

No. 3.

wife renounce, which is a thing prestable in its own nature, and which his wife may fulfil if she will, and if she will not, *sibi imputet*, who might have advised with his wife before he came obliged, and therefore now he ought to fulfil his bond *in forma specifica*; and as to the sum owing by the charger, the suspender stands infest in the same lands therefore, so that the land is burdened both with that infestment and the wife's also, which sum he is content to pay for purging of both infestments, the charger being unwilling to have his lands thus burdened.

The Lords found the letters orderly proceeded, the charger being ready to make forthcoming the money.

Gilmour, p. 111.

1669. June 9. WILLIAM STREET *against* HUME and BRUNTFIELD.

No. 4.

A mandatar having sold his constituent's goods, took bond for them in his own name.

The constituent was found to have direct action against the purchaser, by way of declarator to pay the sum to him.

William Street, Merchant at London, having sent down a parcel of skins to Arthur Lyall, his factor at Edinburgh, Lyall sells the skins to Hume and Bruntfield, and takes the bond for the price thereof, in his own name, payable to himself, without mention of Street. Lyall being dead bankrupt, and Street finding that if he should confirm the value of the skins as executor creditor to Lyall, the rest of Lyall's creditors would come in with him, and share in this sum which was the price of his skins, therefore he raised a declarator against the nearest of kin of Lyall, that the sum due by Bruntfield and Hume, albeit the bond was taken in the name of Lyall, yet the same was for Street's goods and to Street's behoof; and none compearing, he obtains decret of declarator to that effect. And now he pursues Bruntfield and Hume for payment of the sum; who alleged they cannot be *in tuto* to pay to any but those who represent Lyall, to whom they were debtors, and therefore the pursuer must first confirm as executor to Lyall; and as for the declarator obtained, it was in absence, and they not called, and whenever the executors confirms, they cannot exclude them. The pursuer answered, That he needed not confirm as executor to Lyall, because this debt, albeit in the name of Lyall, yet was not *in bonis* of Lyall in so far as it was the price of the pursuer's skins, which were in the custody and management of Lyall, but never his property; but specially, by Lyall's missive produced, he acknowledges the receipt of the skins, and that he had sold them to these defenders; that he was to take bond for them, which is the same bond; and in his count-book produced, he states himself only debtor to Street for £.10 Sterling that he had reserved of his bond, and not for the whole sum, which therefore must import that the remainder remained Street's; and yet for the further assurance of the defenders, he offered caution to warrant them. The defenders answered, That the pursuer having entrusted Lyall with the skins, he had followed Lyall's faith, and could not quarrel what Lyall had done with any third party, so that Lyall taking the bond in his own name did alter the condition of the affair, and stated himself debtor to Street, and the mer-

chants debtors to him ; and as he might have received payment from the merchants, and applied the sum to his own use, so he might discharge them ; and this sum might have been arrested, and affected for Lyall's debt, and therefore was *in bonis* of Lyall, and behoved to be confirmed ; and seeing the defenders cannot be secure, they were not obliged to accept of caution to put themselves to two actions. The pursuer answered, That albeit payment made to Lyall would have been sufficient, as being made *bona fide* ; yet if Lyall had discharged without payment, his discharge would not have excluded Street the pursuer, neither would arrestments for Lyall's debt have excluded him, especially the same having been posterior to the missive produced.

The Lords repelled the defences, and found the same not to be *in bonis* of Lyall, nor to be confirmable as his goods, but to belong to the pursuer Street ; and seeing Street offered caution to warrant the defenders, they ordained him to grant the same accordingly.

Fol. Dic. v. 2. p. 412. Stair, v. 1. p. 616.

* * * Gosford reports this case :

1669. June 10.—Mr. Street having sent a parcel of sheep skins to one Mr. Lyall, who was his factor, which were sold to Bruntfield and his copartners for £.140 Sterling ; the said Lyall, by a missive letter, did signify to the said Mr. Street, that he had sold the same for the foresaid price to the said persons, and was to take security in his own name for Street's behoof, but did take the bond in his own name, payable to himself and his heirs, without making mention that it was to the use of Mr. Street ; likeas, thereafter in his count-book, he states himself debtor to Street, by granting a receipt of a part of the said sum. Thereafter Mr. Lyall being dead, Mr. Street did recover a decret of declarator against Lyall's nearest of kin, finding that the said bond was granted for the price of the said sheep skins, which did belong to him, and thereupon did pursue the debtors for payment of the sums contained in the bond. It was alleged, that this was not *habilis modus* to establish the debt in the pursuer's person, but he ought to confirm himself executor creditor, without which the debtors were not *in tuto* to make payment. The Lords, notwithstanding, did decern the debtors to make payment, the pursuer finding caution to warrant them at all hands, seeing no creditors of Lyall's had confirmed themselves executors, or did compear for their interest ; which, if they had done, or should yet do, the Lords thought that the question would be more difficult.

Gosford MS. p. 48.

1669. June 9. COUNTESS of DUNDEE against MR. JAMES BIRSBIN.

The Countess of Dundee being possessed in an annual-rent out of the Mains of Dudhope, *in anno* 1650, and having consented to the infestments of other creditors