

respondent's failure to pay the money; but this leaves the whole cause as open and unsettled after the examination of witnesses and production of books, as if no such proceedings had been; so that all the expence and delay to be thereby incurred might be fruitless.

The enjoining the appellant to transfer the South Sea stock, arising from the two 500*l.* subscriptions, (which covers but a small part of the debt), or otherwise to find caution to put the same out of his own power; and the ordaining the clerk, not to give up to the appellant the promissory note entrusted in his hands, are apprehended to be very hard and unusual. They tend to strip the appellant of all means of ever obtaining satisfaction from the respondent, and make him quit the only security he has for payment of a small part of the money due.

Judgment,
27 Jan.
1724-5.

This day being appointed to hear counsel upon this petition and appeal, counsel accordingly were called in to be heard; and counsel appearing only for the appellant, proof was made of the due service on the respondent's agent of the order for hearing the said appeal; and thereupon the counsel for the appellants were heard, and due consideration had of what was offered in relation to the cause.

It is ordered and adjudged that the said petition and appeal be dismissed, and that the several interlocutory sentences therein complained of be affirmed.

For Appellant, C. Talbot. Will. Hamilton.

Cases

On three Appeals.

116, 117,
118.

The Commissioners and Trustees for the

Forfeited Estates,

Appellants;

George Lockhart of Carnwath, Esq;

Respondent.

6th Feb. 1724-5.

Presumption-Bond.—Bonds of pension granted to an advocate, afterwards President of the Session, during his continuance to be an advocate, are sued on, after his death by his son, as wholly remaining due, after the lapse of a good many years from their dates; and are sustained till the date of the grantee's becoming President of the Session, his son giving his oath of credulity as to any payments made on the debts acclaimed.

2d appeal.

ROBERT Earl of Southesk, deceased, on the 28th of April 1674, granted a bond of pension to Sir George Lockhart, the respondent's father, for the payment of 300 merks yearly to him, his heirs, executors, and assignees, during his continuance to be an advocate, by two half-yearly payments, the first commencing at Martinmas 1674.

The

The respondent's father continued to practise as an advocate, till the 1st of January 1686, when he was made Lord President of the Session. He died in 1689, leaving the respondent, his son, about eight years of age; the respondent was confirmed executor to his father, by the commissaries of Edinburgh, on the 23d of January 1690.

After the attainder of James late Earl of Southesk, and seizure of his estate real and personal by the appellants, the respondent entered his claim before them on the said bond, for the said sum of 300 merks yearly from Martinmas 1674 to January 1686.

This claim came to be heard before the appellants, on the 1st of September 1719, when they were pleased to disallow and dismiss the same.

The appellant thereupon appealed to the Court of Delegates, who, after hearing counsel for both parties, on the 3d of March 1724 "reversed the decree of the said commissioners, with this quality, that the respondent do make up proper titles in his person to the said debt, before he receive debentures from the appellants, and also give his oath of credulity as to any payment made of the debt acclaimed, and restrict the said claim to the time till the said Sir George Lockhart was made president of the Session."

The first appeal was brought from "a decree of the Court of Delegates in Scotland, made the 3d of March 1724."

Entered.
23 March
1723-4.
2d appeal.

An appeal, of a nature precisely similar, was at same time presented by the appellants on the following case:

George Earl of Marischal, deceased, on the 10th day of March 1673, executed a bond to the said Sir George Lockhart, reciting, that he having many experiences of the sound and wholesome advices and good services done to him by his trusty and faithful friend Sir George Lockhart, advocate, his ordinary advocate and counsellor, in his affairs and business at law; and being very sensible of the trouble and pains he was put to therein, and being desirous in some measure to remunerate his kindness, and trusting he would continue the same towards him, therefore he obliged himself to pay to the said Sir George Lockhart, his heirs, executors, or assignees, the sum of 400 merks Scots money, in name of pension, yearly, in time coming during the said Sir George's continuing to be an advocate.

A claim, similar to that in the first appeal, was entered by the respondent, on the forfeited estate of the Earl of Marischal, on account of this bond, which, on the 16th of September 1720, was disallowed by the appellants; but, upon an appeal, the Court of Delegates, on the 3d of March 1724, reversed the judgment of the appellants, and decided as in the first appeal.

The second appeal was brought from "a decree of the Court of Delegates in Scotland, made the 3d of March 1724."

Entered.
23 March
1723-4.
3d appeal.

