No 231. wise, the presumption of delivery from the date applied as well to blank writs as others. And the decisions cited were far from proving the contrary; in that between Bruxie and Mrs Seton there were many additional circumstances, the deed quarrelled reserved the granter's liferent, contained a power to alter, and a clause dispensing with not-delivery, and was proved to have been blank, and therefore the burden of the proof of the filling up, or delivery *in legitima potestate*, was laid on the possessor. In the case of Grant, the presumption was admitted to be, that the blank bond was delivered of its date: The only question was concerning a transmission thereof from one holder to another, which received no determination, because Grant the possessor offered to prove the delivery to him before declarator of the escheat of the intermediate possessor, but the respondent apprehended the presumption was with him. That in the case of Lady Lucia Hamilton, the disposition was not blank, but to certain persons for behoof of creditors, who were not filled up, and it was a fraudulent deed.

The Lords adhered.

Act. *R. Craigie & H. Home.* Alt. *W. Grant & Ferguson,* Clerk, *Forbes.*

Fol. Dic. v. 4. p. 124. D. Falconer, v. 1. No 113. p. 134.

1746. *July* 30.

Walter Ruddiman *against* The Merchant Maiden Hospital of Edinburgh.

No 232.
Found in conformity with the above.

Thomas Young, son to Robert Young, merchant in Edinburgh, gave bond for 4000 merks Scots, 21st October 1689, to Alison Elliot, his mother, and she, 24th September 1695, assigned it to Thomas Smith, her grandson, son to Thomas Smith, brewer in Edinburgh.

Thomas Young died, being succeeded by his sisters, one of whom, Alison, having in her own right, and by acquisition from the rest, a title to the half of his effects, conveyed them, by mortification, to the Merchant Maiden Hospital of Edinburgh, *anno* 1716.

The bond was registered *anno* 1703, and the assignation 1733; and Thomas Smith having died April 1740, Anna, his sister, wife to Thomas Ruddiman, printer in Edinburgh, confirmed and assigned it to Walter Ruddiman, printer there, who brought an action against the Hospital for payment, or reduction of their right, on the statute 1621.

Prescription was *objected;* to which was *answered,* The minority of Thomas Smith.

Objected; The name of Thomas Smith, the assignee, appears to be wrote in a different hand from the body of the assignation; and, therefore, *non constat* that it was filled up at the date; and, as his minority can only be deducted from the time of the insertion thereof, it is incumbent on the pursuer to prove when that happened. Stair's Instit. Book 3. Tit. 1. § 5. says, 'If the cre-

No 232.

'ditor's name be not filled up with the hand that wrote the bond, or of him 'who inserted the date and witnesses, it will be presumed to have been blank.'

Answered; There are three rules obtain with regard to writs made out blank; 1*mo*, That, notwithstanding a writ appears to have been blank when subscribed, yet it is presumed to be filled up immediately, and before delivery.

2*do*, Where it bears a dispensation with not delivery, and so is presumed to have remained with the granter, the filling up must be proved to have been before he was on deathbed.

3*tio*, When it is proved to have been delivered blank, the time of filling up must be proved to exclude any compensation or arrestment on the debts of the intermediate possessor.

THE LORDS, 25th June, found, "That it was to be presumed, in this case, the assignation was filled up and delivered of the date it bore, unless the contrary were proved."

Pleaded in a reclaiming bill; That the making it a rule, that deeds drawn up blank in the creditor's name were filled up of the date, and before delivery, would be very prejudicial, as rendering all the checks invented to guard against forgery entirely useless with regard to blank writs, on which the translation of property, in a very great measure, formerly depended; for neither the act 117th, Parliament 1540, requiring the subscription of the party and witnesses, nor act 80th, 1579, anent the insertion and subscription of witnesses in obligations, nor act 5th, 1681, concerning probative witnesses, could guard against a fraudulent upfilling; but, indeed, no such rule had been established, for that, in practice, there was always required a tolerable proof of the time and fairness of the filling up, as Stair, in the above cited place, at greater length explained, where he carried the matter so far as to say, that 'this ground is much cleared 'up by the act of Parliament 1681, requiring the name of the filler up to be 'expressed, which, if wanting, will annul the writ.'

