

No 120. lending money ought to take a document in writing ; and, therefore, is justly denied a proof by witnesses. A partial payment of the sum in a bill ought to be marked on the bill ; and therefore, a proof of such payment, even by the drawer's oath, will not be admitted against the onerous indorsee. But even intromission with money-rent may be proved by witnesses, at the instance of any person having interest, provided he had not access to take a document in writing. Bills have extraordinary privileges for the sake of commerce. But commerce ought not to be encouraged at the expence of justice.

Sel. Dcc. No 137. p. 193.

1758. December 6. REID against PROUDFOOT.

No 121.
Obligation of relief of a written obligation cannot be created by parole evidence.

REID being charged for payment of a bill of L. 7 : 3 : 6, accepted by him in favour of Lundy, and indorsed away by Lundy, brought a process before the Justices of Peace, against Proudfoot, founded upon the following facts :

That Proudfoot having bought linens from Lundy, Lundy refused to deliver them, unless Proudfoot should get some person to be security with him for the price : That thereafter, Proudfoot prevailed upon Reid, who was then a young country lad, not of age, and a servant to a farmer, to accept a bill for the price, on a promise, that Reid should never be troubled for the money ; and Proudfoot having told Lundy, that Reid was factor to a country gentleman, prevailed upon Lundy to take the bill, and got the linens from him. On these facts, Reid concluded against Proudfoot to be relieved by him of the above bill.

The Justices having allowed a proof to Reid, he proved the above facts by the oaths of Lundy and his wife, and two other witnesses. The Justices gave decree in favour of Reid.

Proudfoot suspended. In his suspension, he *alleged*, That he had got the linens, and that Reid had accepted the bill for the price of them ; but maintained, that Reid had accepted the bill, not as security for him, but as debtor himself, to account betwixt Reid and him.

Pleaded for Proudfoot, the suspender, from the sentence of the Justices, No proof ought to have been allowed by the Justices to Reid, of the facts alleged by him ; and since it hath been brought, it ought to be disregarded, because the intention of it was to create, by parole-evidence, an obligation of relief of a written obligation ; whereas, such obligation of relief could only be created by oath or writ of party. This rule is general in the law of Scotland ; and no suspicion or presumptions should make courts remove general land-marks.

Answered for Reid the charger, By the pursuer's own account, it appears, Reid was imposed upon, as he accepted the bill, and yet did not get the linens. This gives a right to courts to expiscate by a proof the other circumstances of

fraud. The strong presumption of fraud in this case at first sight, and the certainty of it afterwards, as proved by the evidence, make a particular exception in a particular case for the detection of fraud, an equitable exception from the general rule of strict law.

“ THE LORDS suspended the letters.”

Charger, *J. Craigie.*

Suspender, *Macqueen.*

J. D.

Fol. Dic. v. 4. p. 157. Fac. Col. No 142. p. 259.

No 121.

1761. *January 27.*

Sir GEORGE LOCKHART of Carstairs, Baronet, *against* JEAN & MARY LOCKHARTS.

IN the year 1749, Sir James Lockhart of Carstairs executed a settlement of his estate in favour of his eldest son, William, in fee, and the heirs-male of his body; whom failing, to his other sons in their order of birth, and to their heirs-male, &c.

This settlement contains no limitations, prohibitions, or irritancies, to restrain the several heirs of entail from contracting debts, or from the free disposal and alienation of the estate; but, with respect to the destination of succession, there is this prohibitory clause: “ That it shall not be in the power of the said William Lockhart, or any of the substitutes, to invert or alter the order of succession hereby established; and in case any of them shall do in the contrary, the contraveners, and all descending from them, shall not only amitt and lose all right by these presents, but likewise, that all such deeds inverting the succession shall be *ipso facto* void and null.”

This deed reserves Sir James’s liferent, with full and unlimited power to alter or burden with debt at pleasure.

William, afterwards Sir William Lockhart, the eldest son, made his addresses to Miss Agnew; and Sir James, in order to pave the way for the marriage-contract, executed a deed, first July 1751, in favour of his son William; by which, “ for the love and favour he had to the said William Lockhart, his eldest son, and to enable him to make a suitable settlement in case of his marriage, he discharged the powers reserved to him by the above-recited settlement, and restricted his liferent to a certain annuity out of the estate.”

On the 25th day of July 1751, William Lockhart married Miss Agnew with the consent and approbation of Sir James, and he received as a portion with the lady L. 1000 Sterling in hand, as also L. 500 Sterling, payable the first term after her father’s decease.

By the contract of marriage, the lady was provided to an annuity of 4000 merks, to be increased to L. 300 Sterling in case of no children, and to L. 200 at the first term after her husband’s decease, in full of her claim to furniture

No 122.

A person possessed of an estate, under a prohibition not to alter a certain order of succession, gave large provisions to daughters, who could not succeed to the estate. A proof was allowed of the circumstances of the estate and previous communications of friends, in order to ascertain whether the provisions were not excessive.