

1683. *March.* RAMSAY and M'GILL *against* LANCELOT CARLETON.

No 4.

FOUND that a depositar might have detention of jewels deposited, till he be paid off debt owing to him by the person that has right to them, whether that person be he that did first deposite them, or one come in his place, albeit compensation is not sustained *in deposito*, to hinder restitution.

*Harcarse, (DEPOSITION.) No 413. p. III.*

1685. *January 15.* GEORGE MONTEITH *against* MR HEPBURN.

A BOND of borrowed money granted by Robert Hepburn to for the price of a tenement sold to the granter, being left signed in the hands of Mr James Elphingston the writer, George Monteith, a creditor of the seller, arrested in Mr Hepburn's hand, and got up the bond from Mr Elphingston, upon a ticket to re-deliver it, and pursued a forthcoming of the money.

*Alleged* for Mr Hepburn; That the bond was left with him till a procuratory of resignation should be delivered, which was wanting.

*Answered*; Though the seller was obliged to give a sufficient progress, and particularly procuratories, yet the right cannot be quarrelled for want of these, he and his authors having been forty years in possession, especially seeing the defender cannot prove interruption within the forty years. *2do*, The bond being in the pursuer's hand, Mr Elphingstoun cannot qualify any terms of deposition, unless it be proven by the pursuer's oath, that it was deposited; and it were dangerous to allow havers of writs, especially the writers, to make terms of deposition, when perhaps the writs were lodged in their hands only *custodie causa*.

*Replied*; Where a writ in favours of a person is delivered to him, or in his possession, which imports delivery, comes forward in the possession of a third party, it cannot be pretended to have been deposited by the debtor, seeing the witnesses insert, or others, may prove the delivery. *2do*, The bond in this case is not proven to have been received from Mr James Elphingston by the pursuer's oath, so as he might adject a quality, but by his note for re-delivery. *3<sup>io</sup>*, No clause in the bond is conceived in favours of the pursuer, who has only a consequential interest as creditor to the creditor in the bond.

*Duplied*; A creditor's creditor may, by arrestment or assignation, repeat all defences competent to the creditor their debtor.

THE LORDS, before answer, ordained the creditor in the bond to depone if it was delivered to him, or only deposited in the writer's hand.

*Harcarse, (DEPOSITION) No 414, p. III.*

No 5.

Whether a bond deposited with the writer was to be presumed delivered to the creditor or not; or what proof?