

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.

No 652. that Sir Arthur died shortly thereafter, *anno* 1642; and Cranstoun died *anno* 1645; and Whittinghame's successors were strangers to the business; and the missives adduced were not proved holograph, and were suspected.

THE LORDS found the defence, founded upon the foresaid adminicles, relevant and proved, and therefore assoilzied.

Fol. Dic. v. 2. p. 272. Stair, v. 1. p. 273.

1666. *January 12.*

EXECUTORS OF WILLIAM STEVENSON *against* JAMES CRAWFORD.

No 653.

Found presumed from several circumstances against the executors of a defunct, that a sum contained in the testament had been held by the deceased for behoof of another.

THE executors of William Stevenson having confirmed a sum of 3000 and odd pounds due by bond by John Ker to the said William, and also by James Crawford, who, by his missive, became obliged to pay what bargain of victual should be made between the said John Ker, and John Stevenson for himself, and as factor for William Stevenson; subsume, that this bond was granted for a bargain of victual. It was *answered*, That, albeit this bond had been in the name of William Stevenson, yet it was to the behoof of John Stevenson his brother, who having pursued upon the same ground the defender was assoilzied; and that it was to John's behoof, *alleged*, *imo*, That John wrote a letter to his brother William, to deliver up his bond, acknowledging that it was satisfied; and that John having pursued himself, for the other bond granted in place of this, the said umquhile William Stevenson compeared, or a procurator for him, before the commissaries, and did not pretend any interest of his own; neither did William, during his life, which was ten years thereafter, ever move question of this bond, nor put he it in the inventory of his testament, though that he put most considerable sums therein. It was *answered*, *imo*, That the presumptions alleged infer not that this bond was to John Stevenson's behoof; because, by James Crawford's letter, there is mention made of several bargains of victual, both with John and William; so that the bond, and pursuit at John's instance, might be for one bargain, and at Williams for another, especially seeing the sums differ; *2do*, Writ cannot be taken away by any such presumptions. It was *answered*, That if the defender, James Crawford, had subscribed this bond, it could more hardly have been taken away by presumptions, but he hath not subscribed the bond, but only his missive letter, which is dubious, whether it be accessory to this bond, or if that bond was for this bargain; and therefore such a writ may well be elided by such strong presumptions.

THE LORDS found the presumption relevant, and that they instructed the bond was to John's behoof, and therefore, in respect of the absolvitor at Crawford's instance, they assoilzied.

Fol. Dic. v. 2. p. 271. Stair, v. 1. p. 337.