The petitioners did not say, that the practice had gone so far, as to require the time and the inserter to be named, under the sanction of a nullity; but, in all the questions that had occurred, there had been a proof, more or less, of the time of filling up; and as, in similar cases, in which the strictness of the law, requiring the designations of witnesses, the name of the writer, and, perhaps, the inserter of the date and witnesses names, to be mentioned, had been dispensed with; 30th November 1683, Watson against Scot, *voce* WRIT; 19th June 1722, Laird of Edmonston against the Lady Woolmet, IBIDEM; and such like; in all these it had been required, that the defect should be supplied by a condescendence and proof; so *a pari*, or *a fortiori*, if the expressing the time, and filler up of a blank deed, according to Stair's rule, were dispensed with, the defect ought to be supplied by a condescendence and proof thereof.

The circumstances of this assignation tended to show that it was not filled up of the date; for, 1*mo*, It was done in a different hand, both from that of the

No 232. writer and the other instrumentary witness; 2*do*, The onerous cause thereof was the payment of a certain sum of money, which could not be made by Thomas Smith, an infant; but this circumstance showed that the assignation had been first drawn up, in hopes of a purchaser of the right; besides, the supposing it originally granted to Thomas Smith involved this supposition, that Alison Elliot was immediately giving away this sum, with six years interest thereon, to a grandson by one of five daughters, which was not to be presumed; 3*tio*, The bond was registered eight years after the date of the assignation, without registering it at the same time; 4*to*, Thomas Smith made no mention of this claim during his life, but, on the contrary, was a subscribing witness to the deed of mortification, which giving the liferent of the subject to Alison and Anna, his sisters, he, *anno* 1727, had concurred with them in borrowing money from the Hospital for the reparation thereof; 5*to*, The assignation never appeared with the blanks filled up till 1733 that it was registered, and the form of the letters was alleged to be apparently more modern than what was used at the date.

Answered; That it was a presumption, and, indeed, the foundation of all our rights, that a deed out of the hands of the granter had been delivered of its date, and it ought equally to be presumed, that it was filled up at the time of signing, since *omnia præsumuntur solenniter acta*, unless something appeared, from the writ itself, to show the contrary, as a reservation of the granter's liferent, dispensation with not delivery, or some such clause. Nor was it any argument to the contrary, that the name of the creditor was filled up in a different hand, for that Stair, in the place cited by the petitioners, said, 'Blank 'deeds are frequently drawn up by writers and notaries, leaving the sums, 'names of the debtor and creditor blank, which are afterwards filled up by any 'that makes use of the draught.' That, in a question concerning a disposition blank in the disponee's designation, and recovered, after the granter's death, out of the hand of his wife, it was contended, that the defender behoved to prove the filling up, which was in the hand of the disponer, to have been done *in legitima potestate;* but the Lords found it presumed, that the filling up of the blank was of the same date with the disposition; see No 230. p. 11556. where it is observed, that the like was found, January 1686, Thomson against Pennycuik, No 59. p. 3243. And a parallel case to the present was also determined, 13th June 1746, Mr Francis Sinclair against Ulbster, No 231. p. 11559. in which it was objected as here, that the disposition was in favour of an infant; but, indeed, the cases were so similar, that it was impossible to find a discrepancy.

The argument used by the petitioners, that the sustaining blank writs destroyed all the checks against forgery, arose from their mistake in applying that to the creditor which was only meant of the debtor; it was the falsifying his subscription which was guarded against, and if that was sufficiently certified, the danger was avoided. Nor was there any difference, whether the deed was

blank or not; for, whoever claimed under it, behoved to abide by the verity thereof. No 232.

They were under another mistake concerning Stair's meaning, who was in that place treating of deeds delivered confessedly blank, where the possessor was competing with an arrester upon the debt of an intermediate possessor; in all which cases, there was a suspicion of fraud; and, therefore, the time of filling up behoved to be proved.