The appellants also presented a third appeal, on the following case:

Alexander, late Earl of Linlithgow and Callender, deceased, on the 11th of February 1676, executed a bond for paying to the

said Sir George Lockart, during all the days of his lifetime, at least during his continuing to be employed in his affairs, and until the said pension should be recalled and discharged, the sum of 400 merks Scots yearly.

The respondent made a claim similar to the two former on the forfeited estate of the Earl of Linlithgow and Callender, on account of the last mentioned bond; but his claim was dismissed by the appellants on the 20th of August 1720. He brought his appeal to the Court of Delegates, who, on the said 3d of March 1724, reversed the judgment of the appellants, and decided as in the two former appeals.

Entered,
23 March
1723-4.

The third appeal also was brought from "a decree of the Court of Delegates in Scotland, made the 3d of March 1724."

Heads of the Appellants' Argument.

The decrees of the Court of Delegates are founded on a supposition, that the annual pensions are in arrear, and unpaid; from the time of granting the respective bonds; and, that no part was ever paid to Sir George Lockhart, which is conceived to be incredible.

For these bonds have never been put in suit, nor has any diligence been done for non-payment of the said yearly pensions; neither by the respondent's father, nor his tutors or curators, during his minority, nor by himself since he came of age, except entering the aforesaid claims; and no proof was offered, or brought, of any service performed by the said Sir George Lockhart, to any of the said earls, who granted the bonds claimed, nor of any arrears resting in respect thereof, though the condition of granting one of these bonds was expressed to be for services to be done; and the Earl of Callender, grantor of one of the bonds, died long before the respondent's father. Such pensions are in use to be paid annually, though it be impossible in the present case to recover the releases of such annual payments. Besides, when the respondent, or his tutors, made up titles in his person to the personal estate left by his father, no notice was taken of the sums now claimed.

Heads of the Respondent's Argument.

As the bonds in question are admitted to be regularly executed, they are not to be taken away by presumptions of any kind. If a bond is not sued for in 40 years after its date, it is then barred by the statute of limitations in Scotland; but if any action is commenced in that time, nothing can take away the bond but an actual proof of payment; for as the obligee is not obliged to sue, his having the original bond in his possession, is a presumption of non payment; and if such action be commenced in 40 years, the obligee will be entitled to recover payment.

It is true, the earliest of these bonds was executed in 1673, and the last yearly sums payable upon all of them became due in 1686; but the respondent was 12 years of the time a minor, and 1617. c. 2. it is expressly provided by act of parliament 1617, c. 12. "That
" in

“ in the course of the said 40 years’ prescription the years of
 “ minority and lesse age shall no ways be counted, but only the
 “ years during the which the parties against whom the prescrip-
 “ tion is used and objected were majors, and past 21 years
 “ of age.”

The respondent’s claim was entered in 1718, not quite 19 years after the last payments became due on the bonds, including the years of the respondent’s minority, nor above 33 years from the date of the oldest bond, exclusive of his minority.

There is no necessity for the respondent’s proving, that his father rendered any service as an advocate to the late Earl of Southesk. Bonds of this kind are given merely as retaining fees, and are payable whether any service be done or not. The recital of this bond is for *certain good deeds done and performed, and to be done and performed*, and the pension thereby granted is payable to Sir George Lockhart, his heirs, executors, and assignees, *during his continuing to be an advocate*; which plainly shews, that any proof of service rendered was not necessary; and, indeed, in the nature of this case, such proof cannot be had.

Such pensions are seldom or never paid annually; on the contrary, they are frequently and usually left unpaid for a great many years together. In the case Mrs. Black and Sir Peter Frazer, upon an appeal, it was determined that the pension should be paid though a great many years in arrear.

No. 47. of
 this Collec-
 tion.

It is of no moment that discharges cannot now be easily recovered, for that will be an argument against all debts that are sued at any distance of time: and, on the contrary, it is to be presumed, that the obligee having the bond, the debt is not satisfied unless discharges are produced.

After hearing counsel on the first appeal, *It is ordered and adjudged, that the same be dismissed; and that the decree therein complained of, with respect to the bond claimed by the respondent, alleged to have been given to Sir George Lockhart, his father, by Robert late Earl of Southesk, be affirmed.*

Judgment,
 6 Feb.
 1724-5.

A similar judgment was separately pronounced, of same date, in the two other appeals.

For Appellants, P. York.
 For Respondent, C. Talbot.

C. Wearg.
 Will. Hamilton.