

No 26.

our law, the presumption is in favour of the deed, and therefore the defender must improve it; whereas, in England, the creditor must either support it, or lose his debt. If, indeed, this case had been tried in England, both defences must have been laid before the jury at once; but this is inconsistent with the method of proceeding here. A peremptory defence of actual or presumptive payment must be discussed before the defence of improbation can be proponed; and as a defender may have many defences, it would be great injustice to debar him from any of them.

THE LORDS repelled the defence on the bond pursued on, *quod non est factum*, and found the same not competent, after the defence of prescription formerly proponed and over-ruled.

*C. Home, No 183. p. 395.*

1743. January 4.

JAMES NORRIS of New Windsor, Pursuer, *against* JAMES WOOD, heir served to the deceased SIR JAMES WOOD, Defender.

No 27.

Fromissory notes granted abroad do not, *per se*, prove their dates, so as to affect heritage in Scotland.

SIR JAMES WOOD granted, in Ireland, several promissory notes to the pursuer, who, upon his decease, brought an action against the defender, as heir, for payment.

The defence chiefly *insisted* on was, That, as the notes wanted witnesses, the heir, or heritage in Scotland, could not be subject thereto, as presumably granted on death-bed, and after Sir James's contracting the sickness whereof he died. In course of the process, a proof was allowed, before answer, to both parties, of the state and condition of Sir James's health, memory, and judgment, the time of granting the notes in question, and at what time he died, and of the cause of granting thereof; and, when reported, it appeared that the defender had failed to prove Sir James was on death-bed the time of granting the same; and that the pursuer had likewise failed to prove the facts he undertook to prove, *scil.* that Sir James granted the notes when he was in *liege poustie*, and for onerous causes.

The fact so standing, the question betwixt these parties turned upon this point, Whether the promissory notes not having been proved to have been truly granted by Sir James when he was in *liege poustie*, must, in law, be presumed to have been granted on death-bed, consequently not obligatory upon his heir?

For the defender it was *argued*, That though there is a *comitas* observed with respect to deeds executed in foreign countries, whereby, if they appear to be formal, according to the *lex loci contractus*, they will be sustained here, although they are not attended with all the solemnities required by the law of this country; yet, where there is a prohibitory law in the country where execution is sought upon a deed, the *comitas* will not be carried so far as to infringe or im-

pair the effect of such a prohibitory law, or to open a door to the subjects of this kingdom to elude it abroad, in such manner as the law would not suffer them to elude it at home; *e. g.* a testament signed in a foreign country, where, by the law, the heir might be burdened or prejudged, cannot affect the heir succeeding to lands in Scotland. It is likewise a consequence of the law of death-bed, without which it could have no effect, that no writing, (bills excepted,) which is not attested by witnesses, though otherwise formally subscribed by the defunct, is sufficient of itself to prove the same was signed by the defunct in *liege poustie*, although it should bear such date; but the verity of the date must be otherwise astructed than by the deed itself. No reason can be assigned why a promissory note should be more effectual to disappoint the heir in England than in Scotland; it is probative of its date in both countries; but it does not prove its date against the heir in Scotland; because the law presumes, that people, who impose upon dying persons, to disappoint their heirs of the succession, will not scruple, in order to make the deeds so elicited, *ex facie*, free from challenge, to advise them to affix an anterior date, that they may appear to have been signed at a period of time when the granter was in *liege poustie*. This is indeed an exception from the ordinary rule, that fraud is not presumed; but without it the law would be disappointed every day. And it will be very difficult to assign a reason why this presumption ought to cease when a man dies in a foreign country, as frauds are not less common there than here; if it were otherwise, the law of death-bed behoved to cease the moment a man passed the borders of Scotland, whereby he would be left at liberty, with the help of a contrivance, which the law presumes will be used in such cases, altogether to elude it. In a word, a testament signed abroad will not affect the heir, because it is *fictione juris* a death-bed deed, even though it were proved to be signed in health. Is it consistent with this, that a holograph writing, which is not from any fiction, but from the most solid grounds, presumed to be assigned on death-bed, should, notwithstanding, be sustained, because executed in a foreign country, when no evidence either is, or can be brought to elide the legal presumption?

*Answered* for the pursuer, That it was a mistake to suppose, that holograph deeds are presumed, in all cases, to be granted on death-bed; they are indeed liable to the suspicion of being ante-dated, *e. g.* a provision to younger children contained in a holograph bond, is effectual even in a question with the heir of blood, because of the rationality. Every man is presumed to know the laws of his own country; but that presumption is not extended to those of other countries. The law of death-bed has no place in England or Ireland, therefore there can lie no suspicion against deeds granted there that they are ante dated; the creditor cannot be supposed to foresee that it may cost him a suit in another country, far less is he supposed to be acquainted with the laws of every other country where this suit may be necessary, or that he may meet with such an objection as is now pleaded for the defender; so that no presumption can lie a-

No 27.

gainst him of ante-dating, which justly lies against deeds granted in Scotland; where the grantee is supposed to have the law of death-bed in his eye. Promissory notes stand upon the same footing with bills of exchange by the law of England, which it is admitted are probative of their date, and is a good ground of action against the heir in Scotland; and sure it will not be maintained that there is a greater suspicion of ante-dating promissory notes, than bills; nay, if the pursuer had foreseen this objection, or intended a fraud against the heir, it was easy for him to take bills instead of promissory notes, which must have avoided all suspicion.

And, with respect to the argument, That the *comitas* is never carried so far to impair the effect of a prohibitory law; it was answered, The pursuer had no occasion to differ with the defender upon this point, because the observation does not apply to the present case; seeing there is no law which declares, that the same suspicion which lies against a deed executed in Scotland, must lie against one executed in another country, where the law of death-bed obtains not. See the statute 3d and 4th Annæ; Cook's Institutes, lib. 3. § 337.; Voet, *ad pandectas de statutis*, § 13.; and the case David Kinloch *contra* the Heirs of Dr Fullarton, No 22. p. 4456.

THE LORDS repelled the objections against the notes, and found them probative: But, upon a reclaiming petition and answers, the LORDS found the notes in question do not prove their date, in prejudice of the heir, so as to affect the heritage.

*C. Home, No 221. p. 363.*

No 28.

A person lodged goods in the warehouse of a foreign factor, which belonged to a third party. The factor advanced cash to the person who lodged the goods, supposing them to be his property. By the custom of that country, the factor had a right of retention till payment. He was found accordingly, in an action here, entitled

1746. December 11. MITCHELL *against* BURNET and MOUAT.

SKINNER and Simpson of London having commission from Mitchel of Aberdeen to send certain East India goods to Campvere, whence they were to be re-landed in Scotland, they took the occasion of Sinclair of Aberdeen's having, when at London, purchased from them a quantity of the like goods in the like view; and without distinguishing between the bales which were Mitchel's, and those that were Sinclair's, the bill of loading was taken for the whole in the name of Sinclair, deliverable to him or his assignees, who, upon his arrival at Campvere, lodged the whole in the ware-house.

Sinclair having re-shipped the bales that belonged to himself for Scotland, but, on an occasion unnecessary to be mentioned, left those that were Mitchel's without acquainting Burnet and Mouat, in whose ware-house the goods were, that they were another man's property, and in the *interim* his-circumstances becoming suspected, Burnet and Mouat, to whom he was debtor in above L. 200 of a former debt, and L. 57 at this very time advanced to him, refused, when required by Mitchel, to deliver up the said goods; till they were paid off what Sinclair owed them.