDER *against* BRUCE.

BRUCE of Newton being debtor to Callender of Craigforth, in the sum of 600 merks, by bond; and, being apprehended by caption, he, to relieve himself out of the messenger's hand, grants a bond of presentation, wherein Alexander Bruce, his son, is cautioner with him; whereby they oblige themselves either to pay, or present him at Craigforth's house, without a suspension, at a precise day therein-mentioned; at which day Alexander compears, and intimates to Callender, by a notary, that his father was fallen sick, and it was impossible for him to travel, but offered to produce him within some few weeks after when he should grow better; which Callender refused, because it was Alexander's single assertion, and no testificate produced. Callender having charged Alexander, on the bond of presentation, both for the penalty, and the original debt in his father's bond, he suspended, on this reason, that he was neither *in mora* nor *culpa*, for not presenting his father on the precise day, because he was then sick; and it were against humanity, *et contra bonos mores*, to oblige them to what is naturally or morally impossible; *et nemo tenetur ad impossibile, vel præstare casus fortuitos*.—*Alleged*, Though his sickness (providing it was real and not simulate) did excuse at that time; yet this did not extinguish the obligation of presenting; but how soon he reconvalesced, and was able to come abroad, he was

bound to have presented him.—*Answered*, Though these obligations be *stricti juris*, and to be performed *in forma specifica*, yet that must not be understood judicially, but with an equitable latitude; and the offering him *primo quoque tempore*, on his recovery, cannot take place here, because I did that already, in so far as when I signified to you his indisposition and inability to travel, I likewise offered to present him how soon he grew better; but Callender unjustly refused to consent to a prorogation of the day; and that offer not being agreed to, the bond must be simply null as fully implemented, especially seeing he may have his person still, by which he has no prejudice, the debtor being in no worse condition now than he was at the time he should have been sisted: And, if sickness be a relevant ground whereon, by the Lords' act of sederunt, a prisoner may be let out during the continuance of his sickness, then *multo magis* ought it to liberate one from going to prison; and you should have required me to present him of new, which you never did; and *modica mora*, in such cases, makes not one incur the penalty, says Paulus, in *l. 91. § 3. D. de verb. obligat.* and Lanfrancus Balbus, *decis. 345.*—*Replied*, Your offering to renew your bond to a new day can never exoner you, though I had not accepted it; because I was not obliged to believe your assertion, especially there being no testificate from physicians of his sickness; and if this excuse were allowed, bonds of presentation should be rendered inefficual; for the party, by a little excess of drink, might render himself feverish, and those about him might be fully persuaded of his sickness, and so the creditor be eluded; neither was the offer sufficient to liberate from presenting him when he grew well, nor were they obliged to require him to his duty, seeing *dies interpellat pro homine* in all these cases; and such bonds must not be turned to shams. Some of the Lords were of opinion, that Craighforth's refusal to accept of his offer, on a prorogation of the term, did liberate the cautioner, and fully implement his obligation; but the plurality found, though he should prove his father was really sick at the time prefixed; and that he offered then to continue bound for some weeks, that did not free him, seeing he did not offer to present him when he recovered; and, therefore, found him liable for the penalty in the bond of presentation, and likewise for the original debt.

Fol. Dic. v. 1. p. 114. Fountainball, v. 2. p. 222.

1710. July 22.

HENDERSON against GRAHAM.

ANDREW ROBERTSON, merchant in Edinburgh, being debtor to William Henderson there, in L. 8000 Scots by bill, and having retired out of the kingdom, he is stopt at Durham, and incarcerated in that goal; and being arrested by sundry other of his creditors, Janet Graham, his mother, transacts with his creditors, and gives them a bond of presentation, to produce his person at Edinburgh on

VOL. V.

10 Y

No 8.

A debtor enlisted, which secured him from personal diligence; yet a bond of presentation was found not