

1679. *February 19.* SWINTOUN *against* The LAIRD of TOFTS.

UMQUHILE Mersingtoun gave an infestment of relief to Tofts and others : and now there is a declarator of extinction raised of that infestment, at the instance of Mersingtoun, and Mr Alexander Swintoun, his successor, upon satisfaction of the sums for which it was granted by the creditors, or by Tofts himself; and particularly by a bond of 2000 merks addebted by Tofts to Mersingtoun *in anno* 1639, bearing Tofts to have borrowed that sum from Mersingtoun; and obliging Tofts to retire a bond, due by Mersingtoun to some of his creditors, for the like sum, or otherwise to repay the same.

It was ANSWERED for Tofts, That Mersingtoun was addebted to him in other 2000 merks, with which he craved to compensate; and, for instructing thereof, condescended upon a provision in the infestment of relief, bearing, “But prejudice to Tofts of another bond of 2000 merks, due by Mersingtoun to him.”

It was REPLIED, That this reservation could not instruct the debt, unless the bond reserved were produced; it being the common custom of this kingdom to extinguish bonds by payment, retiring and cancelling thereof without a discharge, unless it had been registrate, or infestment following thereon: and, therefore, no subsequent writ, narrating or reserving a prior bond, can instruct the debt to be resting, without production of the bond; which, otherwise, law presumes to be satisfied and retired. For it is impossible for parties to remember or provide against narrations, or reservations of such writs, either in missive letters, or posterior securities, but do confidently retire the principal bond, upon payment of the sum.

It was DUPLIED, That though narratives *non probant contra tertium, nam non creditur referenti, &c.* yet they prove against the narrator; but much more a reservation.

It was TRIPLIED, That, though these prove, against the narrator, that the debt was due the time of the narration or reservation, yet it will not prove that the debt continues and remains due. And that parties behoved to take discharges to meet such reservations or narrations: or otherwise none could be secure, by securing principal writs, who could not possibly remember or know what posterior letters they had written relating to such bonds, or narrations, or reservations they had made thereof in posterior writs.

The Lords found the reservation did not instruct the debt to be now resting, unless the bond reserved were produced; in respect of the known custom, to satisfy and retire principal bonds without discharge: for, in that case, *chirographum non repertum apud creditorem præsumitur solutum.*

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1679. *February 19.* The LAIRD of PITCURR *against* The LAIRD of DUN.

THE Laird of Fullertoun being taken with caption at the instance of Pitcurr, the Laird of Dun interposed, and gave bond with him to present his person prisoner, in the tolbooth of Dundee, upon the 1st day of February last, or else to pay the debt: Fullertoun appeared in the tolbooth the said day, between ten

and twelve, which was the day appointed ; and instruments were taken thereon in his name and Dun's : there was also an instrument taken by Pitcurr's procurator, that he had attended with Dun's bond and caption, in the upmost storey of the tolbooth, where prisoners used to be incarcerated, from nine to one of the clock the said day ; and thereupon protested, that Dun might be liable for the debt.

And, having charged him upon this bond, Dun SUSPENDS on this reason,—That he had performed, by Fullertoun's appearing, the time appointed, within the tolbooth.

The charger ANSWERED, That the suspender had not fulfilled : *1mo.* Because he had not entered him prisoner, unless he had presented him to the jailer or magistrate, as a prisoner, and had required them to call publicly if there was any person having Pitcurr's caption that might have necessitated the magistrate or jailer to detain him prisoner : in which case, Pitcurr's procurator, who was attending above, in the tolbooth, in the room where prisoners used to be incarcerated, would have produced the caption : but all that Fullertoun did, was to come to the council-house, the doors whereof were and are ordinarily patent, and where prisoners stay not. *2do.* The bond bears,—“ That Fullertoun should present himself to remain prisoner for fulfilling the will of the letters of caption, and should procure no suspension.”

It was REPLIED, That this last clause was not a part of the obligation, but did only express the end for which Fullertoun was to be presented ; otherwise that would import, that if, at any time, he should have escaped, Dun should have been liable ; which could never have been understood, unless it had been so expressed.

The Lords found Dun's bond not to be fulfilled by the instruments produced ; seeing he offered him not to the magistrate as his prisoner, and required him to call for the other party to produce the caption : but did not find Dun liable for his escaping, if he were once a prisoner. *Vol. II, Page 697.*

1679. *February 21.* WILLIAM WHITE *against* THOMAS CHATTO.

WILLIAM White pursues Thomas Chatto for payment of £500 borrowed by him from the pursuer's wife, during the marriage, wherein the father had granted a bond in favour of Isobel Chatto.

The defender ALLEGED, That he could not be liable in double payment ; and was content to pay, either to the pursuer or to the said Isobel : who alleged, that her bond could not be taken from her, by being proven, by the defender's oath, to have been borrowed from his wife, but only to be proven by her own oath.

The PURSUER ANSWERED, That his libel was relevant to be proven by the defender's oath, that he had received sums of money from his wife, during the marriage ; and is not obliged to refer it to the oath of any other. But if the defender has granted bond to a third party, at his wife's desire, he did it *mala fide* : for he could not be ignorant that he should not have given a bond for money borrowed from a wife, but to herself or her husband ; and if, by doing otherwise, he run the hazard of that third party's denying the sum to have been