

1741. November 24.

SAMUEL HENDLY against SARAH GUILLIN.

ANNO 1701, David Guillin merchant in London, granted a double English bond for L. 80 to Jervis Hendly, with a condition, that, upon payment of L. 40 on the 1st of October thereafter, the obligation to be void. In a process on this bond, the executor to the debtor *pleaded* the 20 years prescription, competent by the English law, after elapsing of which time, the debtor has a plea competent to him, that *solvit ad diem*.

*Answered*, The debtor lived all that time out of the kingdom; and this being acknowledged, the defence of prescription was repelled. Thereafter the defender *pleaded* the English defence, that *non est factum*, the effect of which was, that the creditor behoved to prove that the debtor signed and sealed the bond, before he could obtain decret for payment, and that this was incumbent on the creditor when the bond was sued on here; for since the constitution of the debt is according to the form of English deeds, the defences against the same must likewise be thereby regulated.

*Replied* for the pursuer, That there was no real ground for pleading this objection, there being not the least suspicion of the verity of the bond; more especially as the debtor himself, when in life, had acknowledged it, by making a partial payment marked on the bond; and if the defences were to be regulated by the English law, it was necessary that the defender should be tied down by the rules thereof; one of which is, that after a defender has once pleaded a peremptory defence, or, as it is called, a plea in bar of the action, and the same is over-ruled, he is not thereafter allowed to plead a new defence, and thereby protract the plea without end; and that the defence *non est factum*, was quite different from that of improbation, as it is tried by the law of Scotland. In the last, a litiscontestation is made upon facts which the defender undertakes to prove. Here it cannot be pretended that the writ is false; only an objection is laid hold of, which, by the English law, is allowed against every writ whatever, that the party who pleads upon it must instruct the verity and truth of the deed otherwise than by the deed itself. See Coke's Instit. v. 1. p. 304.; Lilly's Practical Register, tit. PLEAS, p. 301. Had this case been tried in England, both these defences, *solvit ad diem*, and *non est factum*, were only triable by jury; and after the defender had relied upon the first, and a verdict given against him, it is impossible to imagine that he would obtain a new trial upon the second. And this ought the rather to hold in this case, that these two defences are quite inconsistent, seeing the first resolves into a presumptive payment, which is an acknowledgment of the bond; whereas the other is a denial that the bond was granted.

*Duplied*, The defence resolves in a denial of the verity of the bond; and so it is in effect the debtor's proponing improbation against the same, which, with us, is the last of all exceptions, and the only difference lies in this, that, by

No 26.

The English exception to a bond, that *non est factum*, is not competent after a peremptory defence has been proponed and repelled.

No 26.

our law, the presumption is in favour of the deed, and therefore the defender must improve it; whereas, in England, the creditor must either support it, or lose his debt. If, indeed, this case had been tried in England, both defences must have been laid before the jury at once; but this is inconsistent with the method of proceeding here. A peremptory defence of actual or presumptive payment must be discussed before the defence of improbation can be proponed; and as a defender may have many defences, it would be great injustice to debar him from any of them.

THE LORDS repelled the defence on the bond pursued on, *quod non est factum*, and found the same not competent, after the defence of prescription formerly proponed and over-ruled.

*C. Home, No 183. p. 395.*

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1743. January 4.

JAMES NORRIS of New Windsor, Pursuer, *against* JAMES WOOD, heir served to the deceased SIR JAMES WOOD, Defender.

No 27.

Fromissory notes granted abroad do not, *per se*, prove their dates, so as to affect heritage in Scotland.

SIR JAMES WOOD granted, in Ireland, several promissory notes to the pursuer, who, upon his decease, brought an action against the defender, as heir, for payment.

The defence chiefly *insisted* on was, That, as the notes wanted witnesses, the heir, or heritage in Scotland, could not be subject thereto, as presumably granted on death-bed, and after Sir James's contracting the sickness whereof he died. In course of the process, a proof was allowed, before answer, to both parties, of the state and condition of Sir James's health, memory, and judgment, the time of granting the notes in question, and at what time he died, and of the cause of granting thereof; and, when reported, it appeared that the defender had failed to prove Sir James was on death-bed the time of granting the same; and that the pursuer had likewise failed to prove the facts he undertook to prove, *scil.* that Sir James granted the notes when he was in *liege poustie*, and for onerous causes.

The fact so standing, the question betwixt these parties turned upon this point, Whether the promissory notes not having been proved to have been truly granted by Sir James when he was in *liege poustie*, must, in law, be presumed to have been granted on death-bed, consequently not obligatory upon his heir?

For the defender it was *argued*, That though there is a *comitas* observed with respect to deeds executed in foreign countries, whereby, if they appear to be formal, according to the *lex loci contractus*, they will be sustained here, although they are not attended with all the solemnities required by the law of this country; yet, where there is a prohibitory law in the country where execution is sought upon a deed, the *comitas* will not be carried so far as to infringe or im-