No 13

THE LORDS decerned the tenant to make payment of the ſum contained in the blank bond; but declared, that if the tenant condeſcended on the date and witneſſes in the bond, the executors ſhould find caution to warrant him, if he were diſtreſſed upon any bond of the ſame date, ſum and witneſſes; or if the tenant could not ſo condeſcend, THE LORDS ſuperſeded extract, as to that ſum, till the firſt day of July, that the tenant might, by exhibition or declarator, ſecure himſelf againſt the blank bond.

Stair, v. 2. p. 588.

1680. *June* 3. BUCHANNAN *against* NAIRN.

No 14.
Found, that a blank bond lying by the creditor at his death, muſt be confirmed as in *bonis defuncti*, no perſon having right to inſert a name in it.

WILLIAM BUCHANNAN having charged Robert Nairn, upon his bond of 220 merks: He ſuſpends on this reaſon, That the bond was blank in the creditors name *ab initio*, delivered to the charger's uncle, among whoſe writs it was blank at his death; and that his uncle's wife was in uſe to lift his rents and ſums, and ſo was *præpoſita negotiis;* all which was offered to be proven by the charger's oath of knowledge, and by the wife's oath, that payment was made to her of this ſum. It was *answered*, That prepoſiture of a wife could not be inferred by uſe of receiving of ſums without a warrant in writ, albeit ſuch uſe might infer prepoſiture in the wife of a vintner, or ſhop-keeper, where writ uſes not to be adhibited, which could never be extended to receiving payment of bonds by gentlemen's wives. 2*do*, Though a commiſſion were in writ, the wife's oath after the huſband's death could not prove.

THE LORDS found the prepoſiture in this caſe could not be proven without a commiſſion in writ, and that the wife's oath could not prove her receiving of the money after her huſband's death; but found, that if it were proven to have been blank by the defunct at his death, it was *in bonus defuncti*, and ſo behoved to be confirmed before extracting. *See* HUSBAND and WIFE.

Fol. Dic. v. 1. *p.* 103. *Stair, v.* 2. *p.* 768.

1695. *January* 25. COLIN M'KENZIE *against* JOHN SUTHERLAND.

No 15.
A diſpoſition ſigned blank, in the name of the diſponee, and filled up after the granter's death, was reduced.

PHILIPHAUGH reported Mr Colin Mackenzie, ſon to Pluſcarden, *contra* John Sutherland, ſon to Lord Duffus. Major Mackenzie being at Lord Duffus's houſe, he ſubſcribes a diſpoſition of his whole means and eſtate; but it is confeſſed to have been blank when he ſigned; and ſome days after falls ſick of a fever and dies. His brother Colin claiming his eſtate, the Lord Duffus produces that diſpoſition now filled up in the name of his ſon John; whereof Colin raiſes a reduction, offering to prove it was blank when ſigned, and put up by him, in preſence of the writer and witneſſes, in his letter-caſe in his pocket, ſo that Duffus muſt prove it was filled up with his ſon's name, who was a boy of ſix years old,

No 15. before he took the ſickneſs whereof he died; and that it was delivered to him by the Major; elſe it is preſumable they have found it blank, after his death, in his pocket, and filled up the name in it.—*Answered*, It is now in their hands, and they cannot be burdened to prove delivery; and *esto* he got it blank, yet law preſumes he was, by that delivery, allowed to fill up his own name in it. And he and his Lady offered to depone (ſeeing his ſon could not,) that they received it from the Major. Many of the Lords were clear that Duffus ought to be burdened with the proof of the time of delivery, and the filling up of the name; ſeeing the circumſtances of its being once blank, and his ſudden falling ſick, and dying in their houſe, made all againſt them; likewiſe that he had totally paſt over his neareſt relations for whom he had a tender affection. But, to have the whole matter before them, they made an act before anſwer, allowing either party to prove the whole circumſtances, qualifications and preſumptions of the matters of fact alleged on either ſide.

1697. *December* 29.

MAJOR M'KENZIE, ſon to the Laird of Pluſcarden, being at Lord Duffus's houſe in the north, takes a fever, and dies. The Lady Duffus then produces a diſpoſition *omnium bonorum*, made by the Major in favour of John Sutherland, her fourth ſon, an infant; which right carried away the ſum of 10,000 merks Duffus was owing the Major by bond; whereupon Colin M'Kenzie, goldſmith in Edinburgh, the Major's brother, raiſed a reduction of the ſaid diſpoſition, on ſundry grounds; that the Major's father, mother, and brethren, being low in their fortunes, it is not to be preſumed he would have diſinherited them all, and left them nothing, without a cauſe: That this diſpoſition has been ſigned blank, and found in the Major's pocket after his death, and ſo filled up. For eliding of theſe qualifications, Duffus condeſcended on adminicles to aſtruct and fortify the right; that he offered to prove the Major then, and before his ſickneſs, declared, he was ſo obliged to my Lord Duffus, that he would leave one of his ſons his heir; and the right being now in his hand, as fiduciary and truſtee for his ſon, it could not be taken from them.—THE LORDS, before anſwer, allowed a conjunct probation, (as mentioned 25th January 1695,) which being this day adviſed, it was argued, that from the witneſſes depoſitions, it appeared, this diſpoſition was not filled up till after the Major's death; and though the Lady deponed ſhe had his order for doing of it, yet that being a mandate, *perit morte mandatoris*, and could not be executed thereafter: Yea, though he had filled it up after he took the ſickneſs, it was ſtill reducible *ex capite lecti*, at the inſtance of his heir: And ſome proved that the Major expreſſed his intentions of lifting his money out of Duffus's hand.—*Answered*, They opponed the pregnant teſtimonies of ſeveral witneſſes, bearing his full deſign to ſettle any thing he had on my Lord Duffus's family.——THE LORDS, on the whole matter, reduced the diſpoſition, and preferred his heir; and as for the purpoſes and reſolutions, they are not fixed acts of the mind, and are ambulatory and revocable at pleaſure.

Fol. Dic. v. 1. *p.* 103. *Fountainhall, v.* 1. *p.* 663. & 806.