

The Lords did repel the allegiance; and declared, that they would advise the action for proving of the tenor, seeing it was intented before the improbation; at least before any term was assigned: and therefore the *causa amissionis* being proven, and the tenor, by the adminicles and deposition of witnesses, the decret ought to be received for satisfying the production in the improbation; and yet would not hinder the improbation of the bond, as false and feigned, as effectually as if the principal had been produced.

Page 265.

1672. July 3. HENRY BLAIR of DENHEAD *against* BLAIR of BALGILLO.

IN transferring of a suspension raised at the instance of Balgillo, *anno* 1635, at the instance of Blair of Denhead, as having right by translation, from the Laird of Collistoun, who was assignee to a bond of Balgillo's father for the sum of 2000 merks, for which he was charged at Collistoun's instance:—

It was ALLEGED for the defender, That the pursuer could have no right by translation from Collistoun the assignee; because Collistoun's assignation was never intimated; and his cedent, this pursuer's father, to whom the bond was granted *in anno* 1655, had granted a general discharge to Balgillo of all debts; which ought to include the bond in question.

To this it was REPLIED, That Collistoun, the pursuer's author, had an assignation to this bond *in anno* 1634, and did intimate the same by a charge of horning, which was suspended, and thereupon there was a most contentious dispute: and that assignation being lost, no decret was extracted; but Denhead, who was creditor in the bond, did thereafter grant a new assignation to Collistoun, which needed no new intimation; seeing the first was lawfully intimated, as said is: so that the said general discharge could not include the bond, which was before assigned and intimated as said is, and could only be interpreted of such debts as remained due to Denhead, whereof he was not denuded.

The Lords, by their interlocutor, did find that the bond in question could not be comprehended within the general discharge.

But thereafter it being ALLEGED, That it was offered to be proven, by the writers and witnesses inserted, and comuners betwixt the parties, that it was specially agreed to, that the general discharge should comprehend this bond;—witnesses being allowed to both parties for proving thereof before answer;—after advising of their depositions, whereupon many presumptions did arise that Collistoun's name was only borrowed upon trust,—the Lords did assoilye from the transferring, and found, that the discharge did take away the foresaid bond; notwithstanding it was alleged for the pursuer, That Collistoun being now dead and denuded, his assignation bearing an onerous cause, the pursuer's translation could not be taken away but *scripto vel juramento*: Which was hard.

Page 266.