

No 656.

cases, *ex nobilio officio*, before answer, do examine witnesses, in order to the taking away of writ, where there are evident presumptions of fraud, or when writs have been deposited, or have been lying by the party the time of his decease; which cannot be pretended in this case, where it is evident by the bond, that it is all written with John Hamilton's own hand, who is one of the parties bound in the bond with Wilkie; and David French is witness to the bond, and it cannot be supposed that if the bond had been taken blank in the creditors' name to his behoof, that he would have been a witness in the bond; and Alexander Gray was altogether a stranger to David French, and it cannot be supposed that if the bond had been taken blank in the creditors' name to his behoof, that he would have intrusted a stranger's name in the bond, without a back-bond; and the assignation to Adam Mitchel is three years after the bond, so that it was not lying blank by him the time of his decease; as also, it is a principle in law, that a cedent's oath cannot be taken in prejudice of the assignee, especially the assignation being for an onerous cause; and if it were otherwise sustained, it would lay a foundation to subvert a great point of the securities in Scotland. THE LORDS, before answer, ordained Alexander Gray, Adam Mitchel, and the writer and witnesses in the bond, to be examined upon the foresaid grounds of declarator, but in respect he was informer, and might tyne or win in the cause, and that there were several other objections against him that might debar him from being a witness, the LORDS discharged him to be a witness.

*Sir P. Home, MS. v. 1. No 25. p. 35.*

1685. December. LAUHLAND LESLIE against INNERNYTIE.

No 657.

Trust declared upon circumstances, and the pursuer's oath in supplement.

LAUHLAND LESLIE having, upon a payment of a debt to my Lord Northesk, gotten a blank assignation *in anno* 1669, and being debtor to John Stuart, son to Sir William Stuart of Innernytie, the assignation was filled in Sir William's name, though then dead, because it did not quadrate with John, who, at the date thereof, was but a child *in familia*: Leslie immediately took up his assignation, till the settlement with John was adjusted; and John dying *medio tempore*, he commenced a declarator against the present Innernytie, for declaring that Sir William's name was inserted in trust.

*Alleged* for the defender; That an assignation in the name of his father, whom he represents, could only be taken away *scripto vel juramento*; and it was improbable the pursuer could fill up a dead man's name, when he could not get a back-bond, unless he had been first secured by the representatives.

*Answered*; The pursuer offers to prove that he paid the money to Northesk, and got the assignation delivered to him, which he now produces; *2do*, Sir

William gave up an inventory of debt due to him, and so did John, without mentioning this debt.

No 657.

THE LORDS declared the trust, the pursuer giving his oath in supplement, but the defender's curators made no great opposition.

*Harcarse, (ASSIGNATION.) No 115. p. 22.*

---

S E C T. XIII.

Trust posterior to the Act 1696.

1708. December 9. WATSON against FORRESTER.

JOHN WATSON, merchant in Edinburgh, being debtor to the deceased William Forrester, Writer to the Signet, in 5000 merks, by bond, John assigns to him, for his better security and payment, 3000 merks, owing by Campbell of Calder, and L. 107 Sterling, due by Sir Peter Fraser of Durris, and pays him in L. 900 Scots in cash, and gets a backbond from William, that he being paid of his 5000 merks, should account to him for the superplus. William having received partial payments, in the year 1697, the principal backbond is given in to him by Watson, to rectify and transcribe the same, to be renewed for the sum then resting, and accordingly, William Forrester writes on the back of it, with his own hand, that he had got in that backbond, because there were several things to be altered therein, because John Watson had uplifted and infromitted with some of the debts assigned by him, and the new backbond was to be formed accordingly; but William dying before that was done, John Watson raises a declarator against William's relict and children, that his 5000 merks bond is more than paid by the debts assigned, and L. 1400 more, which he craved they might refund, and craved exhibition of his account-books, and the foresaid backbond so marked and interlined; and the same being produced, and proved to be William Forrester's hand-writ, he craved decret, declaring the bond satisfied, and the superplus to be repaid him. *Alleged* for Mr Forrester's Heirs, There was neither foundation in law nor reason in this process, for the backbond being in the granter's hand, it was *chyrographum apud debitorem repertum*, which presumes liberation, satisfaction and solution; and as to the notes written on the back of it, only for his own memory, it were a strange and extraordinary case to make that probative, when it might be the state of their affairs at that time in 1697, whereas he lived four or five years after, viz. till 1701, during which time Watson and he have cleared all their

No 658.

An unsubscribed scroll found to afford no evidence of trust after the death of the person who wrote it.