

S E C T. XII.

Trust before the Act 1696.

A. against B.

A GIFT of assignation, or disposition, if taken to the behoof of another person, cannot be proved by witnesses, but *scripto vel juramento partis*, but the gift of escheat taken to the behoof of a rebel may be proved by *membra curiae*, that it was passed on the rebel's expenses,

Auchinleck, MS. p. 154.

No 65L.

1665. February 22. Viscount of KINGSTON against Colonel FULLERTON.

THE Viscount of Kingston pursues Colonel Fullerton, upon the warrandice of an assignation, made by the said Colonel, to Sir Arthur Douglas of Whittinghame. The defender *alleged*, Absolvitor, because the assignation was only made in trust, which he offered to instruct by many adminicles, of which these were the chief; that by the witnesses adduced, it was cleared, that this assignation remained in the hands of one Cranstoun, who was filler up of the date, and witness therein; that it was never delivered to Whittinghame, and that the right assigned was still retained by the Colonel, who thereupon obtained two decreets before the LORDS, and uplifted the money from Sir William Thomson, debtor, Cranstoun, who kept the assignation, being agent in the house, never questioning the same, nor Sir Arthur, or any of his, owning the same for the space of twenty years, till of late Kingston gave 300 merks, to get the assignation out of the hands of one Jenkin, who got it from Cranstoun; and that the money was to have been presently employed for the levying of soldiers for a French regiment, whereof Fullerton was colonel, and Sir Arthur lieutenant-colonel; there were also two letters of Sir Arthur's produced by the Colonel, acknowledging the trust thereof; the one was alleged to be holograph, but nothing adduced to prove the same, but three other writs, subscribed before witnesses, for comparing the subscriptions therein with the subscriptions of the letters. The pursuer *answered*, That so solemn a writ, subscribed before witnesses, could not be taken away by presumptions or witnesses, but either by writ or oath of party; and as to the presumptions adduced, there are stronger presumptions with the solemn writ than against it: Fullerton, a most circumspect man, would never have given an assignation in trust without a back-bond; and

No 652.

Trust found proved by very strong circumstances against which little was objected.