

. Forbes reports this case :

No 81.

IN the competition betwixt Robert Rollo and Susanna Simpson and her husband, for the mails and duties of the lands of Stonehouse, Susanna Simpson having produced a principal heritable bond of 2600 merks, with an infeftment thereupon in the lands, granted by the deceased Alexander Simpson of Stonehouse to his brother William Simpson, with an assignation thereto from William to Susanna, and to Patrick and Alexander Simpsons their brethren; the LORDS found it relevant to extinguish the bond and assignation, that both were in Alexander the debtor's custody after William the creditor's decease; and *instrumenta apud debitorem reperta* are presumed extinct; and found, That the sasine following upon the bond did not alter the case, seeing the debtor could as easily have taken his name from it, as if it had been a personal bond, whereby the sasine had been null, as wanting a warrant. Nor doth the assignation make any further difference than to change the creditor; and its being put with the bond in the debtor's hand before delivery to the assignees, was equivalent to cancelling.

Forbes, p. 389.

1712. June 7.

CHARTERIS *against* CHARTERIS.

MR WILLIAM CHARTERIS, writer to the Signet, being creditor to the Earl of Nithsdale, in 4000 merks, he assigns it to Alexander, John, and Agnes Charteris, his younger children; which debt they assigned to William Charteris, their eldest brother, commissary of Dumfries; and he, in October 1682, grants them a backbond, bearing the assignation was only in trust, that he might do diligence for recovery of it out of Nithsdale's hands; and he dying in 1697, there is a declarator raised by the said Alexander, John, and Agnes, against the commissary's children, to hear and see it found and declared, that the said assignation was merely granted in trust, for their behoof, and that they ought to denude of Nithsdale's debt in their favours. Robert Lauder, writer in Dumfries, having, in obedience to an exhibition, produced the commissary's compt-book, and sundry other writs; it was *alleged* for the pursuers, That the trust was sufficiently evinced and cleared, *imo*, By a backbond, granted by the said commissary, acknowledging the same; *2do*, By his compt-book, bearing a particular article, that the said sum, after deducting his expenses, belonged to the pursuers; *3tio*, The commissary was in use to accept of such trusts, and some of them have been declared against his heirs since his decease. *Answered*, It is no ways denied but the assignation was originally a trust; for the backbond of its date proves that; but the whole question turns on this, if it was so at the

No 82.

A debt was assigned in trust. The trustee granted backbond. This was found in his repositories at his death. Found that the trust was discharged.

No 82. time of the commissary's death; and that it did not continue, is evident; because the backbond was found retired, lying beside him cancelled the time of his decease, which extinguished the trust; it being clear and demonstrative law, that the retiring and re-delivery of the backbond to the commissary who granted it, made the assignation pure and simple, and become absolutely the commissary's own property, as fully and effectually as if he had taken a discharge of the backbond; and the finding it beside him scored and obliterated, brought it to the case of an *instrumentum apud debitorem repertum*, which presumes liberation; so we are to consider its state, not as it was *ab initio*, but as it stood at the time of the commissary's death; and though it be acknowledged in his pocket compt-book, that shews indeed his probity and integrity, but noways that it continued a trust; for his retiring the backbond shews the contrary. Now, put the case, a man who has granted a bond for 1000 merks, writes down in his note-book, that he was debtor in that sum; but after his death, the bond is found lying beside him retired; will that confession in his compt-book constitute the debt against him? *Nullo modo*, for the retired bond will preponder, and take off the presumption: Even so here. *Replied*, The having the backbond in his custody, cannot annul the trust; for he might come by it on sundry other accounts; such as his being tutor to his brothers, and so master of their papers. *2do*, It might have been delivered up to him, to draw a retrocession by it, for denuding him of the trust. *3tio*, He dying suddenly, there was a *fama clamosa* presently raised, that he was only trustee in that debt; and that the declarator was so long of raising, was, that John was a very weak person, and little distant from a fool. *Duplied*, All these are *gratis* assertions, and no term can be now granted in a concluded cause. THE LORDS found it was originally a trust; but that the same was discharged and taken off by his retiring and cancelling the backbond; and therefore assoilzied the commissary's children from the declarator of trust, notwithstanding of the presumptions adduced for its continuance.

Fol. Dic. v. 2. p. 138. Fountainball, v. 2. p. 735.

SECT. IV.

Tocher stipulated by a Wife in her Contract of Marriage when presumed paid.

1665. July 26. BROTHERSTONS *against* OGLE & ORROCKS.

No 83.

JANET BROTHERSTONS, by her contract of marriage, declaring, that she had in money, bonds, and goods, 4000 merks, is provided to all the conquest, and