In the present case, there could be no presumption of fraud, as there were no arrestments, or other diligence, used by the Creditors of Alison Elliot, who made the assignation in favour of her only male descendant, and, therefore, the natural favourite, which it was necessary should be filled up, to hinder his father to dispose of it in his prejudice. It was also proper to conceal the name of the assignee, as she had other children, who might have been offended, and for this reason his father was the proper person to fill it up, with whose other writings it was said it agreed, particularly with his marking of his children's births in his Bible, produced in this process, as part of the proof of his son's minority. And it was also said to be observable, that the particular spelling of the word SONE, in the assignation, agreed with the spelling of the same word in the marking of one of the births, though in others it differed; and if he was the filler up, he died before the course of prescription was run. The writing also, as was alleged, appeared to inspection of the same antiquity with the rest of the deed.

The assignation bore to have been granted for money actually paid down, which, though it could not be by the infant, might have been by his father, and was probably so much as she intended of the bond for her other issue. This onerous cause, together with her not reserving her liferent, was a demonstration that it was made immediately effectual by filling up and delivery. It was plainly intended for a male, the word HIS being frequently repeated, and Thomas Smith, as had been noticed, was her only male descendant; and if any stranger had advanced the money, they would certainly have done diligence in so long a time. And this retorted the argument used by the defender, from Thomas Smith's taciturnity, who was alleged to have been an indolent man; and, besides, it appeared he could not have recovered the half of the debt from the Hospital without a process. Of the remainder, one half was sunk in his own person by confusion, being one of the heirs-portioners of the debtor, and the other was due by a person who was alleged to have been notoriously litigious, whose son was convened in this process.

Observed on the Bench; That, in the case Sinclair against Ulbster, there was a second disposition, before the course of prescription was run, in favour of the same person with the first, which obviated the suspicion of that being filled up afterwards, to save against the prescription. There was also, in that case, a delivery of writings, in which it differed from the present.

No 232.

Observed on the other side; That, in the assignation, the word BREWER, making part of the designation of the assignee, was in the same hand with the rest of the deed; from which it was plain, that it was originally intended either for old Thomas Smith, or a person who was to be designed by his relation to him. But, on inspection, the LORDS did not agree in this, some of them thinking it to be rather in the same hand with the filling up; and it was observable, that they generally voted for Adhering or Altering, according to their apprehensions in this respect.

THE LORDS adhered.

Reporter, *Justice Clerk.* Act. *A. Macdouall.* Alt. *C. Binning & Haldane.* Clerk, *Gibson.*
Fol. Dic. v. 4. *p.* 125. *D. Falconer, v.* 1. *No* 137. *p.* 170.

DIVISION VIII.

Delivery when presumed made, and for whose Behoof.

1626. *December* 16. BYRES *against* JOHNSTON.

No 233.

A DISPOSITION having been delivered by the seller to a writer, in order to draw a charter in favour of the purchaser; this was not understood equivalent as if delivery had been made to the purchaser himself; and so there was still found *locus pœnitentiæ.*

Fol. Dic. v. 2. *p.* 156. *Durie.*

*** This case is No 15. p. 8405. *voce* LOCUS POENITENTIÆ.

1628. *February* 21, L. MONIMUSK *against* L. PITTARO.

No 234.
A bond of provision in favour of children delivered to the mother's brother, was held to be a *depositum*, and not for behoof of the children.

IN an action of exhibition by the Laird of Monimusk against the Laird of Pittaro, for exhibition of certain bonds, and re-delivery of them to the pursuer, which were made by the pursuer in favour of his bairns for their provisions, and which were put by the father in the defender's hands, who was mother-brother to the bairns, to be kept by him to their uses; in respect of the which, the defender *alleged*, That the pursuer having so deposited them, they became the bairns' proper evidents, as effectual as if they had been delivered to themselves, being made for their provisions, which their father did; and their mother now being dead, the pursuer could not seek them back again to be altered in their prejudice, or destroyed at the father's pleasure. Which allegeance the LORDS repelled; and found, that notwithstanding thereof, the