

S E C T. V.

User of a forged deed *bona fide*.

1677. June 26.

WILLIAM DICK of Grange *against* Sir LAWRENCE OLIPHANT of Gask.

No 28.

Found that the *bona fide* user of a false writ was not liable in damages and expenses, but only in so far as he was *lucratus* by getting more for the claim than he paid for it.

IN a declarator, raised at the instance of Dick of Grange against Sir Lawrence, upon this ground, that he having right by assignation from the Lady Grange, his mother, to a debt of 7000 merks, due to her by the Laird of Kilspindie, whereupon she had arrested and obtained decret to make furthcoming against Sir Thomas Tyrie of Drumkilbo; notwithstanding whereof, upon a false assignation alleged, made by Kilspindie to Douglas of Lumsden, and transferred to Sir James Douglas, and by him to the said Sir Lawrence, he was preferred to the Lady, as being prior to her arrestment, but reserving to her to improve the assignation; whereupon she having pursued an improbation, the said assignation was found false, and feigned; and so concluded against Sir Lawrence, that albeit he was found innocent, being a singular successor, that yet he ought to be liable *in quantum lucratus est*; as likewise upon that ground, that so far as the debt was due by Drumkilbo to Kilspindie, as principal, the Lord Oliphant, and Gordon of Park, cautioners for Drumkilbo, the said Sir Lawrence, as assignee, hath discharged Gordon of Park, and thereby the whole debt became irrecoverable, the principal debtor, and Lord Oliphant, being altogether irresponsible. It was *alleged* for Sir Lawrence, against the first ground, That he ought to be assoilzied; for he having *bona fide* acquired right to the said debt, and knowing nothing of the falsehood of the assignation, which he had gotten for a most onerous cause, and not having uplifted the said debts, but transferred the same upon a transaction with Mr George Blair, there was no ground to make him liable *neque ex dolo neque ex contractu*. It was *answered* to the second, That any discharge of a cautioner will not burden him, if he got nothing, but did it for love and favour, he could not be liable as being *lucratus*; and the assignation being now declared false, could not hinder the pursuer to recover payment of Gordon of Park, as cautioner, notwithstanding of the discharge. THE LORDS, after a long debate *in presentia* by both parties, as being a singular case, did at last find that Sir Lawrence was liable only *in quantum lucratus est*, and ordained proof to be led what was the true sum of money he gave for his translation from Sir James Douglas, and what was the true sum he got for his right made to Sir George Blair, so that he might be only liable *in quantum* if it exceeded the sum given out by him for his own right; and, as to the second ground, his discharge to the cautioner being only

for love and favour, they found that unless it were proved *scripto vel inramen-
to*, that he had gotten good deed or sums of money from the cautioner, that
he was only liable *pro tanto*.

No 28.

Fol. Dic. v. 2. p. 341. Gosford, MS. No 983. p. 663.

* * * Dirleton reports this case :

JANET MACMATH, Lady Grange, being creditrix to the Laird of Kilspindie, and having, upon an arrestment in the hands of Drumkilbo, obtained a decret to make forthcoming; there was thereafter a suspension of double poinding against the said Janet Macmath, and Sir Lawrence Oliphant of Gask, who pretended right to the sum due by Drumkilbo, by an assignation intimated before the arrestment; and in the competition foresaid, the said Sir Lawrence was preferred. But thereafter, in an improbation of the said assignation, at the instance of the said Janet Macmath, the said Sir Lawrence having abiden by the same, it was found, after a long and litigious dependence by the space of fifty years, that the assignation was false: And William Dick of Grange, the said Janet's son, having thereafter intented a pursuit against the said Sir Lawrence, to hear and see it declared, that in respect the said Sir Lawrence, by his compearance, and making use of the said false assignation, had been preferred, and had rendered the foresaid diligence by arrestment ineffectual, and had transacted and made benefit of the said false assignation; that therefore, in so far as he was *lucratus*, he should make the same forthcoming for payment of the pursuer's just debt; especially it being considered, that he had discharged one of the cautioner's in Drumkilbo's bond. It was *answered*, That he was *in bona fide* to acquire a right to the said assignation, neither knowing, nor being accessory to the forging of the same; and he had made no benefit by uplifting from Drumkilbo any part of the said debt, but by transferring his right in favour of Mr John Blair, which he had done *bona fide*: And as to the discharging the cautioner, it could not prejudice the pursuer, seeing the discharge would fall in consequence of the assignation.

THE LORDS found, That, albeit he were not accessory to the forgery, yet having used a false writ, and having litigiously so long maintained the same, and, upon that occasion, the pursuer being altogether frustrate, he ought to be liable *in quantum lucratus*, and what he had gotten more by the transaction with Mr George Blair than he had given for acquiring the said right: And the LORDS reserved action to the pursuer against the cautioner; and in case the cautioner should be assoilzied, without prejudice to have recourse against the said Sir Lawrence as accords. *In presentia*.

Act. Lockhart, Monnyhenny, &c. Alt. Cunninghame, &c. Clerk, Mr Thomas Hay.

Dirleton, No 460. p. 223.

* * * Stair's report of this case is No 38. p. 1757. *voce* BONA FIDE CONSUMPTION.