

1713. November 17.

MUNGO COCHRANE, Merchant in Glasgow, *against* JOHN BRYSON, Son to the deceased John Bryson, Writer there.

IN a process at the instance of Mungo Cochrane against John Bryson, as representing his father, for payment of 238 Scots, with L. 50 of penalty, and annualrent, contained in his father's bond ;

*Alleged* for the defender ; The bond contains no definite sum of either pounds, merks, or shillings, but only 238 Scots, and, *in dubio*, the smallest sum is to be presumed ; consequently, it can import an obligation only for 238 shillings Scots.

*Answered* for the pursuer, *1mo*, The quality of the sum of 238 is sufficiently cleared to be so many pounds, by the after denomination of L. 50 of penalty, which ever useth to be of the same species with the principal ; *2do*, The bond being wrote by old John Bryson's own hand, who was an ordinary writer, his omission to distinguish the principal sum must be interpreted to his prejudice, unless he can prove, by the comuners and instrumentary witnesses, that the sum to be filled up in the bond was agreed to be merks or shillings ; especially considering, that he read the bond before signing, and expressed a sum before the witnesses, and thereafter asked several persons what might be the import of a bond expressing no definite sum of pounds or merks ; which argue plainly a designed fraud ; *3tio*, By a common practice, a fifth of the sum is always inserted as the conventional penalty in bonds of borrowed money ; and the penalty in this bond is about the fifth part of L. 238 ; whereas, it would be near a third of 238 merks.—THE LORDS found the indefinite sum of 238 Scots to be pounds.

*Fol. Dic. v. 2. p. 162. Forbes, MS. p. 2.*

1724. June 25.

ANDREW PATERSON, Litster in Dryburgh, *against* JAMES WILKISON, Clerk of the Regality of Melrose.

ANDREW PATERSON having raised reduction of a bond granted in the year 1658, by Andrew Riddle, as principal, and Patrick Riddle, his brother, as cautioner, to Andrew Bulman, for 300 merks, and of certain diligences and decreets that had followed on the bond, which now stood in the person of the defender ; it was *pleaded* for the pursuer, That the bond *quoad* Patrick the cautioner was null and improbative, as not being duly subscribed by him ; there appearing only two letters, which are pretended to be the initial letters of his name.

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No 304.

In a bond where the denomination of the money was omitted, it was presumed to be pounds, the largest.

No 305.

Use of subscribing by initials presumed.

No 305.

It was *answered* for the defender; That bonds subscribed by initial letters are not null, but are sustained upon a proof that the party was in use to sign in that manner; as was found, 16th November 1667, Coulterallers against Chapman, *voce* WRIT; and 22d February 1662, Brown against Johnston, IBIDEM; where a party's mark was sustained, the party proving that he was in use to subscribe by that mark: And since this bond has stood unquarrelled for more than 60 years, the objection cannot be received *post tantum temporis intervallum*, when probably the persons who could prove Patrick's use of subscribing are dead; *2do*, There was, very soon after the date of this bond, diligence used upon it by inhibition, in the year 1663; there was a decret of reduction against this pursuer's author in the 1688, and other diligences were used upon the bond in the 1690 and 1693; and at last a decret of reduction in the year 1720, against the pursuer himself, was obtained on the said inhibition upon this bond, during which processes, no objection was made by the granter of the bond, his heirs, or any deriving right from him: All which ought, in *re tam antiqua*, to presume that he was in use to subscribe by initials.

*Replied* for the pursuer; That there was not in these processes so fair an opportunity of quarrelling the bond, since only an extract was produced.

1724. *January 21.*—"ON report of the Lord Grange, the LORDS found it presumed, that Patrick Riddle was in use to subscribe by initial letters, now after so long time since granting of the bond quarrelled, and so many diligences following thereon; and, therefore, repelled the reasons of reduction."

The pursuer reclaimed by petition; wherein he represented, That it appeared by an heritable bond, granted to his author by the said Patrick Riddle, in the year 1667, for 1000 merks, that Patrick did subscribe by notaries; from which he *contended*, That the presumption of his signing by initial letters was elided; for, *quod fieri debet, facile præsumitur*; and as the rules of subscribing, in cases of importance, when parties cannot write, are settled by act of Parliament, so when any evidence is brought that a person who could not write had subscribed by notaries, the presumption was stronger that he was in use to do so, than that he subscribed by initial letters: And, further, he offered to prove, that Riddle was in use to sign by notaries.

The defender *answered*; That several years intervened betwixt the dates of the two bonds; and the reason of using notaries to the last must have been because the sum in it was considerable, and so the creditor was more anxious about the manner of signing. The act of Parliament concerning Subscription by Notaries, only takes place where the party cannot write at all; but a subscription being only an underwriting, whether that be by the initial letters, or the name at length, is not distinguished.

*Replied* for the pursuer; That the act 21st, Parliament 1672, sufficiently explains what a subscription is, when it statutes, that all others than Nobility or

Bishops shall subscribe by their Christian names, or the initial letters thereof, with their surnames. No 305.

THE LORDS found the presumption, that Riddle was in use to subscribe by two initial letters, was not elided by production of the other bond ; but allowed the petitioner to prove that Riddle was in use to subscribe by notaries, at or about the time of granting the bond to Bulman.

Act. *Ja. Boswell & H. Dalrymple sen.*

Alt. *Ja. Graham sen. & Ja. Colwill.*

Clerk, Justice.

*Fol. Dic. v. 2. p. 129. Edgar, p. 57.*

### DIVISION XIV.

#### Presumptions arising from lapse of time.

1628. February 29.

RUTHVEN against CLERK.

No 306.

THERE was a legacy of 600 merks left to William Ruthven *in anno* 1611, who was then in the eastern seas, and failing of him to Isabel his sister. Forrester, executor confirmed to Isabel his wife, pursued Clerk, in whose hands the money was, for the bygone annualrents thereof, and principal sum also. *Alleged.* The libel could not be sustained, because he had not libelled that William was dead, failing of whom only the sister was substitute, so that unless he offered to prove that the said William was dead, he could have no right as executor to his wife. THE LORDS sustained the libel, in respect there was no other appearance but he was dead, having been so long absent, and no word of him all that time, the pursuer finding caution to warrant the defender at all hands ; for it would have exhausted the whole sum to have led probation of his death, besides that it could very hardly be proved.

*Fol. Dic. v. 2. p. 163. Spottiswood, (SUMMONS & LIBEL.) p. 319.*

\* \* \* Durie's report of this case is No 8. p. 482. *voce* ANNUALRENT, and Auchinleck's, No 3. p. 8048. *voce* LEGACY.

1636. March 17.

WIER against ARNOT.

No 307.

ONE Wier being made assignee by ———, in and to an obligation of monies, which the said obligation bore the cedent to have lent out to James Dal-

A tutor assigned a bond granted to himself, but