

bound to have presented him.—*Answered*, Though these obligations be *stricti juris*, and to be performed *in forma specifica*, yet that must not be understood judicially, but with an equitable latitude; and the offering him *primo quoque tempore*, on his recovery, cannot take place here, because I did that already, in so far as when I signified to you his indisposition and inability to travel, I likewise offered to present him how soon he grew better; but Callender unjustly refused to consent to a prorogation of the day; and that offer not being agreed to, the bond must be simply null as fully implemented, especially seeing he may have his person still, by which he has no prejudice, the debtor being in no worse condition now than he was at the time he should have been sisted: And, if sickness be a relevant ground whereon, by the Lords' act of sederunt, a prisoner may be let out during the continuance of his sickness, then *multo magis* ought it to liberate one from going to prison; and you should have required me to present him of new, which you never did; and *modica mora*, in such cases, makes not one incur the penalty, says Paulus, in *l. 91. § 3. D. de verb. obligat.* and Lanfrancus Balbus, *decis. 345.*—*Replied*, Your offering to renew your bond to a new day can never exoner you, though I had not accepted it; because I was not obliged to believe your assertion, especially there being no testificate from physicians of his sickness; and if this excuse were allowed, bonds of presentation should be rendered inefficual; for the party, by a little excess of drink, might render himself feverish, and those about him might be fully persuaded of his sickness, and so the creditor be eluded; neither was the offer sufficient to liberate from presenting him when he grew well, nor were they obliged to require him to his duty, seeing *dies interpellat pro homine* in all these cases; and such bonds must not be turned to shams. Some of the Lords were of opinion, that Craighforth's refusal to accept of his offer, on a prorogation of the term, did liberate the cautioner, and fully implement his obligation; but the plurality found, though he should prove his father was really sick at the time prefixed; and that he offered then to continue bound for some weeks, that did not free him, seeing he did not offer to present him when he recovered; and, therefore, found him liable for the penalty in the bond of presentation, and likewise for the original debt.

Fol. Dic. v. 1. p. 114. Fountainball, v. 2. p. 222.

1710. July 22.

HENDERSON against GRAHAM.

ANDREW ROBERTSON, merchant in Edinburgh, being debtor to William Henderson there, in L. 8000 Scots by bill, and having retired out of the kingdom, he is stopt at Durham, and incarcerated in that goal; and being arrested by sundry other of his creditors, Janet Graham, his mother, transacts with his creditors, and gives them a bond of presentation, to produce his person at Edinburgh on

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A debtor enlisted, which secured him from personal diligence; yet a bond of presentation was found not

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fulfilled, there
being an im-
pediment by
the act of the
debtor, which
did not exist
when the
bond was
granted.

such a day, death, sickness, &c. being excepted, and that without an expedite suspension, past bill, or sist of execution, otherwise she obliges herself to pay the debt. On this bond he was liberated, and came to Scotland, and was presented by his mother precisely at the day, whereupon she took instruments and went away, and when the messenger having the caption touched him, to make him his prisoner, he pulled out of his pocket a testificate, or declaration, under the hand of one of the officers of my Lord Carmichael's dragoons, that he was listed as a soldier there, and thereon craved the benefit of the late British act of Parliament, called an act for the better and more speedy recruiting of Her Majesty's forces, which discharges all personal execution against them. Upon this, the messenger dismissed him; and Henderson having charged Janet Graham on her bond of presentation, she suspended, on this reason, that she had fully satisfied and performed her bond, in presenting him without any suspension or sist of execution, and though he had listed himself a soldier, yet that was a *casus incogitatus*, and unprovided for, and neither past bill nor sist of execution in the proper received sense of these words, (which is only legal judicial acts of a judge), she can never be liable for that extraordinary accident, not comprehended in her bond. *Answered, Esto* it were yielded she had literally implemented her bond, yet it is plain she had neither fulfilled the spirit nor meaning of the writ; for though she presented him corporally, yet it was in armour inaccessible to law, and with a pocket-pistol to stop execution, and fright away the messenger; whereas all such transactions must be understood to be entered into with that sincerity and *bonne foy* that it shall be effectual security to the creditor, out of which he is not to be tricked nor shammed: and where is the *bona fides*? I consent to let you out of Durham prison on your mother's engaging to present you again, free from any legal impediment that may stop your imprisonment, and you come with a coat of mail as a soldier, this is *fraudem et legi et contractui facere*: and whereas it is pretended that the mother can never be reached, unless she was accessory to the plot, and knew of his being listed, the pretence is of no moment; for she stipulates against a sist of execution, and is not his listing an effectual stop and sist, as much as if it had been past by the Lords? and an obligant in a presentation was found liable by the Lords in a nicer case than this, 7th July 1681, Polstead, *contra* Scot and Maxwell, No 4. p. 1807. where the debtor to be presented being imprisoned *medio tempore*, so the sisting him became imprestable, yet being by his own fact and fault, the Lords found the bond incurred. Now here Robertson stopt his incarceration by his voluntary inrolment among the dragoons; *et fraus sua nec ei nec alteri debet prodesse*. It was farther *alleged*, That the British act prohibited the imprisoning soldiers, but it did not take them out when in. Now Robertson, in the construction of law, was a prisoner by the presentation, as if he had never been out; and if the messenger, either by cowardice, or too much caution, dismissed him, you have none to blame but yourself. See Rolland's case.* *Answered*, In the

* See This case, and those mentioned p. 1811. *voce* PERSONAL PROTECTION.

Laird of Meldrum's case, the contrary was found by the Lords, and also in Sir George Hamilton's, and Mr William Stirling, who had all listed themselves to elude the diligence of law, therefore the messenger acted prudently. Some of the LORDS thought her bond not forfeited, unless she had known of her son's obtaining that enlisting, which could be only proven by her oath. But the plurality found her accession did not concern this case, and that she did not fulfil her bond, not having presented him free of all impediments, with respect to the creditors' power over their debtor's person, to dispose of him as fully as they could have done at the time they dismissed him out of Durham goal, and took this bond in place of it.

Fol. Dic. v. 1. p. 115. Fountainball, v. 2. p. 591.

* * * Forbes reports the same case :

IN the suspension raised by Janet Graham, of a charge, at the instance of William Henderson, against her, upon her bond, whereby she, to redeem her son Andrew Robertson from imprisonment for debt at Durham, obliged herself to present him at his shop in Edinburgh, to the charger his creditor, at a certain day, without suspension, past bill, or sist of execution, or else to pay the debt : The suspender was found not to have implemented her bond, by presenting him at the day, without any judicial sist of execution given in his favour by the Lords of Session ; in respect the said Andrew Robertson defended himself from incarceration, by producing an attestation under the hand of an officer in the Lord Carmichael's regiment, that he was listed as a dragoon in that regiment, which was a legal sist of execution with a witness, authorised by act of Parliament. And it is the natural import of a bond of presentation, that the debtor's person be so presented, as the creditor be not hindered from committing him to prison through his, or the presenter's fact, Polstead *contra* Scot, No 4. p. 1807. Albeit it was *alleged* for Janet Graham the suspender, That her obligation to present her son without sist of execution, could no more be understood counteracted by his listing himself a soldier, which was no fault ; than if he had been made a Peer, which would also have stopped personal diligence against him.

Forbes, p. 429.

See PRISONER.

See APPENDIX.