

1634. *July 24.* GENDINNING of Drumrash *against* WYLLIE.

No. 250.

Inconformity
with McGill,
No 247.
p. 16991.

Drumrash and some cautioners with him being obliged in payment of monies to the bairns of umquhile Alexander Wyllie, to whom Sir John Scot was tutor ; thereafter the said Drumrash, and some other cautioners, subscribed a new bond to Sir John Scot's self of the said sum, which new bond the said Drumrash the principal debtor, sends to Edinburgh to William Buchannan, servitor to John Belches, advocate, to be delivered to the said Sir John, upon condition that he should receive back his prior bond, with a discharge thereof; conform whereto William Buchannan having passed to the said Sir John, and offered the said new bond to him, he desired the prior bond, and a discharge thereof, and the said Sir John desired, that he might have a borrowing of the said last bond, to confer it with the other bond and sums thereof, and he should give an answer what he should do, which being given to the said Sir John, the same day in the afternoon, Sir John renders back the new bond to the said William, because he alleged the same wanted a term's annual-rent of the money, and desired him to advertise Drumrash thereof ; which being done by the said William Buchannan, Drumrash wrote back to the said Sir John, and also to the said Sir William ; after which time William went to Sir John, and offered the bond upon the said condition, who refused to receive and accept the same, affirming his tutory to be expired, and willed him to deliver the bond to the curators. And now pursuit being moved by Wyllie's bairns, as assignees to this new bond, made by Sir John against the cautioners, and havers of the bond for delivery thereof ; Drumrash the principal debtor being dead before any pursuit therefore, it was found that the said principal being dead before delivery of the bond, the condition never being perfected to him, upon doing whereof it was sent to be delivered, and no pursuit moved before his decease, albeit the condition was now offered to be fulfilled, that therefore the said bond now after his decease, could not be delivered in prejudice of the cautioners ; for by his death the bond became extinct as to the principal, and so consequently also to the cautioners, quia mortuo mandatore expirat mandatum, and so the cautioners were freed ; and it was not respected that it was answered, that the cautioners had followed the faith of the principal.

Act. *Stuart & Mowat.*

Alt. *Nicolson & Gilmore.*

Clerk, *Hay.*

Durie, p. 783.